Docket for 04-5462

(18)

No. 04-5462 *** CAPITAL CASE ***
Title: Ronald Rompilla, Petitioner
v.
Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections
Docketed: July 27, 2004
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (00-9005, 00-9006)
Decision Date: January 13, 2004
Rehearing Denied: February 25, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 7 2004	Application (03A932) to extend the time to file a petition for a writ of certiorari from May 25, 2004 to July 24, 2004, submitted to Justice Souter.
May 16 2004	Application (03A932) granted by Justice Souter extending the time to file until July 24, 2004.
Jul 23 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 26, 2004)
Aug 26 2004	Brief of respondent Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections in opposition filed.
Sep 9 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 14 2004	Reply of petitioner Ronald Rompilla filed. (Distributed)
Sep 28 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 22 2004	Application (04A324) to file petitioner's brief on the merits in excess of page limits, submitted to Justice Souter.
Oct 25 2004	Application (04A324) denied by Justice Souter.
Oct 26 2004	Joint appendix filed. (Joint appendix in six volumes).
Nov 7 2004	Brief amici curiae of James Joseph Lynch, Jr. and Friends of Ronald Rompila filed. (Distributed)
Nov 12 2004	SET FOR ARGUMENT ON Tuesday, January 18 2005.
Nov 12 2004	Lodging to Joint appendix of lower court record material received.
Nov 12 2004	Brief of petitioner Ronald Rompilla filed.
Nov 12 2004	Brief amicus curiae of American Bar Association filed.
Nov 12 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 24 2004	CIRCULATED.
Dec 17 2004	Brief of respondent Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections filed. (Distributed)
Dec 17 2004	Brief amicus curiae of United States filed. (Distributed)
Dec 17 2004	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Dec 22 2004	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 27 2004	Record received from U.S.C.A. 3rd Circuit. (1 box)
Jan 7 2005	Reply of petitioner Ronald Rompilla filed. (Distributed)
Jan 14 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Docket for 04-5462

Jan 18 2005	Argued. For petitioner: Billy H. Nolas, Assistant Federal Defender, Philadelphia, Penn. For respondent: Amy Zapp, Chief Deputy Attorney General, Harrisburg, Penn.

(11)

NO. 04-5462

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ROMPILLA,

Petitioner,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, Ronald Rompilla

Dated: July 23, 2004

QUESTIONS PRESENTED IN THIS CAPITAL CASE

Questions related to the Simmons v. South Carolina, 512 U.S. 154 (1994), issue:

1. Does Simmons require a life-without-parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from a lengthy prison term; and the prosecutor argues that the defendant is a frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him?

2. Is the state court decision denying the Simmons claim "contrary to" and/or an "unreasonable application" of clearly established Supreme Court law where the state court held that a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about parole-eligibility and rehabilitation and the prosecution's actual evidence and argument?

Questions related to counsel's ineffective assistance at capital sentencing:

3. Has a defendant received effective representation at capital sentencing where counsel does not review prior conviction records counsel knows the prosecution will use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?

4. Has a defendant received effective representation at capital sentencing where counsel's background mitigation investigation is limited to conversations with a few family members; where the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation; where other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and where the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances?

5. Does counsel's ineffectiveness warrant habeas relief under AEDPA where the state court sought to excuse counsel's failure to obtain any records about the defendant's history by saying the records contained some information that was "not entirely helpful," by saying counsel hired mental health experts (even though those experts did not do any background investigation and never saw the records), and by saying counsel spoke to some family members (even though those family members told counsel they knew little about the defendant and could not help with mitigation); and where the state court did not even try to address counsel's failure to interview other family members (who knew the defendant's mitigating history) or counsel's complete failure to investigate the aggravation that the prosecution told counsel it would use?

TABLE OF CONTENTS

QUESTIONS PRESENTED IN THIS CAPITAL CASE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. THIS COURT SHOULD REVIEW THE ARTIFICIAL LIMITATIONS THE THIRD CIRCUIT HAS NOW PUT ON SIMMONS V. SOUTH CAROLINA. 3
- A. This Death Sentence Violates Simmons. 4
  - 1. Questions from the jury show that future dangerousness was in issue. 5
  - 2. The prosecution's evidence put future dangerousness in issue. 7
  - 3. The prosecutor's argument put future dangerousness in issue. 8
- B. The State Court Decision Was "Contrary to" and an "Unreasonable Application of" Clearly Established Law. 9
  - 1. Contrary to clearly established law 10
  - 2. Unreasonable application of clearly established law 11
- C. The Third Circuit Majority Gravely Erred. 13

II. THIS COURT SHOULD REVIEW THE ISSUES ARISING FROM COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING. 19
- A. Counsel Failed to Reasonably Investigate for Capital Sentencing. 20
  - 1. Counsel's complete failure to investigate aggravation. 24
  - 2. Counsel's "grossly inadequate" background mitigation investigation. 29
- B. Habeas Relief is Appropriate Under AEDPA. 34
- C. The Third Circuit Majority Gravely Erred. 37

CONCLUSION 40

TABLE OF AUTHORITIES

Federal Cases

Allen v. Illinois, 478 U.S. 364 (1986) 7

Allen v. Lee, 366 F.3d 319 (4th Cir. 2004) 14

Board of Cty. Com'rs v. Umbehr, 518 U.S. 668 (1996) 14

Brady v. Maryland, 373 U.S. 83 (1963) 17

Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1994) 25

Gardner v. Florida, 430 U.S. 349 (1977) 15

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) 39

Harris v. Reed, 489 U.S. 255 (1989) 14

Heller v. Doe, 509 U.S. 312 (1993) 7

Huddleston v. United States, 485 U.S. 681 (1988) 11

Johnson v. Texas, 509 U.S. 350 (1993) 7, 10

Jurek v. Texas, 428 U.S. 262 (1976) 7

Kelly v. South Carolina, 534 U.S. 246 (2002) ..... 3, passim

Kimmelman v. Morrison, 477 U.S. 365 (1986) 35

Kokoraleis v. Gilmore, 131 F.3d 692 (7th Cir. 1998) 38

Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987) 24

Lockyer v. Andrade, 538 U.S. 63 (2003) 18

Michelson v. United States, 335 U.S. 469 (1948) 7

Nichols v. United States, 511 U.S. 738 (1994) 7, 10

Penry v. Lynaugh, 492 U.S. 302 (1989) 10, 18

Ramdass v. Angelone, 530 U.S. 156 (2000) 16

Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994) 38

Shafer v. South Carolina, 532 U.S. 36 (2001) 3, 16

Simmons v. South Carolina, 512 U.S. 154 (1994) ..... 2, passim

Skipper v. South Carolina, 476 U.S. 1 (1986) 7, 10, 15, 33

Slack v. McDaniel, 529 U.S. 473 (2000) 13

Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994) 24

Strickland v. Washington, 466 U.S. 668 (1984) ..... 18, passim

Teague v. Lane, 489 U.S. 288 (1989) 10

Tennard v. Dretke, 124 S. Ct. 2562 (2004) 13

United States v. Morley, 199 F.3d 129 (3d Cir. 1999) 11

Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995) 38

Wiggins v. Smith, 123 S. Ct. 2527 (2003) ..... 13, passim

Williams v. Taylor, 529 U.S. 362 (2000) ..... 10, passim

State Cases

Commonwealth v. Baker, 614 A.2d 663 (Pa. 1992) 8, 11, 27

Commonwealth v. Beasley, 479 A.2d 460 (Pa. 1984) 25

Commonwealth v. Billa, 555 A.2d 835 (Pa. 1989) 8, 11

Commonwealth v. Holcomb, 498 A.2d 833 (Pa. 1985) 8, 11, 25

Commonwealth v. Roots, 393 A.2d 364 (Pa. 1978) 8

Commonwealth v. Stanley, 401 A.2d 1166 (Pa.Super. 1979), aff'd, 446 A.2d 583 (Pa. 1982) ... 9

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) ..... 1, passim

Miscellaneous

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ..... 24, passim

Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,
58 N.Y.U. L. Rev. 299 (1983) 24

Petitioner, Ronald Rompilla, prays that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit, which reversed the District Court's grant of habeas corpus relief in this capital case. The Circuit panel was divided 2-1 on both issues presented herein, and the en banc Circuit denied rehearing by a 6-5 vote.[1]

OPINIONS BELOW

The Third Circuit panel decision is Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) ("Rompilla-4") (Appendix 4). The Circuit's denial of en banc rehearing is Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (en banc) ("Rompilla-5") (Appendix 5). The District Court decision is Rompilla v. Horn, 2000 WL 964750 (E.D. Pa. July 11, 2001) ("Rompilla-3") (Appendix 3). Because this is a habeas corpus action by a prisoner in state custody, Petitioner has appended the opinions of the Pennsylvania Supreme Court on direct appeal, Commonwealth v. Rompilla, 653 A.2d 626 (Pa. 1995) ("Rompilla-1") (Appendix 1), and post-conviction appeal, Commonwealth v. Rompilla, 721 A.2d 786 (Pa. 1998) ("Rompilla-2") (Appendix 2).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit denied rehearing en banc on February 25, 2004. This Court granted Petitioner an extension of time until July 24, 2004 in which to file this petition for a writ of certiorari (Appendix 6). This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d) provides in relevant part:

---

[1]All emphasis herein is supplied unless otherwise indicated. Relevant parts of the state court record were included in an Appendix filed in the Third Circuit under that Circuit's rules, and are cited herein as "A" followed by the Third Circuit Appendix page number.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder and related charges and sentenced to death by a jury in the Lehigh County, Pennsylvania, Court of Common Pleas. The Pennsylvania Supreme Court affirmed on direct appeal. Commonwealth v. Rompilla, 653 A.2d 626 (Pa. 1995) ("Rompilla-1"). Petitioner sought state post-conviction relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), which was denied. Commonwealth v. Rompilla, 721 A.2d 786 (Pa. 1998) ("Rompilla-2"). Pennsylvania Supreme Court Chief Justice Flaherty dissented, and would have granted relief from the death sentence under Simmons v. South Carolina, 512 U.S. 154 (1994).

Having exhausted state remedies, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The District Court granted habeas relief from the death sentence, finding that counsel provided ineffective assistance at capital sentencing, but denied Petitioner's other claims. Rompilla v. Horn, 2000 WL 964750 (E.D. Pa. July 11, 2001) ("Rompilla-3").

The Third Circuit panel, in a 2-1 decision, reversed the District Court and reinstated the death sentence. Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) ("Rompilla-4"). Circuit Judge Sloviter dissented, explaining that the panel should have affirmed the District Court's finding that counsel was ineffective for failing to adequately investigate mitigating evidence. Moreover, like the dissent of Pennsylvania Supreme Court Chief Justice Flaherty, Judge Sloviter's dissent also explained that the panel should have granted relief under Simmons.

Petitioner sought en banc rehearing, which was denied by a sharply divided Circuit: five of the eleven Circuit Judges voting on the en banc rehearing request would have granted rehearing. See Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (en banc) ("Rompilla-5").

ARGUMENT

I. THIS COURT SHOULD REVIEW THE ARTIFICIAL LIMITATIONS THE THIRD CIRCUIT HAS NOW PUT ON SIMMONS V. SOUTH CAROLINA.

Of the twenty-six states with a life-without-parole alternative to death, only two, Pennsylvania and South Carolina, routinely refuse to inform sentencing juries of this fact. Shafer v. South Carolina, 532 U.S. 36, 48 n.4 (2001). This Court has reviewed Simmons v. South Carolina, 512 U.S. 154 (1994) claims in three South Carolina cases, see Simmons; Shafer; Kelly v. South Carolina, 534 U.S. 246 (2002), but has never reviewed a Simmons claim arising from Pennsylvania, which has the fourth largest death row in the United States.

Third Circuit Judge Sloviter's dissent explained that this death sentence violates Simmons and that habeas relief is appropriate under AEDPA. See Rompilla-4 (dissent) at 274, 284-94. In Simmons, this Court held: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury ... that he is parole ineligible." Id. at 178 (O'Connor, J, concurring); see also id. at 163-64 (plurality). As the Circuit dissent explained, Simmons was violated here when the trial judge refused to tell the jury that life imprisonment in Pennsylvania is without parole, "notwithstanding the jury's questions on that issue on three different occasions during its sentencing deliberations," Rompilla-4 (dissent) at 274, and notwithstanding that the jury heard the prosecution describe Petitioner as a frightening, violent recidivist who was released on parole from a prior lengthy prison term just three months before this murder, who learned from his prior convictions to kill anyone who might identify him, and who was not rehabilitated by his prior lengthy imprisonment, id. at 287-88. Pennsylvania Chief Justice

Flaherty agreed, finding the jury's questions to be "a clear expression of the jury's concern about [Petitioner's] future dangerousness." Rompilla-2 at 795 (Flaherty, CJ, dissenting).

The Third Circuit majority denied relief by artificially limiting Simmons in a way that this Court has repeatedly rejected. The Circuit majority applied its restriction on Simmons despite its own recognition that its ruling is "difficult to police," and "superficial," and lets prosecutors "encourage a jury to think about future dangerousness" without allowing the jury to know that life imprisonment is without possibility of parole. Rompilla-4 at 266. The Circuit majority attributed its unworkable, easily manipulated limitation on Simmons to the state court, saying the state court was "reasonable" for using it, even though the state court never actually used it.

The Circuit majority has made Simmons a hollow shell in Pennsylvania. This Court should review this case and provide Pennsylvania's capital defendants the due process Simmons requires.

A. This Death Sentence Violates Simmons.

The only alternative to a death sentence in Pennsylvania is life without possibility of parole. Petitioner's jury was never told this, even after it interrupted its sentencing deliberations and expressly asked about parole-eligibility. The only dispute is whether Petitioner's "future dangerousness [was] in issue." Simmons, 512 U.S. at 178 (O'Connor, J, concurring).

Future dangerousness was in issue here: (1) the jury repeatedly said it was concerned about parole-eligibility and rehabilitation, signaling jury contemplation of future dangerousness; (2) the prosecution's evidence was that Petitioner is a violent recidivist who functions poorly outside prison and who killed three months after being paroled from a lengthy prison term; and (3) the prosecutor argued that Petitioner is a frightening repeat offender and cold-blooded killer, and that he learned from prior convictions that he should kill anyone who might identify him. Yet the court refused to tell the jury the truth – that there is no parole from a Pennsylvania life sentence – and, instead, suggested parole is available.

1. Questions from the jury show that future dangerousness was in issue.

During more than eleven hours of capital sentencing deliberations, the jury asked the court several parole- and future dangerousness-related questions. As the Chief Justice of the Pennsylvania Supreme Court explained in dissenting from the state court's denial of relief, these jury questions are "a clear expression of the jury's concern about [Petitioner's] future dangerousness." Rompilla-2 at 795 (Flaherty, CJ, dissenting). The trial judge, however, refused to address the jury's concern. Instead, as in Simmons at 165-66, this jury was "denied a straight answer about ... parole eligibility even when it was requested."

The jury's first question came after two hours of deliberations. The jury asked: **"If a life sentence is imposed, is there any possibility of the defendant ever being paroled?"** A802. Thus, these jurors plainly were concerned that Petitioner would be paroled if sentenced to life.[2] Trial counsel asked the judge to answer the jury's question truthfully, explaining to the judge: "Because of ... misconceptions, a lot of people think that if you get a life sentence, you're out in five years or three years." A801. The judge responded: "I can't stop that," A802, and refused to tell the jury the truth – that there is no parole from a Pennsylvania life sentence. Instead, the judge told the jury: "I'm sorry to say, I can't answer that question." A802-03.

After deliberating for nine hours, the jury asked more parole/danger-upon-release type questions: about "the length of the sentence" on the prior convictions; if the sentence "was commuted in any way"; and if he "got released on behavioral." A823. The judge again told the jury he could not answer the questions and the prosecutor, in the jury's presence, said: "You can't tell

[2] See Rompilla-2 at 795 (Flaherty, CJ, dissenting); Simmons at 170 n.10 (plurality) ("It almost goes without saying that" when jury interrupts deliberations to ask "Does the imposition of a life sentence carry with it the possibility of parole?", jury does not know "life" means without possibility of parole; otherwise, "there would have been no reason for the jury to inquire"); id. at 178 (O'Connor, J, concurring) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison").

them." A823-24.

After deliberating for eleven hours, the jury asked if Petitioner was "offered any type of rehabilitation either while in prison or after his release from prison" and, generally, if "rehabilitation [is] available in prison." A838, A842-43. The judge replied: "I'm sorry to say, I can't answer that," and told the jurors to "rely upon your own knowledge" of the "penology system." A842-43.

After thus being frustrated in its attempts to obtain parole- and dangerousness-related information, the jury imposed the death sentence. A854. The jurors' questions plainly show that they were concerned about Petitioner's parole-eligibility and inability to be rehabilitated before being paroled – i.e., his future dangerousness.

The judge could have told the jury the truth – there is no parole from a Pennsylvania life sentence – but refused to do so. Instead, the judge's responses affirmatively suggested that parole is available. The judge's "I can't answer" responses suggested that parole was in fact available, but that the court could not tell the jury about it, or it was outside the court's control. See Simmons at 170-71 (plurality).[3] The judge's instruction that jurors should rely on their personal "knowledge" of the "penology system," A842-43, further suggested parole-eligibility, since, as this Court noted in Simmons, that "knowledge" commonly includes the misunderstanding that a life-sentenced prisoner is parole-eligible. See id. at 170 (plurality); id. at 177-78 (concurrence).

It is not surprising that this jury was concerned about parole and future dangerousness. Future dangerousness and parole were put in issue by the prosecution's evidence and penalty-phase argument.

---

[3]The jury likely viewed the judge's "I can't tell you" responses as being intended to protect Petitioner by concealing his parole eligibility, just as other court rulings had protected him by concealing information from the jury. See, e.g., A774 (prosecutor introduces prior convictions and tells jury they were things "we weren't permitted to tell you in the trial"); A646-47 ("I was not permitted to tell you about that earlier").

2. The prosecution's evidence put future dangerousness in issue.

The jury heard evidence that Petitioner is a violent recidivist with a significant history of violent felony convictions; that he functions poorly outside prison; and that he committed this killing three months after being paroled from a lengthy prison term.

The guilt-phase evidence was that this was a "brutal murder" during which the victim was "stabbed repeatedly," "set on fire," and left "lying ... in a pool of blood." Rompilla-1 at 628-29, 634. At capital sentencing, the prosecution asserted three aggravating circumstances. Id. at 628, 634. Most significantly, the jury found the "(d)(9)" aggravating circumstance, 42 Pa.C.S. § 9711(d)(9), that Petitioner had a "significant history" of violent felony convictions. Id. at 634. The prosecution's evidence included testimony of a victim of the prior offenses, who described Petitioner as extremely violent. Id. at 633-34; Rompilla-2 at 793-94.

The evidence of a "significant history" of violence, and of extreme violence during this offense, put Petitioner's future dangerousness "in issue." This Court has often found (and common sense dictates) that a jury hearing such evidence will believe the defendant has a propensity for violence and, thus, will be dangerous in the future.[4] Similarly, the Pennsylvania Supreme Court has recognized that the (d)(9) aggravating factor (significant history of violent felonies), which the jury found here, shows that the defendant has "pronounced recidivistic tendencies" and exhibits a "willful and persistent refusal to curb a propensity towards ... violent aggression against others,"

---

[4]E.g., Nichols v. United States, 511 U.S. 738, 752 (1994) (prior crimes evidence "predict[s] the likelihood of recidivism"); Heller v. Doe, 509 U.S. 312, 323 (1993) ("Previous instances of violent behavior are an important indicator of future violent tendencies."); Allen v. Illinois, 478 U.S. 364, 371 (1986) (prior crimes "predict future behavior"); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is ... inevitable."); Johnson v. Texas, 509 U.S. 350, 355-56 (1993) (future dangerousness shown by prior crimes); Jurek v. Texas, 428 U.S. 262, 272-73 (1976) (same; "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record."); Michelson v. United States, 335 U.S. 469, 475-76 (1948) (jurors infer "propensity" for crime from prior crimes).

Commonwealth v. Holcomb, 498 A.2d 833, 851 (Pa. 1985) – a dictionary-like definition of future dangerousness.[5]

In short, as this Court recently stated in a Simmons case, a "jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior" in the future. Kelly, 534 U.S. at 253-54. The prosecution's evidence (and jury aggravation finding) that Petitioner is a violent recidivist certainly put future dangerousness in issue.

And this jury heard even more parole- and future dangerousness-related evidence – it heard that Petitioner was paroled from his prior convictions three months before this offense; he does not function well on parole; there is a lack of rehabilitation services before prisoners are paroled; and his son was frightened of him when he was released on parole. Rompilla-4 (dissent) at 288; A734-57. This evidence reinforced the jury's "common sense" belief that "parole [is] a mainstay of ... sentencing regimes," Simmons at 169-70, and showed Petitioner is dangerous when released on parole.

3. The prosecutor's argument put future dangerousness in issue.

The prosecutor's argument to the jury also put future dangerousness at issue: the prosecutor told the jury that Petitioner is "absolutely frightening" because he commits the same type of violent crime over and over again, and because the "lesson" he learned from his prior convictions is to kill any possible witnesses to his repeated offenses.

The prosecutor first stressed the "frightening ... similarity" between the prior crimes, from which Petitioner was released on parole, and this one, committed three months after he was paroled:

---

[5]See also id. at 852 (finding of (d)(9) aggravating circumstance shows "pronouncedly recidivistic violent tendency" and "uncontrolled recidivistic tendencies to violent assaults"); Commonwealth v. Baker, 614 A.2d 663, 676 (Pa. 1992) (prior convictions evidence allows capital sentencing jury to "explore the defendant's prior behavior and dangerousness before sanctions are imposed"); Commonwealth v. Roots, 393 A.2d 364, 368 (Pa. 1978) (prior crimes have "natural tendency ... to be interpreted as indicative of the defendant's propensity to commit crime"); Commonwealth v. Billa, 555 A.2d 835, 841-42 (Pa. 1989) (same).

> You heard testimony, that in 1974, the Defendant was convicted of the crime of Rape and Burglary, and you heard some testimony of that case ... Jo[sephine] MaCrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point.... [I]sn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from Jo[sephine]'s Bar, takes a taxi the night of this crime. He slashes [the prior victim] in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. (A779-80)

The prosecutor's emphasis on how "frightening" Petitioner is, and on the "frightening similarities" of the crimes, drove home the idea that Petitioner is a dangerous, violent recidivist – he is "absolutely frightening" because he repeatedly commits the same type of violent crimes when released from prison.[6]

The prosecutor further stressed dangerousness by saying Petitioner "learned a lesson" from his prior convictions, and "[t]hat lesson was, don't leave any witnesses. Don't leave anybody behind who can testify against you. Don't leave any eye witnesses." A780. Obviously, someone who "learned [this] lesson" is dangerous when released. The prosecutor's argument made Petitioner's release on parole an "absolutely frightening" prospect. It put his future dangerousness in issue.

B. The State Court Decision Was "Contrary to" and an "Unreasonable Application of" Clearly Established Law.

These reasons why future dangerousness was at issue were provided by Petitioner to the Pennsylvania Supreme Court. That Court ignored virtually all of them. Instead, it focused only on the question of whether the (d)(9) (significant-history-of-violent-felonies) aggravating circumstance, by itself, necessarily raises future dangerousness. It denied relief on the ground that (d)(9)

---

[6]See Holcomb, 498 A.2d at 852 (prior crimes most strongly indicate "pronounced recidivist tendencies" when similar to current offense); Commonwealth v. Stanley, 401 A.2d 1166, 1174 (Pa.Super. 1979) (jury especially likely to infer recidivist tendency from prior conviction "when informed that the defendant's prior crime was the same as one of the crimes for which he is currently being tried"), aff'd, 446 A.2d 583 (Pa. 1982).

supposedly "only addresses [Petitioner's] past conduct, not his future dangerousness." Rompilla-2 at 795. This state court decision is "contrary to" and an "unreasonable application of" clearly established Supreme Court law, requiring habeas relief under 28 U.S.C. § 2254(d)(1).

1. Contrary to clearly established law:

The state court's holding – that a history of violence is supposedly irrelevant to the jury's assessment of future dangerousness – is contrary to clearly established law. This Court's precedents show that jurors view past conduct as predictive of future behavior and, in particular, view a history of violence as predictive of future violence. See note 4, supra (citing cases).[7] The fact that Petitioner's history of violence is relevant to the (d)(9) aggravating factor does not negate its additional relevance to future dangerousness. Evidence may be, and often is, relevant to more than one issue, and it is clearly established law that juries view past conduct as predictive of future behavior, even when that past conduct is also relevant to other matters.[8] In short, as this Court has reiterated in a Simmons case: "Evidence of future dangerousness ... is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it

[7]The cases cited above in note 4 qualify as "clearly established law" for the Simmons claim because they pre-date the state court's 1998 decision (Rompilla-2) on the Simmons claim. See Williams v. Taylor, 529 U.S. 362, 412 (2000) ("clearly established law" found in "this Court's decisions as of the time of the relevant state-court decision"). Moreover, the note 4 cases were also decided before 1995, when Petitioner's conviction became final on direct appeal. Thus, application of these cases does not implicate Teague v. Lane, 489 U.S. 288 (1989). See Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989) (under Teague, habeas petitioner is "entitled to the benefit of those decisions" pre-dating the conclusion of his direct appeal).

[8]Nichols, 511 U.S. at 752 (prior crimes evidence "reflect[s] the seriousness of his prior criminal conduct" and "predict[s] the likelihood of recidivism"); Johnson, 509 U.S. at 369 ("forward-looking perspective of the future dangerousness inquiry" is "not independent of an assessment of personal culpability," and same evidence may be relevant to both inquiries); Skipper, 476 U.S. at 6-7 (state erred in trying to make "distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct"); see also MCCORMICK ON EVIDENCE at 259 (5th ed.) ("An item of evidence may be logically relevant in several aspects, leading to different inferences or bearing upon different issues.").

might support other inferences." Kelly, 534 U.S. at 254. The state court's holding that "past conduct" is irrelevant to future dangerousness is contrary to this Court's clearly established law.

2. Unreasonable application of clearly established law:

The state court decision is also an "unreasonable application" of clearly established law, for three separate reasons.

a. The state court's false distinction between evidence that is probative of past conduct and evidence that is probative of future behavior is "objectively unreasonable." Williams, 529 U.S. at 409. As noted earlier, this Court has repeatedly found evidence of past conduct probative of future behavior. The Pennsylvania Court itself has recognized that a jury finding the (d)(9) (significant-history-of-violent-felonies) aggravator, which the jury found here, brands the defendant as having a "propensity [for] violent aggression" and "uncontrolled recidivistic tendencies to violent assaults." Holcomb, 498 A.2d at 851-52. The Pennsylvania Supreme Court has also recognized that prior crimes evidence is used by capital sentencing juries to "explore the defendant's prior behavior and dangerousness." Baker, 614 A.2d at 676. And all courts recognize that juries view prior crimes evidence as showing a propensity for later crime, even when the prior crimes evidence is also relevant to other issues – that is why courts require limiting instructions when such evidence is admitted for some non-propensity purpose.[9] It was objectively unreasonable for the state court to assume that this jury would not consider Petitioner's history of violence as showing his future dangerousness.

b. Assuming, arguendo, that it was reasonable for the state court to hold that presentation of the (d)(9) (significant-history-of-violent-felonies) aggravating circumstance did not in-and-of-

[9]E.g., Billa, 555 A.2d at 841 (other crimes evidence must be accompanied by limiting instructions to protect against jury's natural tendency to treat it as proof of propensity for crime); Huddleston v. United States, 485 U.S. 681, 691-92 (1988) (same); United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999) (same). No limiting instruction was given here.

itself put future dangerousness at issue, the state court decision is still unreasonable, because it ignored most of the factors that actually made future dangerousness at issue in this case. There was far more here than mere presentation of the (d)(9) aggravating circumstance. There was, inter alia:

* the jury's questions about Petitioner's parole-eligibility; the unavailability of rehabilitation in prison; and his lack of rehabilitation;

* the trial judge's evasive and misleading responses to the jury's questions;

* the extreme violence of this offense and the prior crimes;

* the way in which the prior crimes evidence was presented – through the prior victim's testimony about Petitioner's violence;

* the evidence that Petitioner was not rehabilitated by a lengthy prison term;

* the evidence that Petitioner killed within months after being paroled from the previous lengthy prison term;

* the prosecutor's argument that Petitioner is a frightening recidivist who "learned a lesson" from his prior convictions that he should kill anyone who might identify him;

The state court decision simply ignored all of this, and addressed only the bare fact that the (d)(9) aggravating circumstance was presented. Accordingly, the state court decision unreasonably applied Simmons. See Williams, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts, as shown by its "fail[ure] to even mention" them).

c. Even if the state court had applied the correct law, which it did not, and even if the state court had considered all the relevant facts, which it did not, the state court's conclusion that future dangerousness was not at issue would still be objectively unreasonable, given the above-described prosecutorial evidence and arguments, and the jury's repeated questions. On this record, it is abundantly clear that this jury was concerned about Petitioner's parole eligibility and future dangerousness, and it is objectively unreasonable to hold otherwise.

C. The Third Circuit Majority Gravely Erred.

Because the state court did not provide the due process rights required by Simmons, the federal habeas courts had a duty to fulfil their "vital role in protecting constitutional rights." Slack v. McDaniel, 529 U.S. 473, 483 (2000). The Third Circuit majority failed to do so; its errors, outlined below, are serious; its approach allows the gutting of Simmons in Pennsylvania and demands this Court's review.

1. One error in the Third Circuit majority's analysis is strikingly similar to an error committed by the Fifth Circuit in Tennard v. Dretke, 124 S.Ct. 2562 (2004), which resulted in this Court reversing the Fifth Circuit's judgment.

The Third Circuit majority believed that Simmons "may be read ... narrowly" to require a no-parole instruction only when the prosecutor explicitly says that the defendant is a future threat; the Circuit majority then deemed the state court decision "reasonable" for supposedly adopting this narrow view of Simmons. See Rompilla-4 at 264-67.

But that is not what the state court actually did in this case. Instead, the state court held that Simmons applies when future dangerousness is "at issue," but that future dangerousness is not put "at issue" by presentation of the (d)(9) aggravating circumstance, because (d)(9) supposedly addresses only "past conduct." Rompilla-2 at 795. That is the actual state court decision in this case.

The Third Circuit majority here did what the Fifth Circuit did in Tennard, 124 S.Ct. at 2569: "Rather than examining the ... [state] court decision," the Third Circuit majority "invoked its own restrictive gloss on" Simmons, a "restrictive gloss" that was not actually applied by the state court. Because the Circuit majority's miserly restriction on Simmons was not actually relied upon by the state court, it "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law. Wiggins v. Smith, 123 S.Ct. 2527, 2539

(2003).[10] The actual state court decision is contrary to and an unreasonable application of clearly established law, for the reasons described earlier.

2. Relief is appropriate under § 2254(d)(1) even if it is inaccurately assumed, for the sake of argument, that the state court did apply the Circuit majority's "restrictive gloss" on Simmons, because the Circuit majority's narrowing of Simmons is an unreasonable application of Simmons.

The Circuit majority admitted that its distinction between cases where the prosecutor explicitly argues future dangerousness and cases where "future dangerousness is inferred by the jury from the evidence that is brought to its attention" is "difficult to police and arguably superficial," and allows prosecutors to evade Simmons by "encourag[ing] a jury to think about future dangerousness without expressly referring to that concept." Rompilla-4 at 266. It is unreasonable to see Simmons as adopting such a difficult, superficial, easily manipulated rule. "Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government ..., is an enterprise that [this Court] ha[s] consistently eschewed." Board of Cty. Com'rs v. Umbehr, 518 U.S. 668, 679 (1996).

Nothing in Simmons or this Court's applications of Simmons suggests that Simmons adopted the Third Circuit majority's formalistic and easily evaded rule.

Justice O'Connor's controlling Simmons opinion says a no-parole instruction is required when "the State puts the defendant's future dangerousness in issue." Id. at 178. The Simmons

[10] Accord Allen v. Lee, 366 F.3d 319, 343 n.3 (4th Cir. 2004) ("Having found that the analysis employed by the state court was unreasonable, we could not properly deny relief under § 2254(d) on the basis that the result of the state court proceeding was not unreasonable. Such a conclusion would necessarily be premised on reasoning that was not relied on by the state court. Reasoning that the state court could have – but did not – employ must be evaluated de novo, without applying the deferential standard prescribed by § 2254(d)(1). See Wiggins, 123 S.Ct. at 2540. The Wiggins Court explained that § 2254 deference to a state court finding is simply not possible in these circumstances because 'the State court made no such finding.' Id."); cf. Harris v. Reed, 489 U.S. 255, 262, 265 n.12 (1989) (comity requires federal habeas court to defer to state court procedural rule only if state court actually relied on rule as basis for denying relief).

opinions do not say that only an explicit prosecutorial argument can put future dangerousness "in issue." Instead, Justice O'Connor, like the plurality, found future dangerousness in issue based on the state's evidence that the defendant "[wa]s a vicious predator who would pose a continuing threat to the community," id. at 176; the prosecutor's arguments (which were not explicit), id. at 176; and the jury's questions about parole-eligibility, id. at 177-78. This is just like Petitioner's case. The Third Circuit majority's limitation on Simmons is not supported by the Simmons opinions.

The precedents upon which Simmons relied also show that the Third Circuit majority unreasonably narrowed Simmons. The holding of Simmons is based on two decisions, Skipper v. South Carolina, 476 U.S. 1 (1986) and Gardner v. Florida, 430 U.S. 349 (1977), which found due process violated when an accused is sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner, 430 U.S. at 362; Skipper, 476 U.S. at 5 n.1. See Simmons at 161, 164-65, 171 (plurality); id. at 175-76 (concurrence). In Gardner, the relevant "information" was evidence (a pre-sentence report) – it did not involve prosecutorial arguments at all. Id., 430 U.S. at 351. In Skipper, the relevant "information" was both "evidence and argument." Id., 476 U.S. at 9 (Powell, J, concurring).

Thus, the precedents upon which Simmons relied considered both prosecutorial arguments and evidence, and one of those precedents did not involve prosecutorial arguments at all. The Third Circuit majority's restrictive gloss on Simmons, which ignores the evidence and considers only the prosecutor's argument, is utterly inconsistent with Simmons' precedential basis.

This Court's applications of Simmons confirm that the Third Circuit majority was way off the mark. This Court has repeatedly reaffirmed that Simmons requires a no-parole instruction when future dangerousness is "in issue," and has never restricted Simmons to cases where the prosecutor

explicitly argues future dangerousness.[11] And this Court has twice repeated what is clear from Simmons itself: to determine if future dangerousness was at issue, the reviewing court should ask "whether [the defendant's] future dangerousness was a logical inference from the evidence, or was injected into the case through the State's closing argument." Kelly, 534 U.S. at 252 (citations and quotation marks omitted); accord Shafer, 532 U.S. at 46, 54. The Third Circuit majority's approach is, at least, an unreasonable application of Simmons.

3. Habeas relief is appropriate here even under the Third Circuit majority's narrow view of Simmons, because this prosecutor did argue future dangerousness. As stated above, this prosecutor told this jury that Petitioner is "absolutely frightening" because he is a violent recidivist who repeats the same type of violent crimes every time he is released from prison and who learned from his prior convictions that he should kill anyone who might be a witness to his crimes. This is a future dangerousness argument that is at least as explicit as that made by the Simmons prosecutor.[12]

The Circuit majority tried to avoid the obvious import of this prosecutor's argument by citing its "context," saying it was made in "response" to defense counsel's mitigation argument. Rompilla-4 at 271. The majority's "context" argument, however, is the position taken by the dissent in Simmons, which also complained that, when "[r]ead in context," the prosecutor's argument "was not made ... in the course of an argument about future dangerousness, but was a response to

[11]See Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality) (no-parole instruction required when future dangerousness is "at issue"); id. at 178-79 (O'Connor, J, concurring) ("In Simmons ..., a majority of the Court held that '[w]here the State puts the defendant's future dangerousness in issue," a no-parole instruction is required."); Shafer, 532 U.S. at 39 (Simmons requires no-parole instruction when "a capital defendant's future dangerousness is at issue."); id. at 46, 49, 51 (same); Kelly, 534 U.S. at 248 ("reiterat[ing] the holding of Simmons" that no-parole instruction required "when a capital defendant's future dangerousness is at issue").

[12]See Simmons at 176 (O'Connor, J. concurring) ("The prosecutor argued that the jury's role was to decide 'what to do with [petitioner] now that he is in our midst,' and told the jury: 'Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense.'" (citations omitted)); id. at 181-82 (Scalia, J, dissenting) (quoting argument).

petitioner's mitigating evidence." Id. at 181-82 (Scalia, J, dissenting). Thus, Simmons rejected the Circuit majority's "context" argument.

The Circuit majority also tried to minimize the prosecutor's argument by claiming that when the prosecutor called Petitioner's violence "absolutely frightening," he really meant "astounding"; and when the prosecutor said Petitioner learned the "lesson" to kill any possible witnesses, he really meant something other than future dangerousness. Rompilla-4 at 271-72. This speculation about what the prosecutor "really" meant "is sheer conjecture." Rompilla-4 (dissent) at 292.

It "is plain from Simmons ... that the reasons for the prosecutor's statements are not dispositive of whether they put future dangerousness at issue." Rompilla-4 (dissent) at 292. In Simmons, as in other contexts, the constitutional significance of the prosecutor's presentation "depends ... on the reasonable understanding of the [jury], not merely the intent of the [prosecutor]." Rompilla-4 (dissent) at 292; see Brady v. Maryland, 373 U.S. 83, 87 (1963) (due process assesses fairness of proceeding, not intent of prosecutor). Whatever the prosecutor's intent, he sent a clear message to the jury – Petitioner is dangerous because he is a violent recidivist who will kill again if released on parole.

4. In addition to imposing an unreasonable "restrictive gloss" on Simmons, the Circuit majority also failed to take into account the full body of "clearly established law" that is relevant to this claim under § 2254(d)(1). As stated above, the state court decision is contrary to and/or an unreasonable application of the "clearly established law" cited in note 4, supra, that jurors view past conduct as predictive of future behavior. The Circuit majority, however, declined to evaluate the state court decision against this "clearly established law" because the cases cited in note 4 are "not ... Simmons case[s]." Rompilla-4 at 269-70 & n.21.[13] But the "clearly established law" relevant to

[13]The Third Circuit majority mentioned only Skipper. See Rompilla-4 at 269-70. All of the note 4 cases, however, were cited in Petitioner's Third Circuit briefs.

a particular constitutional claim is not limited to decisions on the exact same claim.[14] Instead, "clearly established law" encompasses "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71 (2003). Here, one clearly established "governing legal principle" is that jurors view past conduct as predictive of future behavior. The majority erred when it slighted this clearly established law.

5. The Circuit majority also erred when it declined to use later precedent from this Court that requires relief on this claim; instead, the Circuit majority erected a per se ban on consideration of any Supreme Court case that post-dates the state court decision.[15]

As the Circuit dissent shows, this Court's decision in Kelly v. South Carolina 534 U.S. 246 (2002) is materially indistinguishable from this case and plainly shows that relief is appropriate under Simmons. See Rompilla-4 (dissent) at 286-91. The Circuit majority did not dispute that Kelly requires relief. Instead, the Circuit majority said "Kelly cannot aid Rompilla" because Kelly post-dates the state court decision on the Simmons claim. Rompilla-4 at 267. The Circuit majority erred when it erected a per se bar against consideration of any Supreme Court opinion that post-dates the state court decision. This Court's cases show that Kelly applies, as Circuit Judge Sloviter explained in her dissent, see Rompilla-4 (dissent) at 291, and as outlined below.

This Court directly rejected the Circuit majority's approach in Wiggins v. Smith, 123 S.Ct.

---

[14]For example, suppose a death-sentenced prisoner asserted a claim, under Strickland v. Washington, 466 U.S. 668 (1984), that his lawyer was ineffective at capital sentencing for failing to present mitigating evidence of mental retardation and childhood abuse, and the state court denied the claim by holding that mental retardation and childhood abuse are not mitigating. Such a state court decision would be contrary to the clearly established law of Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (mental retardation and childhood abuse are mitigating), even though Penry is not a Strickland case, and even if the state court recognized Strickland as controlling authority for ineffective assistance of counsel claims.

[15]Petitioner is entitled to habeas relief even without the benefit of any Supreme Court precedent that post-dates the state court decision, for the reasons stated above.

2527 (2003). In Wiggins, the state argued that Williams v. Taylor, 529 U.S. 362 (2000) could not aid the defendant because Williams post-dated the Wiggins state court decision – i.e., the state in Wiggins took the position taken by the Circuit majority here. This Court, however, rejected that argument, holding that Williams controlled because Williams was just an "application of" Strickland v. Washington, 466 U.S. 668 (1984), and Strickland was "clearly established" at the time of the Wiggins state court decision. Wiggins, 123 S.Ct. at 2535-36.

For the same reason, Kelly applies here. Just as Williams was an "application of" Strickland, Kelly was an "application of" Simmons. Indeed, Kelly expressly states that it is "within the four corners of Simmons," and "need[ed] go no further than Simmons in our discussion." Kelly, 534 U.S. at 254 & n.4. Thus, Kelly applies here, and shows that the Rompilla state court decision was unreasonable, just as Williams showed that the Wiggins state court decision was unreasonable.

II. THIS COURT SHOULD REVIEW THE ISSUES ARISING FROM COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING.

The Third Circuit was sharply divided on this claim. The panel split 2-1 and the en banc Circuit split 6-5. Prior to this, the District Court had granted relief on this claim.

The Third Circuit dissenters found this a case of "shocking ineffective assistance of counsel," where counsel's "grossly inadequate investigation" resulted in their failure to present compelling mitigating evidence of, inter alia, Mr. Rompilla's "abusive [childhood] background, his dysfunctional [childhood] family situation, his low IQ [in the mentally retarded range], his meager reading and understanding ability, ... [his] brain dysfunction," and his mental and emotional disturbances. Rompilla-4 (dissent) at 273-75, 284; Rompilla-5 (dissent) at 310.

The dissenters sharply criticized the majority's ruling. They said the majority "seriously err[ed]"; they denounced the majority ruling as "astonishing" and "inexplicable in light of" controlling Sixth Amendment Supreme Court precedents; they lamented that the "majority opinion in this case infuses our jurisprudence with [a] degraded standard" for effective assistance of counsel,

and improperly excuses "inept" and "shabby lawyering." Rompilla-4 (dissent) at 274, 282-83; Rompilla-5 (dissent) at 311-12.

This Court should afford review and address the Third Circuit majority's errors.

A. Counsel Failed to Reasonably Investigate for Capital Sentencing.

The Sixth Amendment right to effective assistance of counsel is violated when counsel's performance is deficient, i.e., falls below "an objective standard of reasonableness"; and the defendant is prejudiced, i.e., confidence is undermined in the outcome of the original proceeding. Wiggins v. Smith, 123 S.Ct. 2527, 2535 (2003); Strickland, 466 U.S. at 694.

Here, the existence of prejudice is clear, and has never been disputed by any of the state and federal judges who considered this claim. Trial counsel, neither of whom had ever prepared for or conducted a capital sentencing proceeding and one of whom was just 2½ years out of law school, presented paltry mitigation: twenty transcript pages of testimony from some family members who were asked whether they loved Mr. Rompilla; whether he was nice and helped around the house in the three months between his release on parole and this crime; and whether they wanted mercy and believed he was innocent. Rompilla-4 (dissent) at 276-77, 282; A733-59.

Post-conviction proceedings, in contrast, disclosed significant mitigating evidence that trial counsel could have introduced.

Post-conviction counsel obtained Mr. Rompilla's school records, prior conviction records, prison records and juvenile court records. These records show that he suffered a very traumatic childhood. His parents were severe alcoholics. His childhood home was extremely dysfunctional and marred by fear, neglect, instability and poverty. The children were abandoned by the parents for weeks at a time. Conditions in the home were so awful that the family was "notorious" in the county and the children had to be removed from the home and placed in hospitals and foster care. Rompilla-4 at 240; id. (dissent) at 273-74, 278-79, 281-82, 284; A1005, A2277-2366.

These records also document Mr. Rompilla's lifelong history of intellectual, mental and emotional impairments. The records show that his IQ was repeatedly found to be in the mentally retarded range. He was in special education classes until he left school in 9th grade. Throughout his life, he never advanced functionally beyond the 3rd grade level. Psychological tests in the records show serious abnormalities on scales measuring schizophrenia, paranoia, neurosis and obsessive/compulsive problems. The records describe a lifelong history of debilitating alcoholism. Rompilla-4 at 240; id. (dissent) at 273-74, 278-79, 281-82, 284; A1005, A2277-2366.

These records were readily available at the time of the capital trial. They could have been easily obtained by trial counsel. The prior conviction records were available in the clerk's office in the same courthouse where the capital trial was held; the prison records were contained in the prior conviction court file; the school records were available in the public school building, across the street from the courthouse; the juvenile court records were maintained nearby. Trial counsel, however, did not seek or obtain these records, or any other records about Mr. Rompilla. Rompilla-4 (dissent) at 273-74, 277, 281-82; A1075, A1077, A1087-89, A1107-09, A1197, A1297, A1307, A1335, A1351-52. The jury never heard any of the mitigation the records disclose.

Post-conviction counsel also presented testimony from three of Petitioner's siblings, sisters Randi Rompilla, A1407-48, and Barbara Harris, A1479-98, and brother Nick Rompilla, A1449-78, who corroborated and elaborated on the information in the records. The siblings' testified:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or

> to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Rompilla-4 (dissent) at 279 (citations to record omitted).

This family testimony was available, but not presented, at the time of capital sentencing. Trial counsel never spoke to either of these sisters (Randi, Barbara), even though both were reasonably available to trial counsel (both lived locally, one attended the trial). If counsel had interviewed them and asked them about Mr. Rompilla's background, they would have provided the same information to trial counsel and the capital sentencing jury that they provided at the post-conviction hearing. Rompilla-4 (dissent) at 274, 279-80; A1422-23, A1436-37, A1489-90.[16]

Post-conviction counsel also submitted mental health mitigation evaluations of Mr. Rompilla. Post-conviction counsel gave the above-described background information, none of which was obtained by trial counsel, to the post-conviction experts (Drs. Carol Armstrong and Barry Crown) and asked them to evaluate Mr. Rompilla in light of this history. The doctors testified that this background information contain numerous "red flags" indicative of organic brain damage, mental retardation and extreme mental/emotional disturbances, and clearly showed the need for psychological and neuropsychological testing, which they performed. Based on the background information and their testing, they found that Mr. Rompilla suffers from organic brain damage, mental retardation, serious psychological impairments and alcoholism. They found that his mental,

[16]Trial counsel did speak to the brother, Nick, who briefly testified at capital sentencing. At the post-conviction hearing, Nick testified that trial counsel had asked him only about his relationship with Mr. Rompilla during the three months they lived together between the time Mr. Rompilla was paroled and this offense. The state court, however, declined to credit that part of Nick's testimony. See Rompilla-4 (dissent) at 279. Trial counsel, however, did not claim to have spoken to Randi or Barbara at all. Assuming that Nick's post-conviction testimony was not available to trial counsel, the state court still did not question the veracity or availability of the two sisters, who would have provided the above-described information to trial counsel and the sentencing jury if trial counsel had interviewed them. See id. at 280.

emotional, intellectual and cognitive impairments are severe, date back to childhood, and were likely caused by fetal alcohol exposure, head injuries and childhood trauma. They found that, at the time of the offense, he was suffering from extreme mental and emotional disturbances, and had a substantially impaired capacity to appreciate criminality of conduct or conform to the law, both statutory mitigating factors in Pennsylvania. They testified that all of their findings could have been developed and presented at the time of the original capital sentencing proceeding. Rompilla-4 at 244; id. (dissent) at 279-80; A1558-1780.[17]

The capital sentencing jury never heard any of the mitigating evidence, presented post-conviction, concerning childhood trauma, organic brain damage, mental retardation, mental and emotional disturbances, and alcoholism. "Had the jury been able to place [this evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck

[17]Post-conviction counsel also presented a report prepared by the Chief Psychiatrist at the state prison where Mr. Rompilla is incarcerated on death row. The report, A2377-79, states that Mr. Rompilla is of "borderline intelligence"; his mother was a heavy drinker; he "dropped out of school after 9th grade and started drinking heavily that summer"; he "has a very significant alcohol problem which includes frequent blackouts"; "whenever he gets out of prison he drinks very heavily and has frequent blackouts"; and the times of this offense and prior offenses were "during these blackouts." Based on these findings, the prison's Chief Psychiatrist recommended that the death sentence be commuted to life imprisonment.

The Commonwealth retained a post-conviction "rebuttal" psychologist, Dr. Frank Dattilio. Dr. Dattilio's testimony was remarkable: it supported Mr. Rompilla's case. Dr. Dattilio testified that Mr. Rompilla's records and history were replete with "red flags" indicating organic brain damage, mental retardation and a traumatic childhood, and had mitigating significance. See A1911-2014.

The mental health experts who were contacted by trial counsel (Drs. Sadoff, Gross and Cooke) also testified at the post-conviction hearing. They testified that trial counsel did not give them any records or other background information about Mr. Rompilla. They testified that the background information, which they saw for the first time at the post-conviction hearing, provides significant mitigation and contains numerous "red flags" for organic brain damage, mental retardation and psychological impairments. They testified that if trial counsel had provided the background information to them they would have done the same type of psychological and neuropsychological testing done by the post-conviction doctors, rather than the brief "screening" tests that one of them (Dr. Cooke) administered at the time of trial. Rompilla-4 at 242; id. (dissent) at 281-82; A1518-47, A1795-1821, A1839-72.

a different balance," thus showing prejudice. Wiggins, 123 S.Ct. at 2543.

Trial counsel testified at the post-conviction hearing that they did not withhold any of this evidence for tactical or strategic reasons. Counsel testified that they would have presented it if they had been aware of it. E.g., Rompilla-4 (dissent) at 279; A1074-75, A1078-83, A1091-92, A1096, A1101, A1110-13, A1156-62, A1198.

This leaves the only real issue here: did counsel's investigation satisfy the Sixth Amendment? The Third Circuit dissenters found it did not even come close – counsel's investigation was "grossly inadequate," making this a case of "inept," "shabby lawyering" and "shocking ineffective assistance of counsel." Rompilla-4 (dissent) at 273-74; Rompilla-5 (dissent) at 311-12. As outlined below, the Circuit dissenters are right. The Circuit majority's denial of relief is "inexplicable in light of" this Court's controlling precedent, Rompilla-4 (dissent) at 274, and is based upon a "degraded standard" that is inconsistent with the Sixth Amendment, Rompilla-5 (dissent) at 312. This Court should consider this case and address the Third Circuit majority's "degraded standard."

1. Counsel's complete failure to investigate aggravation.

A critically important duty of capital counsel is to investigate what the prosecution may introduce as aggravation. Wiggins, 123 S.Ct. at 2537 (counsel should seek "all reasonably available ... evidence to rebut any aggravating evidence that may be introduced" (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(C) (1989))).[18] Here,

[18]See also ABA Guideline 11.8.5(A) (counsel should investigate at "earliest possible time" areas that may relate to aggravation); ABA Guideline 11.8.3(A) ("Counsel should seek information ... to rebut the prosecution's sentencing case."); Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 337 (1983) ("counsel must investigate ... any evidence of other crimes or circumstances in the defendant's background which the prosecution may be permitted to introduce in aggravation"); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994) ("basic concerns" of capital counsel "are to neutralize the aggravating circumstances ... and to present mitigating evidence"; counsel ineffective for failing to challenge invalid aggravators); Lewis v. Lane, 832 F.2d 1446, 1453-58 (7th Cir. 1987) (capital counsel ineffective for failing to investigate defendant's criminal record where it was used to establish aggravator);

trial counsel completely failed to investigate the Commonwealth's aggravating evidence. If counsel had reasonably investigated the aggravation, they would have obtained the records that contain the significant mitigation outlined above.[19]

The Commonwealth disclosed pre-trial that it would present aggravation that Petitioner had a "significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. C.S. § 9711(d)(9). Counsel knew pre-trial that the Commonwealth would pursue the (d)(9) aggravating circumstance and would introduce Petitioner's prior (burglary/rape) convictions as evidence for (d)(9). Under Pennsylvania law, the Commonwealth was entitled to introduce, as evidence for (d)(9), more than the mere existence of the prior convictions. It also could introduce their "facts and circumstances" as reflected in the prior convictions court record. Commonwealth v. Beasley, 479 A.2d 460, 465 (Pa. 1984); Commonwealth v. Holcomb, 498 A.2d 833, 851 n.18 (1985). The Commonwealth told counsel pre-trial it would introduce evidence from the prior convictions court file to show the "facts and circumstances" of the priors. A633-34, A640, A1278.

The prior convictions court file was a public record, available to trial counsel in the clerk's office in the same courthouse where the capital trial was held. Given counsel's knowledge that the Commonwealth would introduce information from the prior convictions court file as part of its (d)(9) evidence, counsel had a duty to, at least, inspect that file as part of investigating the aggravation. Shockingly, however, counsel failed to take this rudimentary investigatory step – counsel never even looked at the prior convictions court file. A626, A629, A633-34, A638-41, A1278. When the Commonwealth introduced materials from that file at capital sentencing, as it had told counsel it would, counsel admitted they had never bothered to look at the file before trial. The prosecutor

Esslinger v. Davis, 44 F.3d 1515, 1529-30 (11th Cir. 1994) (non-capital counsel ineffective for failing to investigate defendant's criminal record where it was used to enhance sentence).

[19]Independent of the duty to investigate aggravation, effective counsel would have obtained these records as part of a reasonable background investigation for mitigation. See infra.

replied, aptly: "it's a public record, ... you could have ... looked at it just like I did." A629.

If counsel had done a rudimentary investigation of the prior convictions used to establish the (d)(9) aggravating circumstance – by reading the prior convictions court file – counsel would have found significant mitigating evidence.

The prior convictions court file contains prison records created in connection with those convictions. A1005, A1253. These court/prison records include "achievement test" scores showing that Mr. Rompilla, as an adult, had not progressed beyond 3rd grade level in spelling and arithmetic, with abilities below 97% of the population. These records also include results from the Minnesota Multi-Phasic Personality Inventory ("MMPI"), a psychological test, which was administered to Mr. Rompilla when he entered prison for the prior convictions. The test results show serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales. These records state that Mr. Rompilla is an alcoholic and needed "counseling pertaining to his longstanding abuse of alcohol." These records also note that he was "raised in [a] slum environment."

Thus, basic investigation of the aggravation would have uncovered substantial mitigation regarding Mr. Rompilla's learning/cognitive problems, psychological impairments, alcoholism and deprived childhood. Trial counsel, however, never took this first step and, as a result, were ignorant of this mitigating evidence. The jury never heard it. The doctors never received it. Counsel never used it to develop a penalty-phase defense.

Moreover, if counsel had taken the elementary investigatory step of looking at their client's prior case file, they would have been led to other records that also contain compelling mitigation. The court/prison records refer to Mr. Rompilla's juvenile court records as containing additional relevant information. Given the mitigation contained in the court/prison records, "any reasonably competent attorney would have realized that pursuing these leads was necessary," Wiggins, 123 S.Ct.

at 2537, and would have obtained the juvenile court records.[20]

The juvenile court records, A2297-2304, contain significant mitigating evidence about Mr. Rompilla's traumatic childhood and mental retardation. They contain a report from the Allentown School District, dated November 20, 1964, when Mr. Rompilla was sixteen years old, stating that his IQ is in the mentally retarded range (sixty-nine) and that he "is easily influenced by others into different events, no matter if it is bad or good." The file also contains a juvenile court "summary," dated November 27, 1964, which describes some of the dysfunctional conditions in the home, including "neglected children"; parental alcoholism; reports that the "mother was picked up by the police in a drunken condition"; removal of the children from the home by the city health department, which placed them in "in a hospital" and foster case; parental abandonment "for a period of one or several weeks at a time"; and reports "that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times." The "summary" notes that, as a result of this dysfunctional home situation, the family was "notorious" in the county.

Mr. Rompilla's juvenile court file also states that additional information about the family is contained in the juvenile court records of his brother, Nick Rompilla. Again, given the information in this file, effective counsel "would have realized that pursuing these leads was necessary," Wiggins, 123 S.Ct. at 2537, and would have obtained Nick's juvenile records. Those records, A2305-66, confirm that Mr. Rompilla's childhood home was deeply dysfunctional. A report dated April 6, 1957, when Mr. Rompilla was nine years old, states: "I regret to say that the home conditions in this [Rompilla] family group have not changed. The mother still is neglecting her children with filth and lack of supervision existing at all times." A "summary," dated October 7,

---

[20]Even if the juvenile court records had not been explicitly referenced in the prior convictions court file, effective counsel would have been concerned that the Commonwealth would introduce prior juvenile adjudications in support of the (d)(9) aggravating circumstance, as Pennsylvania law allows, see Baker, 614 A.2d at 676, and would therefore have investigated the juvenile court history as part of a reasonable investigation of evidence the Commonwealth might introduce in aggravation.

1957, reiterates that the children were "neglected"; the mother had been "picked up by the police in a drunken condition"; "the mother was frequently missing from the home for weeks at a time"; "[t]he children at all times have been poorly kept, always on the filthy side"; "the house always showed signs of neglect"; because of neglect and parental drunkenness the children were removed from the home. A May 13, 1960 "Classification Summary" notes the "father-son relationships were weak"; the mother was an "alcoholic" who was "often off with other men" and away from "home [for] weeks at a time"; there were "poor home conditions"; it was "an unstable home situation"; there was "[n]eglect of children"; and the "children were always dirty." Trial counsel did not get the records and the jury never heard this mitigation.

As stated, Mr. Rompilla's juvenile court records contain a report from his school that his IQ is in the mentally retarded range. Effective counsel would have "pursu[ed] th[is] lead," Wiggins, by obtaining school records. Similarly, an effective lawyer seeing the very low achievement test scores in the court/prison file also would have realized that school records should be obtained.

The school records, A2277-98, show that Mr. Rompilla's IQ was repeatedly found to be in the mentally retarded range. At age six, his IQ score was in the 60's; at age eleven, his "verbal," "performance" and "full-scale" IQ scores were 61, 75 and 64; at age thirteen, they were 69, 75 and 69. Achievement test results in the school records show that his abilities never advanced above 3rd grade level (which is consistent with the very low achievement test scores in the court/prison records). The school records show he was placed in special education classes, where he remained until he left school in 9th grade. The records state that school officials could get "no cooperation" from his parents in trying to deal with his problems. Trial counsel did not get the records and the jury never heard this mitigating evidence.

In sum, effective counsel would have investigated the aggravation evidence by, at least, reviewing the prior convictions court file from whence that evidence came. Effective counsel then

would have followed the obvious leads created by the first step in an adequate investigation, and would have obtained the rest of the above-described records. Effective counsel thus would have had compelling documentary evidence showing childhood trauma in the dysfunctional home of alcoholic parents, mental retardation, serious learning problems, mental and emotional disturbances, and a lifelong struggle with alcoholism. These lawyers, however, did not take even the first, rudimentary step toward investigating the prior convictions that were used in aggravation. The jury never heard any of the compelling mitigation that an adequate investigation would have revealed.

2. Counsel's "grossly inadequate" background mitigation investigation.

Effective capital counsel "conduct a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence," including "all reasonably available" evidence about his "educational history," "family and social history" and "adult and juvenile correctional experience." Wiggins, 123 S.Ct. at 2535, 2537 (quoting Williams, 529 U.S. at 396, and ABA Guidelines 11.4.1, 11.8.6 (emphasis altered)). Here, trial counsel did not perform the thorough background investigation required by the Sixth Amendment – their background investigation was "grossly inadequate." Rompilla-4 (dissent) at 274.

A "comparison of counsel's actions in this case with those of counsel in Wiggins ... is instructive" and shows that these lawyers were ineffective. Rompilla-4 (dissent) at 277.

In Wiggins, counsel investigated the defendant's background by obtaining a Pre-Sentence Investigation ("PSI") report, which included a brief account of the defendant's "personal history," and "track[ing] down" social service records about the defendant. Id., 123 S.Ct. at 2536. This Court found this background investigation inadequate because it gave counsel only a "rudimentary knowledge of [the defendant's] history from a narrow set of sources." Id. at 2537. This Court held that effective counsel would have reached beyond the "narrow set of sources" upon which they relied, and would have gathered and developed much more background information, such as that

described in a "social history report" prepared for post-conviction, which used "social services, medical, and school records, as well as interviews with [the defendant] and numerous family members" to "chronicle[] [the defendant's] bleak life history." Id. at 2532-33.

Trial counsel's background investigation here was "no more thorough, perhaps less, than th[at] found inadequate ... in Wiggins." Rompilla-4 (dissent) at 282. Mr. Rompilla's lawyers did not even come close to developing the type of social history information that Wiggins found would have been developed by effective counsel. Instead, their entire investigation of Mr. Rompilla's background consisted of talks with a few family members. Counsel thus relied on a remarkably "narrow set of sources," Wiggins, especially given that several other sources – the above-described records and other family members – were readily available.

Counsel's reliance on this "narrow set of sources" was particularly unreasonable because counsel knew that the few people to whom they spoke were poor sources of background information – those people told counsel that they did not know much about Mr. Rompilla. Rompilla-4 (dissent) at 281. As trial counsel testified at the post-conviction hearing:

> The "overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody. ... [T]here wasn't a lot that they knew." A1094;
>
> Family members to whom counsel spoke had "limited knowledge of" Mr. Rompilla. A1098
>
> "Q. Were they the type of family that would provide you information when asked?
> A. No. As I said earlier, it seemed pretty clear that they didn't feel as though they knew Ron very well, because there was a distance as a result of his being incarcerated and as a result of their own whatever was going on with them." A1165-66.
>
> The family told counsel "they hardly know him. I mean one said, 'He was in a reformatory. He's been away the whole time. We didn't know him that well.'" A1303.

Moreover, counsel also knew that the few people to whom they spoke avoided discussing topics that might mitigate because they believed Mr. Rompilla was innocent – they "were coming from the position that Ronald was innocent. And, therefore, they weren't looking for reasons for

why he might have done this." A1093; see also A1180-81 ("Q. Did they ever waiver on the fact that they thought he was innocent? A. No. Q. So it's fair to say that no one ever tried to offer you an excuse as to why he might have done it? A. No.").[21]

Counsel thus relied upon an extraordinarily "narrow set of sources" and counsel knew they were obtaining, at best, no more than a "rudimentary knowledge," Wiggins, of Mr. Rompilla's background, because the few people on whom counsel relied told counsel that they knew little about Mr. Rompilla's history and were not interested in topics that might mitigate. Under these circumstances, "[c]ounsel certainly had reason to inquire further." Rompilla-4 (dissent) at 281. Effective counsel would have expanded their investigation beyond this "narrow set of sources" and would have sought something more than a "rudimentary knowledge" of Mr. Rompilla's background. And there are two obvious, readily available sources to which effective counsel would have turned: other family members and records about Mr. Rompilla.

Given the lack of background information obtained from the few family members to whom

---

[21]Counsel testified that Mr. Rompilla, like the family members counsel spoke to, was not a good source of information. E.g., A1128, A1164, A1195, A1294-95, A1300. There are several likely reasons why Mr. Rompilla and the few family members counsel spoke to were unable to provide useful background information. The experts at the post-conviction hearing, including the Commonwealth's "rebuttal" expert, Dr. Dattilio, testified that Mr. Rompilla's brain damage, low intelligence, cognitive impairments, communication problems and memory deficits make him a very poor historian; moreover, he is the victim of childhood trauma, which is difficult for even an unimpaired person to discuss. E.g., A1517 (Dr. Gross); A1988, A1998-2001, A2005 (Dr. Dattilio); A1722 (Dr. Armstrong); A1637 (Dr. Crown). Similarly, the dysfunctional family situation made it difficult for other family members to discuss Mr. Rompilla's childhood. A2000-01, A2005 (Dattilio); A1517 (Gross). These problems were exacerbated by the fact that trial counsel who spoke to the family, Ms. Dantos, asked only "general questions" – e.g., was there "anything important or noteworthy about his family, upbringing?" – rather than specific questions about abuse, neglect, poverty, etc. A1073, A1096-97, A1156-58. The experts testified in post-conviction that such general questions are often inadequate when questioning people, like Mr. Rompilla and his family, who have suffered childhood trauma. A2000-01, A2005 (Dr. Dattilio); A1517 (Dr. Gross). In the end, however, the reason why trial counsel's "narrow set of sources" was unable to help is largely irrelevant. The point is that counsel knew this "narrow set of sources" did not know much about Mr. Rompilla's background and would not be likely to aid in developing mitigation.

counsel spoke, counsel "certainly had reason to inquire further as to the availability of other family members ... who did know more about Rompilla's youth." Rompilla-4 (dissent) at 281. As discussed above, other family members (sisters Randi and Barbara) were available to counsel, and would have provided significant background information, but counsel never contacted or spoke to them to determine what they knew about Mr. Rompilla's background. Counsel ineffectively failed to go beyond their unproductive, "narrow set of sources" by interviewing other family members. Wiggins; see also Williams, 529 U.S. at 415-16 (counsel deficient where they presented testimony from mother and two friends but failed to interview and present other "friends, neighbors and family").

Even more striking than counsel's failure to interview other family members is their complete failure to seek or obtain any records about Mr. Rompilla. The ABA Guidelines, which articulate "reasonable" professional "standards for capital defense work," Wiggins, 123 S.Ct. at 2536-37, explain that one of the first things capital counsel should do as part of a mitigation investigation is seek "all reasonably available" records about the defendant, including records about "educational history," "adult [criminal] record," "correctional experience" and "juvenile [criminal] record," ABA Guideline 11.4.1 (cited in Wiggins, 123 S.Ct. at 2537) – precisely the records that were obtained by post-conviction counsel here. See also Williams, 529 U.S. at 395-96 (counsel ineffective for failing to obtain defendant's juvenile records).

As stated above, these records were "reasonably available" to counsel – school records were across the street from the courthouse; adult criminal records were in the courthouse; prison records were in the criminal record court files (or could easily have been obtained from the prison); juvenile records were referenced in the court/prison records and available nearby. Counsel, however, did not seek or obtain any of these readily available records, or any other records about Mr. Rompilla. Counsel's mitigation investigation fell below reasonable professional norms.

The ABA Guidelines say capital counsel should always seek the type of records that trial counsel failed to seek here (school, juvenile, prior conviction, prison) as part of a reasonable mitigation investigation. And there are several features of this case that make counsel's failure to seek or obtain these (or any other) records particularly "shocking," Rompilla-4 (dissent) at 273, and highlight counsel's ineffectiveness.

First, as stated above, counsel knew the few people they spoke to were not good sources of information, making it particularly obvious that counsel needed to seek other sources.

Second, as stated above, counsel knew the Commonwealth would introduce evidence from the prior convictions court file as aggravation. Under these circumstances, effective counsel would have investigated the prior convictions by, at least, reviewing the court file that the Commonwealth planned to introduce, and would have done so even if there was no duty to investigate mitigation.[22]

Third, counsel knew the capital sentencing jury would learn that Mr. Rompilla spent fourteen years in prison before this offense.[23] It was well-established at the time of this trial that "evidence bearing on the defendant's ability to adjust to prison life" can be mitigating. Skipper v. South Carolina, 476 U.S. 1, 6 (1986). Under these circumstances, effective counsel would have obtained and reviewed the prison records as a possible source of this mitigating evidence.

Fourth, counsel knew that Mr. Rompilla left school in 9th grade and that this suggested "problems in school." A1314-15. Under these circumstances, effective counsel would have obtained and reviewed the school records.

Fifth, counsel knew, from police reports provided in pre-trial discovery, A2367-76, that Mr.

---

[22]For similar reasons, effective counsel would have reviewed the juvenile court file, even if there was no duty to investigate mitigation. See note 20, supra.

[23]As stated above, the sentencing jury learned that Mr. Rompilla committed this offense three months after being released on parole from fourteen years imprisonment for the prior convictions that were used to establish the (d)(9) aggravating circumstance.

Rompilla was drinking so heavily around the time of the offense that he was described as being incoherent and passing out, showing that his alcoholism needed to be investigated. The available records about Mr. Rompilla's background were an obvious source of information about the development and history of his alcoholism, and effective counsel would have obtained them.

The "narrow set of sources" counsel used did not give counsel any information about any of these matters, yet counsel never sought other, readily available sources. Effective counsel would have gone beyond this narrow set of unhelpful sources by getting easily obtainable records about Mr. Rompilla. Those records had significant mitigation.

B. Habeas Relief is Appropriate Under AEDPA.

Habeas relief is appropriate under AEDPA. The state court did not rule on Strickland's "prejudice" prong. See Rompilla-2 at 789 n.3. Thus, habeas "review is not circumscribed by a state court conclusion with respect to prejudice," i.e., prejudice is reviewed de novo. Wiggins, 123 S.Ct. at 2542. No court has ever doubted the existence of prejudice here, which is established by the compelling mitigating evidence presented in the post-conviction proceedings.

The only issue here is the adequacy vel non of counsel's investigation. As stated above, counsel's investigation was deficient in two ways: (1) counsel completely failed to investigate the aggravating evidence; and (2) counsel did not conduct the thorough investigation for background mitigation that the Sixth Amendment requires. A ruling for Mr. Rompilla on either issue requires habeas relief. Relief is appropriate on both.

1. The state court did not address counsel's complete failure to investigate the aggravation, despite the fact that Mr. Rompilla squarely presented the argument in state court, see Commonwealth v. Rompilla, No. 152 CAP, Initial Brief of Appellant at 67-69 (Pa. June 3, 1997); id., Reply Brief of Appellant at 3 (Pa. Aug. 8, 1997). Thus, habeas review of this aspect of counsel's deficient performance "is not circumscribed by a state court conclusion," Wiggins at 2542, and relief is

appropriate for the reasons stated above.[24]

2. With respect to the mitigation investigation, the state court tried to excuse counsel's failure to seek or obtain any records because: (a) the records supposedly are "not entirely helpful"; (b) counsel hired mental health experts; (c) counsel spoke to Mr. Rompilla and a few family members. Rompilla-2 at 790. These attempts to excuse counsel's "grossly inadequate investigation," Rompilla-4 (dissent) at 274, are unreasonable.[25]

a. The Pennsylvania Supreme Court believed it could excuse counsel's failure to seek or obtain any records because "the [post-conviction hearing] court found [the records] not entirely helpful." Rompilla-2 at 790. We explain below that this "finding" is absurd. But even assuming the records are "not entirely helpful," this is an unreasonable application of Strickland because it uses the contents of records never seen by counsel to justify counsel's failure to get them. The state court thus engaged in a paradigmatic improper use of hindsight to justify counsel's investigative failure. E.g., Strickland, 466 U.S. at 689 (reviewing court must avoid "distorting effects of hindsight," and must "evaluate [counsel's] conduct from counsel's perspective at the time"); Kimmelman v. Morrison, 477 U.S. 365, 386-87 (1986) (same).

The state court's hindsight approach is directly refuted by Williams, where counsel was

---

[24]Habeas relief is also appropriate if the failure-to-investigate-aggravation issue is reviewed under § 2254(d), since nothing in the state court decision suggests any reasonable basis for counsel to completely fail to investigate the source of the aggravating evidence.

[25]"It is impossible to determine" from the state court opinion "the extent to which the [Pennsylvania] Supreme Court's error[s] with respect to" each of these three areas "affected its ultimate finding that" counsel were effective. Williams, 529 U.S. at 414. Accordingly, the state court decision is unreasonableness if any one of these three excuses given by the state court is unreasonable. Id. Moreover, the state court did not address at all counsel's failure to interview the two sisters who would have provided significant background mitigation about Mr. Rompilla's traumatic childhood and the development of his mental problems and alcoholism, see Rompilla-4 (dissent) at 280, and habeas relief is appropriate on that ground even apart from counsel's failure to obtain any records. Nevertheless, we outline the unreasonableness of all three of the state court's excuses for counsel's failure to seek records.

ineffective for failing to obtain juvenile records, and where those records actually contained harmful information. This Court explained: "Of course, not all of the [unpresented] evidence [in records] was favorable to Williams. ... But ... failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision" because counsel did not adequately investigate and did not know what the records contained. Id., 529 U.S. at 396; accord Wiggins, 123 S.Ct. at 2535. The state court's use of the records' purported contents to justify counsel's failure is an unreasonable application of Strickland.

Moreover, as a factual matter, the Pennsylvania Supreme Court's "not entirely helpful" assertion is absurd. It is based on the post-conviction hearing court's statement that the "records were not entirely helpful" because, "[w]hile they reveal a low IQ, low IQ can simply be part of the bell curve." A2029. It is silly to say this makes the records unhelpful. Any IQ score is "part of the bell curve." The low IQ scores of mentally retarded people, like Mr. Rompilla, are at the low end of the "bell curve." The state court's "not entirely helpful" ruling is thus "based on an unreasonable determination of the facts," requiring relief under section 2254(d)(2).

b. The state court believed that hiring mental health experts absolved counsel of the duty to investigate Petitioner's background. This, too, is unreasonable. In Wiggins, when the state "emphasized counsel's retention of a psychologist," this Court rejoined that "counsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background." Id. at 2541. Whether counsel hires experts or not, counsel has an "obligation to conduct a thorough investigation of the defendant's background." Id. at 2535 (quoting Williams).

Even if counsel could abdicate their background investigation duty to mental health experts, counsel here could not reasonably rely on the experts for such an investigation because counsel did not ask the experts to seek or expound upon background mitigation. Instead, counsel asked only for expert opinions about Mr. Rompilla's mental state at the time of the offense. A1067-71 (trial

counsel testimony); Rompilla-4 (dissent) at 281.[26] And, even if counsel had asked the experts to do a background investigation, the experts would have had a very "narrow set of sources," Wiggins – no records about Mr. Rompilla's history, no family interviews, and so on. Finally, hiring mental health experts would not under any circumstances have relieved counsel of the duty to investigate the prior convictions used in aggravation. Thus, if it is falsely assumed that counsel asked the experts to do a background investigation and falsely assumed that they did one, it still did not meet Sixth Amendment standards.

c. The Pennsylvania Supreme Court tried to excuse counsel's failure to seek or obtain any records because counsel spoke to a few family members. This is an unreasonable application of Strickland for the reasons stated in Wiggins, by the Circuit dissenters, and above. Counsel's reliance on this remarkably narrow set of sources, who told counsel they knew little about Mr. Rompilla's background, does not even come close to meeting the Sixth Amendment requirement that counsel investigate thoroughly for all reasonably available background mitigation.

C. The Third Circuit Majority Gravely Erred.

When examined in light of this Court's controlling precedents, Williams and Wiggins, the Third Circuit majority's ruling is "astonishing" and "inexplicable." Rompilla-4 (dissent) at 274, 282. In light of Williams, the District Court had granted relief. In light of Williams and Wiggins, several Third Circuit Judges were appalled by the Circuit majority's ruling.

Under Williams and Wiggins, this is an easy case. Counsel did not even come close to the "thorough investigation of the defendant's background" for "all reasonably available mitigating evidence" that this Court requires. Unlike the Circuit majority, the Circuit dissenters actually evaluated this claim under Williams and Wiggins, and found that counsel "fail[ed] to conduct even

---

[26]One expert did not even know counsel wanted a mitigation mental state evaluation; he believed counsel was interested only in possible guilt-phase mental defenses. A1545 (Dr. Gross).

the most rudimentary investigation into Rompilla's background." Rompilla-5 (dissent) at 312. Applying Williams and Wiggins, the dissenters found this is a case of "grossly inadequate investigation" and "shocking ineffective assistance of counsel." Rompilla-4 (dissent) at 273-74.

The Circuit majority, however, did not discuss Williams' Sixth Amendment analysis at all (it cited Williams only for its general interpretation of § 2254(d)). See Rompilla-4 at 240, 246, 250. The Circuit majority treated Wiggins as an afterthought relegated to the end of its opinion, Rompilla-4 at 256, and hinged its ruling instead on lower court decisions which pre-date both Williams and Wiggins and do not apply the Sixth Amendment analysis required by Williams and Wiggins.[27]

The Circuit majority not only treated Wiggins as an afterthought, it also ignored the core of its teaching. According to the Circuit majority, Wiggins found counsel ineffective solely because they failed "to follow the leads" they found in records they obtained. Rompilla-4 at 257. But failure-to-follow-leads is only one of the reasons this Court found Wiggins' lawyers deficient.

The Wiggins Court first stressed, at some length, that "well-defined norms" for capital counsel, as "articulated by" the ABA Guidelines and other professional standards, require capital counsel to conduct a "thorough investigation of the defendant's background" for "all reasonably available mitigating evidence." Id., 123 S.Ct. at 2535-37 (citations omitted; emphasis original). Applying these Sixth Amendment norms, this Court found counsel's investigation inadequate because it gave counsel only a "rudimentary knowledge of [Wiggins'] history from a narrow set of sources." Id. at 2537. None of this had anything to do with counsel failing to "follow leads" in records they already had. After holding that counsel's investigation was deficient because it was not "thorough" and did not seek "all reasonably available mitigating evidence," Wiggins then went on to further hold that the "scope of their investigation was also unreasonable in light of what counsel actually discovered in the ... records" they obtained, because effective counsel would have followed up on leads contained in those records. Id. at 2537.[28]

Thus, Wiggins held that capital counsel must both: (1) thoroughly investigate for all reasonably available mitigation; and (2) follow up on leads contained in information they obtain. The Circuit majority ignored the first requirement and treated Wiggins as if it held only the second. The Circuit majority thereby stripped Wiggins of most of its force. As Circuit Judge Sloviter said in dissent, the Circuit majority's narrow view of Wiggins is "nothing short of astonishing" and "entirely misses the point" of this Court's decision. Rompilla-4 (dissent) at 282.

The Circuit majority also paid no heed to the ABA Guidelines, mentioning them only in a footnote, and belittling their importance. Rompilla-4 at 259 n.14. This cavalier treatment of the ABA Guidelines cannot be squared with Williams and Wiggins. See, e.g., Wiggins, 123 S.Ct. at 2536-37 (ABA Guidelines are "norms" and "standards to which we long have referred as 'guides to determining what is reasonable'" under the Sixth Amendment (citing Strickland; Williams)); see also Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003) (in light of Wiggins, ABA Guidelines "provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases").

Finally, and inexplicably, the Circuit majority did not even discuss counsel's complete failure

---

[27]The decisions relied on by the Circuit majority highlight the "degraded" approach decried by the dissenters. For example, the majority cited Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994), which explicitly held that "thorough investigation" is not required in capital cases, a holding directly contrary to Williams and Wiggins; Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), where "[u]nder the majority's analysis, defense counsel need have no trial strategy, need not find out how witnesses will testify before putting them on the stand, and need not know about the value of mitigating evidence," id. at 1529 (dissent); and Kokoraleis v. Gilmore, 131 F.3d 692, 697 (7th Cir. 1998), where the defendant confessed to being "a serial killer who ... eats his victims after fetishistic ... ceremonies," yet the court deemed it reasonable for counsel to not investigate mental health mitigation because the defendant "appeared normal" to counsel.

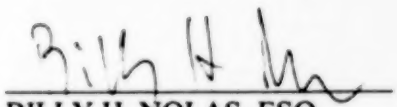
[28]See also id. at 2541-42 ("Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records – evidence that would have led a reasonably competent attorney to investigate further.").

to investigate aggravation, even though that argument was squarely presented by Mr. Rompilla. There was no reasonable basis whatsoever for counsel to fail to investigate the prior convictions that were used to establish an aggravating circumstance. Had they done so, they would have found the significant mitigation described herein. Neither the Third Circuit nor the state courts have ever even suggested any reason why this argument is not meritorious.

CONCLUSION

This Court should issue its writ of certiorari and review the decision of the Third Circuit.

Respectfully submitted,



BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, Ronald Rompilla

Dated: July 23, 2004

(12)

NO. 04-5462

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ROMPILLA,

Petitioner,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, Ronald Rompilla

Dated: July 23, 2004

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
Ronald ROMPILLA, Appellant.

Argued Oct. 20, 1994.
Decided Jan. 23, 1995.

Defendant was convicted in the Common Pleas Court, Lehigh County, Criminal Division, No. 682 of 1988, David E. Mellenberg, J., of murder in the first degree, burglary, criminal trespass, robbery, theft, and receiving stolen property and was sentenced to death, and he appealed. The Supreme Court, No. 53 Capital Appeal Docket, Nix, C.J., held that: (1) evidence supported conviction for first-degree murder, and (2) during sentencing phase, Commonwealth's reading of rape victim's testimony that, after defendant stole money, he raped victim at knifepoint was necessary to support aggravating circumstance that defendant had significant history of felony convictions involving use of violence to the person.

Affirmed.

West Headnotes

[1] Criminal Law ⚿1134(3)
110k1134(3)

Supreme Court would not specifically address any of the issues raised in capital murder defendant's pro se brief which was appended to his counsel's brief and which focused on sufficiency of the evidence and trial counsels' ineffectiveness because Court was obligated to undertake independent review of sufficiency of the evidence supporting defendant's conviction and because defendant was free to raise ineffectiveness of any of his prior counsel in a subsequent proceeding.

[2] Criminal Law ⚿1134(3)
110k1134(3)

Although capital murder defendant did not specifically challenge sufficiency of the evidence supporting his conviction, Supreme Court would nevertheless undertake such review.

[3] Criminal Law ⚿1144.13(3)
110k1144.13(3)

[3] Criminal Law ⚿1159.2(7)
110k1159.2(7)

In reviewing sufficiency of the evidence, Supreme Court must view evidence and all reasonable inferences derived therefrom in light most favorable to Commonwealth as verdict winner, to determine whether all elements of offense have been established beyond reasonable doubt.

[4] Homicide ⚿1184
203k1184
(Formerly 203k234(11))

[4] Homicide ⚿1187
203k1187
(Formerly 203k234(11))

Evidence supported defendant's conviction for first-degree murder; in paying for motel room, defendant paid $121 in cash and flashed large amount of cash, defendant used false name when he checked in, defendant's sneakers matched footprint in blood that was discovered near victim's body, blood found on sneakers matched victim's blood type, victim's wallet was found in bushes outside defendant's motel room, defendant's fingerprint was found on one of the knives used to commit murder, and there were numerous inconsistencies between what defendant had told police concerning his activities on the nights in question and testimony of other witnesses.

[5] Criminal Law ⚿438(5.1)
110k438(5.1)

In determining admissibility of photograph of corpse in homicide trial, court must determine whether photograph is inflammatory and, if not, photograph may be admitted if it has relevance and can assist jury's understanding of the facts; if photograph is inflammatory, court must decide whether photograph is of such essential evidentiary value that its need clearly outweighs likelihood of inflaming minds and passions of jurors.

[6] Criminal Law ⚿438(5.1)
110k438(5.1)

Photograph showing body of victim lying face down behind his bar among a number of broken bottles was not inflammatory so as to preclude its admissibility in homicide trial; distance from body and angle from which photograph was taken tended to diminish inflammatory nature of the subject matter and number of broken bottles surrounding victim made it difficult, if not impossible, to discern whether substance beside victim was alcohol or blood.

[7] Criminal Law ⚿438(6)
110k438(6)

Photograph showing body of victim lying face down behind his bar among a number of broken bottles was admissible in homicide trial based on its evidentiary value, even if photograph was inflammatory; photograph was introduced by the Commonwealth to demonstrate the state of disarray of the bar and severity of struggle between victim and his attacker.

[8] Criminal Law ⚿823(16)
110k823(16)

In first-degree murder prosecution, any error which might have resulted from trial court's instruction on accomplice liability was cured by its subsequent admonition to jury that it should not consider such a theory because there was no evidence presented during trial to support such a finding. 18 Pa.C.S.A. § 306.

[9] Criminal Law ⚿863(1)
110k863(1)

In first-degree murder prosecution, trial court's denial of defendant's request that culpability portion of accomplice liability statute be read to jury was well within court's discretion because jury had been specifically instructed that it was not to consider accomplice liability in its deliberations. 18 Pa.C.S.A. § 306.

[10] Criminal Law ⚿641.13(1)
110k641.13(1)

Counsel can never be considered ineffective for failing to raise meritless claim. U.S.C.A. Const.Amend. 6.

[11] Criminal Law ⚿641.13(6)
110k641.13(6)
Objections.

Defense counsel was not ineffective for failing to file request for bill of particulars so that defense counsel could limit Commonwealth to the single theory that defendant was the actor and not accomplice because Commonwealth never asserted or attempted to prove that defendant's role in murder and robbery was anything other than that of the actor. U.S.C.A. Const.Amend. 6.

[12] Criminal Law ⚿874
110k874

Trial court did not err when it refused to poll jurors in order to ascertain whether defendant was convicted as an accomplice or actor since trial judge clearly and adequately explained to jury that there was no evidence offered to prove that defendant acted as accomplice and that it should not inject such considerations into its deliberations.

[13] Searches and Seizures ⚿113.1
349k113.1

In determining validity of search warrant, Pennsylvania Supreme Court follows totality of the circumstances test articulated by United States Supreme Court in *Illinois v. Gates*.

[14] Searches and Seizures ⚿113.1
349k113.1

Finding of probability of criminal activity is sufficient to support probable cause requirement of search warrant; prima facie showing of such activity is not required.

[15] Searches and Seizures ⚿114
349k114

Probable cause existed to support search warrant executed on defendant's hotel room; detective sergeant observed bloody footprint tread near location of victim's body which pattern of tread was recognized to be similar to the one on sneakers worn by defendant when police officer had interviewed him and defendant had checked into hotel room sought to be searched by using fictitious name at time when defendant had told police that he was at a different location.

[16] Sentencing and Punishment ⚿1762
350Hk1762
(Formerly 203k357(5))

During capital sentencing phase of first-degree murder prosecution, Commonwealth's reading of rape victim's testimony that defendant raped victim at knifepoint after stealing money was necessary to support aggravating circumstance that defendant had

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

653 A.2d 626
(Cite as: 539 Pa. 499, 653 A.2d 626)

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

significant history of felony convictions involving use of violence to the person: rape conviction was the only felony for which defendant was convicted that clearly involved use of violence; in order to show that threat of violence was used in commission of burglary so as to establish a felony history, rape victim's testimony was read into the record because burglary was part of the same episode; and by having assistant district attorney read from transcript, Commonwealth presented facts of defendant's prior crime in way that minimized inflammatory impact of his prior crimes to jury. 42 Pa.C.S.A. § 9711(d)(9).

[17] Sentencing and Punishment ⇐1788(5)
350Hk1788(5)
(Formerly 110k1208.1(6))

In death penalty case, it is Supreme Court's statutory duty to insure that jury's sentence is based upon facts presented at sentencing hearing. 42 Pa.C.S.A. § 9711(h).

[18] Sentencing and Punishment ⇐1681
350Hk1681
(Formerly 203k357(7))

In first-degree murder prosecution, evidence during the sentencing phase supported jury's finding of aggravating circumstance that defendant committed killing while in perpetration of a felony; defendant killed his victim during commission of burglary and robbery of victim's tavern. 42 Pa.C.S.A. § 9711(d)(6)

[19] Sentencing and Punishment ⇐1684
350Hk1684
(Formerly 203k357(11))

In capital murder prosecution, evidence during the sentencing phase supported jury's finding of aggravating circumstance that offense was committed by means of torture; forensic pathologist testified that victim was alive during infliction of almost all of the injuries that he received, which included multiple stab wounds, and number and location of wounds on victim's body were indicative of injuries that were inflicted with intent of causing pain. 42 Pa.C.S.A. § 9711(d)(8).

[20] Sentencing and Punishment ⇐1705
350Hk1705
(Formerly 203k357(5))

In first-degree murder prosecution, evidence during the sentencing phase supported jury's finding of aggravating circumstance that defendant had significant history of felony convictions involving use of violence to the person; in addition to rape conviction, defendant had been convicted of burglary in which he brandished and used knife to harm victim. 42 Pa.C.S.A. § 9711(d)(9).

****628 *503** Albert V.F. Nelthropp, for R. Rompilla.

Robert Steinnberg, Douglas G. Reichley, for Com.

Robert A. Graci, for Atty. General's Office.

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY, CASTILLE and MONTEMURO, JJ.

***504** *OPINION*

NIX, Chief Justice.

This is an automatic appeal [FN1] from the imposition of a death sentence following a trial by jury in the Court of Common Pleas of Lehigh County. Appellant, Ronald Rompilla, was convicted of murder of the first degree, [FN2] burglary, [FN3] criminal trespass, [FN4] robbery, [FN5] two counts of theft, [FN6] and two counts of receiving stolen property. [FN7] Pursuant to 42 Pa.C.S. § 9711(c)(1)(iv), the jury sentenced Appellant to death on November 1, 1988, after it found three aggravating circumstances which outweighed the one mitigating circumstance presented by Appellant.

FN1. 42 Pa.C.S. § 9711(h)(1).

FN2. 18 Pa.C.S. § 2502(a).

FN3. 18 Pa.C.S. § 3502(a).

FN4. 18 Pa.C.S. § 3503(a)(1)(ii).

FN5. 18 Pa.C.S. § 3701(a)(1)(i).

FN6. 18 Pa.C.S. § 3921(a).

FN7. 18 Pa.C.S. § 3925(a).

[1][2][3] Although Appellant has not specifically challenged the sufficiency of the evidence supporting his conviction, we will nevertheless undertake such a review in accordance with the standard set forth in *Commonwealth* ****629** *v. Zettlemoyer*, 500 Pa. 16, 26-27 n. 3, 454 A.2d 937, 942 n. 3 (1982), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). [FN8] In ***505** reviewing the sufficiency of the evidence, we must view the evidence and all reasonable inferences derived therefrom in the light most favorable to the Commonwealth as verdict winner, to determine whether all the elements of the offense have been established beyond a reasonable doubt. *Commonwealth v. Carpenter*, 511 Pa. 429, 435, 515 A.2d 531, 533-34 (1986).

FN8. Appellant has apparently had a contentious history with court-appointed counsel during his trial and appeal. Appellant's discontent with his attorneys has caused him to file a number of *pro se* motions and briefs in addition to those filed by court-appointed counsel. Present counsel has appended to the Brief for Appellant what is represented to be Appellant's own brief alleging other issues not included in counsel's brief. This appended brief authored by Appellant is addressed to the trial court and is intended to be a supplemental brief in support of Appellant's post-trial motions.
This Court recently addressed the issue of an appellant's right to file *pro se* supplemental briefs while that appellant is represented by counsel. In *Commonwealth v. Rogers*, 537 Pa. 581, 645 A.2d 223 (1994), we held that although an appellant has a clear right to terminate representation *prior* to the filing of an appeal, there is no concomitant right to file a separate *pro se* brief once appellate counsel has filed briefs. *Id.* at 583-84, 645 A.2d at 224. Thus, we refused to allow the appellant in *Rogers* to terminate appellate counsel and proceed *pro se* on amended and supplemented briefs once counsel had filed briefs. It was our belief that the appellant would "confuse and overburden the court by his own pro se filing of briefs at the same time his counsel is filing briefs on his behalf." *Id.* (quoting *Commonwealth v. Ellis*, 534 Pa. 176, 183-84, 626 A.2d 1137, 1141 (1993) (emphasis omitted)). A review of the issues raised in Appellant's *pro se* brief reveals that Appellant's claims are focused on the sufficiency of the evidence and trial counsels' ineffectiveness. As noted above, we are obligated to undertake an independent review of the sufficiency of the evidence supporting Appellant's conviction. We also hasten to point out that Appellant is free to raise the ineffectiveness of any of his prior counsel in a subsequent proceeding. Accordingly, we will not specifically address any of the issues raised in Appellant's *pro se* brief.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

In the early morning hours of January 14, 1988, the victim, James Scanlon, was murdered in his bar, the Cozy Corner Cafe, located in Allentown, Pennsylvania. At approximately 6:30 a.m. on that same morning, the victim's son discovered the body of his father lying behind the bar in a pool of blood. The victim had been stabbed repeatedly and set on fire. The victim's wallet had been stolen and approximately $500 to $1,000 had been stolen from the bar.

The Commonwealth's case consisted almost entirely of circumstantial evidence as there were no eyewitnesses to this killing. Appellant was seen in the Cozy Corner Cafe on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.

When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he had been in the Cozy Corner Cafe on the night of the murder and ***506** left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only $2.00 to buy breakfast at a local diner. A cab driver testified that he picked up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of $9.10.

[4] Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid $121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.

The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.

The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Scanlon's wallet was found by a groundskeeper in the bushes, six to eight feet outside the room that Appellant ****630** had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives that was used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told police concerning his activities on January 14 and 15, 1988, and the testimony of other witnesses.

When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence clearly supports Appellant's conviction for first degree murder. Accordingly, we will now proceed to address Appellant's seven allegations of error relating to the trial underlying his conviction and sentence.

Appellant first contends that the trial court erred in allowing the Commonwealth to introduce a photograph of the victim in this case. The photograph in question, Commonwealth's Exhibit Number 5, shows the body of the victim lying face down behind the bar among a number of broken bottles. Appellant argues that the inflammatory nature of this photograph***507** outweighs any evidentiary value that it may have had. The Commonwealth responds that the photograph is not inflammatory, and even if this Court were to find otherwise, its introduction was necessary to capture the disarray of the bar and to show the severity of the struggle between the victim and Appellant.

[5] "We have consistently held that the question of admissibility of photographs in homicide cases is a matter within the discretion of the trial judge, and only an abuse of that discretion will constitute reversible error." *Commonwealth v. Duffey*, 519 Pa. 348, 359, 548 A.2d 1178, 1183 (1988) (citing *Commonwealth v. Petrakovich*, 459 Pa. 511, 329 A.2d 844 (1974); *Commonwealth v. Woods*, 454 Pa. 250, 311 A.2d 582 (1973)). In determining the admissibility of photographs of a corpse in a homicide trial, this Court utilizes a two-part analysis. *Commonwealth v. Chester*, 526 Pa. 578, 591, 587 A.2d 1367, 1373, *cert. denied*, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

> First a court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Id. 526 Pa. at 591-92, 587 A.2d at 1373-74 (citation omitted).

[6] Based on our review of the photograph, we find that, although unpleasant, it does not rise to the level of what we consider to be inflammatory. The distance from the body and the angle from which the photograph was taken tend to diminish the inflammatory nature of the subject matter. Moreover, the number of broken bottles surrounding the victim makes it difficult, if not impossible, to discern whether the substance beside the victim is alcohol or blood.

[7] In addition, we agree with the Commonwealth and the en banc trial court that even if we were to find the photograph inflammatory, it would still be admissible based on its evidentiary ***508** value. The photograph was introduced by the Commonwealth to demonstrate the state of disarray of the bar and the severity of the struggle between the victim and his attacker. Accordingly, we conclude that the trial judge did not abuse his discretion in admitting this photograph into evidence.

Appellant next argues that the trial court erred in answering the jury's question regarding accomplice liability. Shortly after deliberations began, the jury presented a note to the court in which it asked the following: "If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?" (N.T. 10/31/88, 166). In response, the trial judge read 18 Pa.C.S. § 306(a), which defines the general rule for liability for conduct of another, [FN9] and briefly explained the concept of complicity to the jury. (N.T. 10/31/88, 167-68). The trial judge then cautioned the jury:

> FN9. 18 Pa.C.S. § 306(a) provides that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."

> I can only say this to you, that you should determine this case based on the Charge of ****631** the Court as it had given [sic] you originally. There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but it requires other proof or findings on your part that were not apart [sic] of this case nor were they made a part of this case....

(N.T. 10/31/88, 168-69). Appellant argues that by being instructed on an accomplice theory and then being told to disregard it, the jury might have been confused and convicted Appellant as an accomplice.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

[8] Appellant's claim is analogous to an issue that this Court addressed in *Commonwealth v. Edwards*, 521 Pa. 134, 555 A.2d 818 (1989). In *Edwards*, the jury asked the trial judge whether it had the option to condition a verdict of life imprisonment on the defendant's ineligibility for parole. In his initial response to the jury, the trial judge deviated from ***509** the standard that we had previously prescribed when the jury asked such a question. We concluded that despite this error, the curative instruction and proper charge that were subsequently given were sufficient to leave the jury's death sentence undisturbed. *Id.* at 158-59, 555 A.2d at 830-31. Likewise in the instant case, we are satisfied that any error which might have resulted from the trial judge's instruction on accomplice liability was cured by the subsequent admonition to the jury that it should not consider such a theory because there was no evidence presented during trial to support such a finding.

[9] Additionally, we reject Appellant's argument that the trial court erred in failing to grant defense counsel's request that the culpability portion of section 306 be read to the jury. As noted above, the jury was specifically instructed that it was not to consider accomplice liability in its deliberations. Therefore, the denial of Appellant's request was well within the trial judge's discretion. *See Commonwealth v. Perkins*, 473 Pa. 116, 132, 373 A.2d 1076, 1084 (1977) ("when the court provides supplemental instructions at the jury's request, it may confine those instructions to the particular questions asked by the jury, even though requested by the defendant to give yet additional instructions").

[10][11] Appellant next contends that trial counsel was ineffective for failing to file a request for a bill of particulars. By requesting a bill of particulars, Appellant argues that defense counsel could have limited the Commonwealth to the single theory that Appellant was the actor and not an accomplice. "A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid a surprise, or intelligently raise pleas of double jeopardy and the statute of limitations." *Commonwealth v. Chambers*, 528 Pa. 558, 580, 599 A.2d 630, 641 (1991), *cert. denied*, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992). In the instant case, the Commonwealth never asserted nor attempted to prove that Appellant's role in the murder and robbery was anything other than that of the actor. ***510** Thus, Appellant's argument is plainly without merit. Because counsel can never be considered ineffective for failing to raise a meritless claim, Appellant's claim of ineffectiveness must be rejected. *See Commonwealth v. Pettus*, 492 Pa. 558, 563, 424 A.2d 1332, 1335 (1981).

[12] In a related argument, Appellant contends that the trial court erred in refusing his request to poll the jury in order to ascertain whether he was convicted as an accomplice or actor. The record indicates that the jury was polled as to their individual verdicts, but the trial judge refused to question each juror as to whether they found Appellant guilty as an actor or accomplice. (N.T. 11/1/88, 5-7). Appellant again relies on the erroneous premise that the jury failed to heed the trial court's warning that it was not to consider an accomplice theory of liability. Our review of the record satisfies us that the trial judge clearly and adequately explained to the jury that there was no evidence offered to prove that Appellant acted as an accomplice and that it should not inject such considerations into its deliberations.

> The purpose of the poll is to give any juror, who may possibly have been under ****632** pressure from other members of the jury to acquiesce in the verdict, an opportunity to speak out and declare to the court that the verdict as announced by the foreman was not voluntarily joined in by the answering juror.

Commonwealth ex rel. Ryan v. Banmiller, 400 Pa. 326, 328, 162 A.2d 354, 355, *cert. denied*, 364 U.S. 852, 81 S.Ct. 99, 5 L.Ed.2d 76 (1960). In the instant case, Appellant has not alleged lack of unanimity of the verdict or that it was the product of undue pressure placed on one or more of the jurors. Accordingly, we conclude that the trial court did not err when it refused to poll the jurors on the theory upon which they convicted Appellant.

In his next allegation of error, Appellant asserts that the search warrant used to obtain evidence to link him to the crime was not supported by probable cause. The en banc ***511** Court of Common Pleas considered Appellant's challenge to the search warrant and found that

> [t]he affidavit in the present case, sworn to by a detective sergeant of the Allentown Police Department, contained sufficient averments supporting that there was a fair probability that

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

evidence of a crime would be found in the defendant's room. The averments in the affidavit contained a general description and location of the crime and victim, as well as the fruits from what was properly believed to be a burglary and/or robbery, as well as the criminal homicide. The affidavit placed the defendant not only at the scene of the crime earlier that evening but also sets forth the fact that entry into the premises was gained by opening a window in the bathroom of the premises from the inside and that the defendant was seen going into the bathroom on a number of occasions that evening. Moreover, the detective sergeant observed a bloody footprint tread near the location of the victim's body, which pattern of tread was recognized to be similar to the one on the sneakers worn by the defendant when the police officer had interviewed him a short time prior to the execution of the affidavit. Lastly, the affidavit revealed that the defendant had checked into the room sought to be searched by using a fictitious name at a time when the defendant had told the police officer that he was at a different location. Lastly [sic], the affidavit set forth that, approximately two months' [sic] before the criminal homicide, the defendant had been hiding in the victim's bar after hours.

Commonwealth v. Rompilla, No. 682/1988, slip op. at 8-9 (C.P. Lehigh County March 12, 1993) (en banc).

[13][14][15] In determining the validity of a search warrant, this Court has adopted the totality of the circumstances test articulated by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying ***512** hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing] that probable cause existed."

Commonwealth v. Gray, 509 Pa. 476, 484, 503 A.2d 921, 925 (1985) (quoting *Illinois v. Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332, 76 L.Ed.2d at 548 (1983)) (citation omitted); *see also* Rule 2003(a) of the Pennsylvania Rules of Criminal Procedure ("[n]o search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits"). A finding of probability of criminal activity is sufficient to support the probable cause requirement of a search warrant; a *prima facie* showing of such activity is not required. *Commonwealth v. Baker*, 532 Pa. 121, 126-27, 615 A.2d 23, 25 (1992). After reviewing the affidavit underlying the warrant and giving due deference to the conclusions of the issuing magistrate, we find that probable cause existed to support the search warrant executed on Appellant's hotel room. *Commonwealth* ****633** v. Council*, 491 Pa. 434, 444, 421 A.2d 623, 628 (1980). Accordingly, Appellant's argument must be rejected as meritless. [FN10]

> FN10. When police entered Appellant's hotel room armed with the aforementioned search warrant, they were accompanied by a parole officer who held a parole detainer. This detainer was based on the fact that Appellant was observed drinking alcohol in violation of one of his conditions of parole. Appellant maintains that the presence of the parole officer was a pretext because the search warrant executed on his hotel room was not based on probable cause. Based on our finding that the search warrant was supported by probable cause, we need not address this issue. We note, however, that parole officers may arrest a parolee without a warrant for violating any of the terms of his parole. *See* 61 P.S. § 331.27

Appellant argues lastly that the trial court erred in allowing a transcript of a rape victim's testimony to be read to the jury during the sentencing phase. Appellant claims that the Commonwealth was appealing to the passions of the jury and could have utilized a different method to describe what had happened. ***513** The Commonwealth responds that it was necessary to prove that Appellant had a history of convictions for felonies involving violence and that reading the transcript of the victim's testimony was the most efficient way to present the facts of one of the prior convictions.

[16] Our review of the record affirms the Commonwealth's contention that the reading of the victim's testimony was necessary to support the aggravating circumstance found under 42 Pa.C.S. § 9711(d)(9). [FN11] Appellant had previously been convicted of theft, burglary, and rape. Prior to the sentencing hearing, defense counsel attempted to have the burglary conviction excluded from the jury's

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

consideration based upon this Court's decision in *Commonwealth v. Christy*, 511 Pa. 490, 515 A.2d 832 (1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2202, 95 L.Ed.2d 857 (1987). In *Christy*, this Court held that the trial court had erred in submitting a burglary conviction to the jury for purposes of 42 Pa.C.S. § 9711(d)(9) because the Commonwealth failed to present evidence that the conviction involved the threat or use of violence. *Id.* 511 Pa. at 507-08, 515 A.2d at 840-41. We concluded that "[i]n order for a felony to be includable under 42 Pa.C.S. § 9711(d)(9), the Commonwealth must present evidence that the defendant actually threatened another with violence or actually used violence on another." *Id.* at 508, 515 A.2d at 841.

> FN11. 42 Pa.C.S. § 9711(d)(9) provides that an aggravating circumstance can be found by the jury where "[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person."

In *Commonwealth v. Goins*, 508 Pa. 270, 495 A.2d 527 (1985), this Court held that a single felony conviction for a crime of violence does not suffice to establish a significant history under 42 Pa.C.S. § 9711(d)(9). In the instant case, a rape conviction was the only felony for which Appellant was convicted that clearly involved the use of violence. Thus, the Commonwealth had to show that a threat of violence or actual violence was used in the commission of the burglary in order to establish a felony history under 42 Pa.C.S. § 9711(d)(9). In order to achieve that end, the Commonwealth had the testimony ***514** of the rape victim read into the record because the burglary involving the use of violence was part of the same episode. [FN12] By having an assistant district attorney read from a transcript, we believe that the Commonwealth presented the facts of Appellant's prior crime in a way that minimized the inflammatory impact of his prior crimes to the jury. Accordingly, we conclude that the trial court did not err in allowing the Commonwealth to present evidence of Appellant's prior crime through the reading of the victim's testimony.

> FN12. Appellant had broken into the victim's apartment which was located above a bar. According to the victim's testimony, Appellant initially entered the apartment in the belief that she kept a large sum of money there. (N.T. 11/1/88, 75-76). After discovering that the money was located in the bar's cash register, Appellant and the victim proceeded downstairs where he stole the money from the register. (N.T. 11/1/88, 78- 80). Appellant then brought the victim back up to the apartment and raped her at knifepoint. (N.T. 11/1/88, 82-90).

[17][18][19][20] Finally, it is our statutory duty to insure that the jury's sentence is based upon ****634** the facts presented at the sentencing hearing. *See* 42 Pa.C.S. § 9711(h). Our review of the record in this case satisfies us that the sentence imposed by the jury was not the product of passion, prejudice, or any other arbitrary factor. The record also supports the jury's finding of the aggravating circumstances set forth in 42 Pa.C.S. § 9711(d)(6), (8) and (9). [FN13] Appellant killed his victim during the commission of the burglary and robbery of the victim's tavern. Moreover, the manner in which Appellant carried out this brutal murder is sufficient to support a finding that the killing was committed by means of torture. "In order to establish the aggravating circumstance of torture, the Commonwealth must prove that the defendant had a specific intent to inflict 'a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity.' " *Commonwealth v. Daniels*, 537 Pa. 464, 473, 644 A.2d 1175, 1180 (1994) (quoting *Commonwealth* ****515** v. Thomas*, 522 Pa. 256, 277, 561 A.2d 699, 709 (1989); *Commonwealth v. Pursell*, 508 Pa. 212, 239, 495 A.2d 183, 196 (1985)). In the instant case, Dr. Isidore Mihalakis, a forensic pathologist, testified at the sentencing hearing that the victim was alive during the infliction of almost all of the injuries that he received. (N.T. 11/1/88, 101). These injuries included abrasions, lacerations, blunt force injuries, a fractured nose, and multiple stab wounds. (N.T. 11/1/88, 102). Dr. Mihalakis further testified that the number and location of the various wounds on the victim's body were indicative of injuries that were inflicted with the intent of causing pain. (N.T. 11/1/88, 110). Thus, there is ample evidence on the record to support the jury's finding of torture in this case. Lastly, with respect to Appellant's history of felony convictions involving the use of violence, the record fully supports the jury's finding. In addition to a rape conviction, Appellant was convicted of burglary in which he brandished and used a knife to harm his victim.

> FN13. The aggravating circumstances found by the jury were that "[t]he defendant committed a killing while in the perpetration of a felony," that "[t]he offense was committed by means of torture," and

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

that "[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. § 9711(d)(6), (8) and (9), respectively.

The information compiled by the Administrative Office of Pennsylvania Courts indicates that the sentence imposed in this case is not disproportionate to the sentence imposed in similar cases.

Accordingly, the judgment of sentence is affirmed.

[FN14]

FN14. The prothonotary of the Supreme Court is directed to transmit the full and complete record in this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

MONTEMURO, J., is sitting by designation.

653 A.2d 626, 539 Pa. 499

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Briefs and Other Related Documents

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
Ronald ROMPILLA, Appellant.

Submitted Aug. 5, 1997.
Decided Dec. 10, 1998.
Reargument Denied Jan. 19, 1999.

After defendant's murder conviction and death sentence were affirmed, 539 Pa. 499, 653 A.2d 626, defendant petitioned for postconviction relief. The Court of Common Pleas, Lehigh County, No. 682 of 1988, Thomas A. Wallitsch, J., denied relief. Defendant appealed. The Supreme Court, No. 152 Capital Appeal Docket, Nigro, J., held that: (1) counsel was effective with respect to investigation and presentation of mitigation evidence during penalty phase; (2) prosecutor's penalty phase summation did not contain improper argument that violated defendant's right to due process and fair capital sentencing proceeding; (3) trial court's apparent discussion with counsel about proceedings outside of defendant's presence did not violate defendant's right to be present at all stages of trial; (4) Commonwealth could introduce facts surrounding prior burglary conviction to establish aggravating factor of significant history of felony convictions involving violence or threat of violence the person; and (5) defendant was not entitled to penalty phase instruction that life meant life without parole.

Affirmed.

Cappy and Newman, JJ., concurred in result.

Flaherty, C.J., dissented and filed opinion.

West Headnotes

[1] Criminal Law ⇐1519(4)
110k1519(4)
(Formerly 110k998(8))

To establish claim of ineffective assistance of counsel under Post Conviction Relief Act (PCRA), defendant must show that (1) underlying claim is of arguable merit; (2) counsel had no reasonable basis for act or omission in question; and (3) but for counsel's act or omission, outcome of proceedings would have been different. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § § 9541-9546.

[2] Criminal Law ⇐641.13(7)
110k641.13(7)

Trial counsel was effective with respect to investigation of defendant's mental health for purposes of presenting mitigation evidence during penalty phase of capital murder prosecution, where counsel employed three experts to evaluate defendant but, based upon their testing, experts found nothing helpful to defendant's case and diagnosed him as sociopath. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § § 9541-9546.

[3] Criminal Law ⇐641.13(7)
110k641.13(7)

Trial counsel was effective with respect to investigation of defendant's background for purposes of presenting mitigation evidence during penalty phase of capital murder prosecution, where counsel spoke to family before trial, but no family members revealed abuse or other circumstances that could be used as mitigation evidence. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. §§ 9541-9546.

[4] Criminal Law ⇐1171.1(2.1)
110k1171.1(2.1)

Prosecutor's comments do not constitute reversible error unless their unavoidable effect would be to prejudice jury and form in their minds fixed bias and hostility toward defendant such that they could not weigh evidence objectively and render true penalty determination.

[5] Criminal Law ⇐713
110k713

At penalty phase, prosecutor has more latitude in presenting argument, as presumption of innocence is no longer applicable.

[6] Sentencing and Punishment ⇐1780(2)
350Hk1780(2)
(Formerly 110k723(1))

Prosecutor did not inject personal opinion that jury should impose death penalty when prosecutor stated, during penalty phase, that it was "not easy for me to argue for the death penalty."

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

[7] Sentencing and Punishment ⇐1780(2)
350Hk1780(2)
(Formerly 110k723(1))

Prosecutor argued with permissible oratorical flair that jury should impose death sentence, when prosecutor stated, during penalty phase, that "if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for."

[8] Sentencing and Punishment ⇐1780(2)
350Hk1780(2)
(Formerly 110k723(1))

Prosecutor could ask jury, during penalty phase of capital murder prosecution, to show defendant the same mercy that defendant showed victim.

[9] Sentencing and Punishment ⇐1780(2)
350Hk1780(2)
(Formerly 110k723(1))

Prosecutor's argument, during penalty phase of capital murder prosecution, that defendant killed victim to eliminate any witnesses to burglary did not have unavoidable effect of prejudicing jurors and forming in their minds fixed bias and hostility towards defendant so as to prevent them from weighing evidence and returning true verdict.

[10] Sentencing and Punishment ⇐1780(2)
350Hk1780(2)
(Formerly 110k723(1))

Prosecutor did not improperly comment during penalty phase on murder victim's family's inability to testify as to their feelings about victim's death as compared to defendant's family's ability to share their feelings with jury; comments served to respond to defendant's family's testimony, and jury was able to infer victim's family's feelings.

[11] Criminal Law ⇐1550
110k1550
(Formerly 110k998(6.1))

While Supreme Court did not condone prosecutor's penalty phase comments that murder victim's son missed his father, unavoidable effect of comments did not arouse jury's emotions or prejudice jury so they could not fairly weigh evidence, and thus did not warrant postconviction relief.

[12] Sentencing and Punishment ⇐1780(3)
350Hk1780(3)
(Formerly 203k311)

Trial court's instruction on death penalty aggravating circumstance that offense was committed by means of torture was not unconstitutionally vague. 42 Pa.C.S.A. § 9711(d)(8).

[13] Sentencing and Punishment ⇐1617
350Hk1617
(Formerly 110k1206.1(2))

In evaluating vagueness challenge, Supreme Court considers whether death penalty statute adequately channels sentencing jury's discretion so that death penalty is not imposed on arbitrary or capricious grounds.

[14] Sentencing and Punishment ⇐1625
350Hk1625
(Formerly 110k1206.1(2))

Statute setting forth as death penalty aggravating factor that defendant has significant history of felony convictions involving use or threat of violence to the person is not unconstitutionally vague. 42 Pa.C.S.A. § 9711(d)(9).

[15] Criminal Law ⇐636(1)
110k636(1)

Defendant has constitutional right to be present in court at every stage of criminal trial. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 9.

[16] Criminal Law ⇐636(3)
110k636(3)

[16] Criminal Law ⇐662.70
110k662.70

Trial court's apparent discussion with counsel about proceedings outside of defendant's presence did not implicate defendant's confrontation rights, and defendant's right to be present at all stages of trial was not violated. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 9; Rules Crim.Proc., Rule 1117(a), 42 Pa.C.S.A.

[17] Criminal Law ⇐1440(1)
110k1440(1)
(Formerly 110k998(13))

Postconviction review of claim already litigated on

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

appeal cannot be obtained by alleging ineffective assistance of prior counsel and presenting new theories of relief. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § 9543(a)(3).

[18] Sentencing and Punishment ⇐1762
350Hk1762
(Formerly 203k358(1))

Commonwealth may place underlying facts of prior convictions before jury during penalty phase of capital murder prosecution so that jury is able to assess weight to be given to aggravating factor that defendant has significant history of felony convictions involving use or threat of violence to the person. 42 Pa.C.S.A. § 9711(d)(9).

[19] Sentencing and Punishment ⇐1780(3)
350Hk1780(3)
(Formerly 110k796)

Jury must be told during capital sentencing proceeding that life means life without parole only when defendant's future dangerousness is at issue.

[20] Sentencing and Punishment ⇐1780(3)
350Hk1780(3)
(Formerly 203k311)

Defendant was not entitled to instruction, during penalty phase of capital murder prosecution, that life meant life without parole, based on Commonwealth's argument for aggravating circumstance that defendant had significant history of felony convictions involving use or threat of violence to the person; aggravating circumstance only addressed defendant's past conduct, not his future dangerousness. 42 Pa.C.S.A. § 9711(d)(9).

[21] Criminal Law ⇐1042
110k1042

Defendant waived claim that trial court erred in failing to excuse juror for cause and that trial counsel failed to challenge him for cause, where claim was not raised in defendant's postconviction petition or in proceedings before postconviction court. 42 Pa.C.S.A. §§ 9541-9546.

[22] Criminal Law ⇐1453
110k1453
(Formerly 110k998(6.1))

No prejudicial cumulative error existed which would entitle defendant to new trial and sentencing proceeding on petition for postconviction relief, where defendant's individual claims of error failed for lack of merit.

****788 *382** Billy H. Nolas, Philadelphia, for R. Rompilla, appellant.

***383** Michael P. McIntyre, Allentown, Robert A. Graci, Harrisburg, for the Com., appellee.

****789** Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN and SAYLOR, JJ.

OPINION

NIGRO, Justice.

In this capital case, Appellant Ronald Rompilla appeals from the Order of the Lehigh County Court of Common Pleas, which denied his petition for relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. For the reasons set forth below, we affirm.

On November 1, 1988, Appellant was convicted of murdering James Scanlon on January 14, 1988 in Scanlon's bar, the Cozy Corner Cafe, in Allentown, Pennsylvania. Scanlon's son discovered his father's body lying behind the bar in a pool of blood. Scanlon had been stabbed repeatedly and set on fire. His wallet had been stolen and about $500 to $1000 had been stolen from the bar. [FN1] On November 3, 1988, after a penalty hearing, the jury found three aggravating factors outweighed one mitigating factor and sentenced Appellant to death. [FN2] This Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Rompilla*, 539 Pa. 499, 653 A.2d 626 (1995).

FN1. Appellant was convicted of murder in the first degree, 18 Pa.C.S. § 2502(a); burglary, *id.* § 3502(a); criminal trespass, *id.* § 3503(a)(1)(ii); robbery, *id.* § 3701(a)(1)(i); two counts of theft, *id.* § 3921(a); and two counts of receiving stolen property, *id.* § 3925(a).

FN2. With respect to aggravating factors, the jury found that Appellant committed a killing in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6), that the offense was committed by means of torture, *id.* § 9711(d)(8), and that Appellant has a significant history of felony convictions

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

involving the use or threat of violence, *id.* § 9711(d)(9). The jury found as a mitigating circumstance other evidence of mitigation under 42 Pa.C.S. § 9711(e)(8).

Following a stay of execution, on December 5, 1995, Appellant filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On March 28 and 29, 1996, the PCRA court held hearings on the petition. By Order dated August 21, 1996, the PCRA court denied ***384** Appellant's petition for relief. Appellant then appealed to this Court. He raises twelve claims.

Appellant first argues that his trial counsel was ineffective in the penalty phase for failing to investigate, develop and present evidence of mitigation related to his childhood upbringing, alcoholism, mental retardation, cognitive impairment and organic brain defects, which may have caused the jury to impose a life sentence. Appellant specifically maintains that counsel did not obtain records that would have aided the mental health experts who evaluated him, including school records reflecting a low IQ, a hospital record reflecting a fever at age two, and Department of Corrections records reflecting in part low achievement test scores and alcohol abuse. Appellant also argues that counsel failed to learn about Appellant's abusive childhood from his family.

[1] To establish a claim of ineffective assistance of counsel under the PCRA, a defendant must show that (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for the act or omission in question; and (3) but for counsel's act or omission, the outcome of the proceedings would have been different. *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313, 323 (Pa.1997). [FN3] At the PCRA hearings, Appellant questioned former trial and appellate counsel about their representation and three of his siblings testified about his childhood. Appellant subsequently submitted depositions of a psychologist and neuropsychologist who evaluated him in 1995 and 1996 respectively. The parties also submitted depositions of the mental health experts who evaluated Appellant in 1988 and the deposition of a psychologist who reviewed Appellant's 1995 and 1996 evaluations.

FN3. While the Court is currently considering the stringency of the prejudice requirement applicable to ineffective assistance claims under the PCRA in *Commonwealth v. Kimball,* No. 38 M.D. Appeal Dkt.1997, as shown below, this requirement is not implicated in this case.

After the hearings, the PCRA court concluded that Appellant's claim has arguable merit because Appellant was entitled to have relevant information of mental infirmity presented to the jury. However, the court found that counsel had a ***385** reasonable basis for ****790** proceeding as they did. It explained that trial counsel employed two recognized experts in the field of psychiatry and psychology who administered tests, evaluated Appellant, and reported that there was nothing that could be used as mitigation evidence. Rather, the experts told counsel that Appellant was a sociopath. Counsel also obtained an evaluation by another psychiatrist who after evaluating Appellant, found nothing that would be beneficial in the penalty phase. Although counsel did not obtain the records identified above, the PCRA court found them not entirely helpful to Appellant and further found that counsel gave the experts whatever information they requested.

With respect to Appellant's siblings' testimony about his childhood, the PCRA court accepted trial counsel's testimony that when they questioned Appellant and his family before trial, they did not reveal the information that they now claim should have been told to the jury. The court rejected the siblings' testimony to the contrary. The court also stated that Appellant made contradictory statements to counsel during his representation and that counsel was reasonable in believing that their only avenue was to ask the jury to have mercy on him.

[2] We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. In addition to concluding that counsel acted reasonably, we further find that Appellant's claim lacks arguable merit. As recognized by the PCRA court, trial counsel employed three experts to evaluate Appellant. N.T., 3/28/96 at 68-69, 120-21. Based upon their testing, the experts found nothing helpful to Appellant's case and diagnosed him as a sociopath. *Id.* at 122-23. The fact that Appellant now has found two experts who conclude that he has brain damage does not negate the fact that trial counsel investigated Appellant's cognitive abilities with other experts. In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential ***386** mitigating circumstances. *See* N.T., 3/29/96 at 27-28, 33, 38-39. Thus, Appellant's claim that trial counsel failed to investigate his mental health is without arguable merit.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

[3] With respect to the mitigation evidence brought forth by Appellant's siblings, the PCRA court accepted as credible trial counsels' testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-19, 133, 143; N.T., 3/29/96 at 111. Thus, Appellant's claim that trial counsel failed to investigate his family background also lacks arguable merit.

Related to this claim, Appellant next argues that because trial counsel failed to investigate his background, he received inadequate evaluations by mental health professionals in violation of his constitutional rights. Having found above that trial counsel did not fail to investigate, this claim similarly has no merit.

[4][5] Appellant next argues that the prosecutor's penalty phase summation contained improper argument that violated his right to due process and a fair capital sentencing proceeding. We disagree. A prosecutor's comments do not constitute reversible error unless their unavoidable effect would be to prejudice the jury and form in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a true penalty determination. *Commonwealth v. Johnson,* 542 Pa. 384, 404, 668 A.2d 97, 107 (1995). At the penalty phase, the prosecutor has more latitude in presenting argument since the presumption of innocence is no longer applicable. *Commonwealth v. Washington,* 549 Pa. 12, 700 A.2d 400, 414 (Pa.1997).

In his closing argument, the prosecutor said "[i]t's not easy for me to argue for the death penalty...." N.T., 11/2/88 at 45. The prosecutor also ended his argument by stating "if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for...." N.T., 11/2/88 at 53. Appellant maintains ***387** that in making these ****791** statements, the prosecutor personally vouched for the propriety of imposing the death penalty.

[6][7] Appellant misconstrues the first statement. The prosecutor did not inject a personal opinion that the jury should impose the death penalty but rather stated that it is a difficult penalty to ask for. With respect to his second statement, the prosecutor argued with permissible oratorical flair that the jury should impose a death sentence. *See Commonwealth v. Jones,* 546 Pa. 161, 206, 683 A.2d 1181, 1203 (1996) (statement that "this is just the kind of case that the legislature had in mind [for the imposition of the death penalty]" found proper).

[8] In addition, Appellant challenges the following statements by the prosecutor:

> [Defense counsel] gave you a very inspired, a very emotional speech and that is her job, there's nothing wrong with that. And what the main touchstone of that speech was mercy ... [B]ut ask yourselves this, ladies and gentlemen of Jury. Did Ronald Rompilla show any mercy to Jimmy Scanlon, any mercy whatsoever? I submit to you, he did not. He did not show one bit of mercy on January 14, 1988.
>
> Did he show Jimmy Scanlon any mercy, any mercy whatsoever? I submit to you, he didn't.
>
> ... I'm only asking you to show the same mercy to him that he showed to Jimmy Scanlon.

N.T., 11/2/88 at 47, 49, 50. This Court, however, has held that it is permissible during the penalty phase for a prosecutor to ask the jury to show the defendant the same mercy he showed the victim. *See Commonwealth v. Washington,* 549 Pa. 12, 700 A.2d 400, 415 (Pa.1997) (rejecting a similar challenge). Thus, no relief is warranted on this claim.

[9] Appellant also argues that the prosecutor improperly stated that he killed the victim in order to eliminate any witnesses to his burglary of the bar. *See* N.T., 11/2/88 at 51-52. Appellant asserts that there is no evidence supporting this argument. The Commonwealth concedes that the argument ***388** was not strong given the facts of this case but maintains that it was fair as it related to the aggravating circumstance that the killing took place during the perpetration of a felony. We agree with the Commonwealth that whatever its purpose, the argument did not have the unavoidable effect of prejudicing the jury and forming in their minds fixed bias and hostility towards Appellant so as to prevent them from weighing the evidence and returning a true verdict.

[10][11] Lastly with respect to prosecutorial misconduct, Appellant maintains that the prosecutor improperly commented upon the victim's family's inability to testify as to their feelings about the victim's death as compared to Appellant's family's

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

ability to share their feelings with the jury. *See* N.T., 11/2/88 at 52-53. The Court rejected a similar argument in *Commonwealth v. Jones,* 546 Pa. 161, 206, 683 A.2d 1181, 1203 (1996), where the prosecution stated that the jury did not have an opportunity to hear from the victim's family and friends, who would feel exactly the opposite of the defendant's family members. As in *Jones,* these comments served to respond to Appellant's family's testimony and the jury was able to infer the victim's family's feelings. While we do not condone the prosecutor's additional comments that the victim's son misses his father, we cannot conclude that the unavoidable effect of these comments was to arouse the jury's emotions or prejudice the jury so they could not fairly weigh the evidence. [FN4]

> FN4. This claim and most of Appellant's remaining claims were not raised on direct appeal. Appellant primarily argues the merits of each claim and notes that trial and appellate counsel were ineffective in handling the issues. The PCRA court ruled on the merits of Appellant's claims. We have also addressed the merits. Since we conclude that the claims do not have merit, it is unnecessary to address the other prongs of the test applicable to ineffective assistance of counsel claims, which is set forth on page three above.

[12] Next, Appellant claims that the trial court's instruction on the aggravating circumstance that the offense was committed by means of torture, 42 Pa.C.S. § 9711(d)(8), was unconstitutionally vague. The court's instruction was as follows:

> ****792 *389** The second aggravat[ing] circumstance advanced by the Commonwealth was that the ... offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily h[einous], atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not--the killer is not satisfied with the killing alone.

N.T., 11/2/88 at 55. This Court has previously found this instruction proper and has held that the aggravating circumstance that an offense was committed by means of torture is not unconstitutionally vague. In *Commonwealth v. Pursell,* 508 Pa. 212, 238-39, 495 A.2d 183, 196-97 (1985), the Court explained that this aggravating circumstance is sufficiently specific because the meaning of torture is a matter of common knowledge and an ordinary man would not have to guess what was intended. Thus, the jury will not impose the death penalty in an arbitrary manner. The trial court's instruction defining torture in this case is essentially the same as that given in *Pursell. See id.* at 239 n. 13, 495 A.2d at 197 n. 13.

Appellant appears to concede that the trial court gave an instruction defining torture that comports with *Pursell* and its progeny. [FN5] Nonetheless, Appellant argues that the definition employed by the court is unconstitutionally vague under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Maynard,* however, found vague an aggravating circumstance in the Oklahoma death penalty statute that provided that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at 363-64, 108 S.Ct. 1853. The Court explained that these words alone did not guide the jury as almost every murder could be characterized as especially heinous, atrocious, or cruel. *Id. Maynard* did not involve an ***390** aggravating circumstance that an offense was committed by means of torture. In addition, the Court in *Maynard* agreed that a limiting instruction that the aggravating circumstance at issue required torture would be constitutionally acceptable. *Id.* at 364-65, 108 S.Ct. 1853. Thus, *Maynard* does not preclude defining torture as the infliction of pain that is unnecessarily heinous, atrocious or cruel, with the intent to cause pain and suffering in addition to the intent to kill. Appellant's claim is without merit.

> FN5. *See, e.g., Commonwealth v. Wharton,* 530 Pa. 127, 607 A.2d 710 (1992) (requiring instruction that defines the term torture); *Commonwealth v. Nelson,* 514 Pa. 262, 523 A.2d 728 (1987) (same).

Appellant next argues that 42 Pa.C.S. § 9711(d)(9), which sets forth as an aggravating factor that the defendant has "a significant history of felony convictions involving the use or threat of violence to the person," is unconstitutionally vague. While acknowledging that the Court has consistently rejected this argument, *see, e.g., Commonwealth v. Rivers,* 537 Pa. 394, 644 A.2d 710 (1994); *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986), Appellant contends that the Court wrongly decided the issue.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Appellant maintains that in *Rivers* and *Fahy* the Court improperly relied upon *Commonwealth v. Beasley,* 504 Pa. 485, 475 A.2d 730 (1984), which held that the mitigating circumstance that a defendant has "no significant history of prior criminal convictions" is not vague. *Beasley* relied upon *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), where the defendant challenged a similar mitigating circumstance under the Florida death penalty statute. The United States Supreme Court found that the death penalty statute presented questions that required no more line-drawing than is commonly required of a factfinder and held that the mitigating circumstance is not unconstitutionally vague. *Id.* at 257, 96 S.Ct. 2960.

[13][14] In evaluating a vagueness challenge, the Court considers whether the death penalty statute adequately channels the sentencing jury's discretion so that the death penalty is not imposed on arbitrary or capricious grounds. *See Commonwealth v. Holcomb,* 508 Pa. 425, 463, 498 A.2d 833, 852- 53 (1985). While *Beasley* involved a mitigating circumstance and ***391** thus did not present the ****793** identical issue that was before the Court in *Rivers* and *Fahy,* the Court looked to that decision because the statutory language challenged as vague was the same. A finding that a mitigating circumstance adequately channels the sentencing jury's discretion supports that an aggravating circumstance with the same language also passes constitutional muster. Thus, Appellant's claim is without merit. [FN6]

> FN6. Appellant also argues that three other states have found similar aggravating circumstances unconstitutionally vague. *See State v. David,* 468 So.2d 1126 (La.1984); *Gall v. Commonwealth,* 607 S.W.2d 97 (Ky.1980); *Arnold v. State,* 236 Ga. 534, 224 S.E.2d 386 (1976). This Court distinguished these decisions in *Commonwealth v. Holcomb,* 508 Pa. 425, 463-64, 498 A.2d 833, 853 (1985), and we shall not revisit this issue.

Appellant next argues that the trial court and counsel improperly discussed outside of his presence whether an instruction on voluntary manslaughter would be provided to the jury. He maintains that this discussion violated his right to be present during all critical phases of the trial. Appellant relies upon a discussion in the record that references an agreement made on an earlier date on whether the instruction would be given. *See* N.T., 10/31/88 at 92. Present counsel reviewed the record for the referenced date and found no discussion of the issue. Appellant thus claims a discussion was improperly held outside of his presence.

[15] Defendants have a constitutional right to be present in court at every stage of a criminal trial. *Commonwealth v. Ford,* 539 Pa. 85, 100-01, 650 A.2d 433, 440 (1994). This right is based in part on the defendant's right to confront his witnesses under the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution. *See id.* In addition, the Pennsylvania Rules of Criminal Procedure provide:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The ***392** defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict.

Pa. R.Crim. P. 1117(a).

[16] The trial court explained that its discussions with counsel essentially involved housekeeping matters and that Appellant's presence would not contribute to the fairness of the trial. Appellant does not develop his constitutional argument in his brief to this Court. We conclude that the trial court's apparent discussion with counsel about the proceedings outside of Appellant's presence did not implicate his confrontation rights and his right to be present at all stages of the trial was not violated.

[17] Appellant next argues that the trial court erred in answering the jury's question about accomplice liability. This Court ruled on this claim on direct appeal. *See Rompilla,* 539 Pa. at 508-09, 653 A.2d at 630-31. Appellant may not obtain relief under the PCRA on a claim that has already been litigated. 42 Pa.C.S. § 9543(a)(3). While Appellant contends in a footnote that appellate counsel did not adequately pursue this claim on direct appeal, post-conviction review of a claim already litigated on appeal cannot be obtained by alleging ineffective assistance of prior counsel and presenting new theories of relief. *Commonwealth v. Peterkin,* 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994).

Appellant next argues that the trial court improperly allowed the prosecutor to read to the jury the testimony of the victim of a prior rape during the penalty phase. Appellant was convicted of rape and burglary arising from a single incident in 1974.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

When Appellant objected to the introduction of the testimony, the prosecutor argued in part that it was necessary to establish that the related burglary conviction was violent for purposes of the aggravating circumstance that Appellant has a significant history of felony convictions involving the use or threat of violence, 42 Pa.C.S. § 9711(d)(9). *See* N.T., 11/1/88 at 33-38. The trial court admitted the testimony. *Id.*

***393** On direct appeal, Appellant's former counsel argued that the trial court erred in admitting the rape victim's testimony because it ****794** appealed to the passions of the jury. The Commonwealth again maintained that it was necessary to establish the aggravating factor and that reading the transcript was the most efficient way to present the facts. This Court held that the trial court did not err in allowing the testimony to be read to the jury. *Rompilla*, 539 Pa. at 512-14, 653 A.2d at 633 (1995). Relying upon *Commonwealth v. Christy*, 511 Pa. 490, 515 A.2d 832 (1986), the Court stated that the Commonwealth had to show a threat or use of violence in the commission of the burglary to establish a significant history of felonies under 42 Pa.C.S. § 9711(d)(9). *Id.* [FN7] The Court also concluded that by reading the transcript, the Commonwealth presented the facts in a way that minimized the inflammatory impact.

> FN7. In *Christy*, the Commonwealth introduced evidence of the defendant's prior burglary conviction to establish the aggravating factor. The Commonwealth did not introduce evidence showing that the burglary involved the threat or use of violence. On appeal, the Court stated that the Commonwealth must present evidence that the defendant actually threatened or used violence to include a felony under 42 Pa.C.S. § 9711(d)(9). 511 Pa. at 507-08, 515 A.2d at 840-41. However, since the jury did not find the aggravating factor, the Court held that the error was not prejudicial. *Id.*

The Court has thus already decided on direct appeal that the rape victim's testimony was admissible. Nonetheless, Appellant now argues that prior counsel was ineffective for not bringing *Commonwealth v. Rolan*, 520 Pa. 1, 549 A.2d 553 (1988), to the attention of the trial court and this Court on direct appeal. Appellant maintains that under *Rolan*, it was only necessary to introduce evidence of his burglary conviction to establish a felony involving the threat or use of violence. [FN8]

> FN8. In *Rolan*, the Commonwealth introduced evidence of the defendant's prior burglary convictions in order to establish the aggravating factor. Appellate counsel argued that trial counsel was ineffective in allowing the evidence since burglaries are not felonies involving the use or threat of violence. The Court held that burglary is a crime involving the use or threat of violence and found counsel effective. 520 Pa. at 15, 549 A.2d at 559-60. It stated that the discussion in *Christy* as to the evidence necessary to establish the aggravating factor was dicta since the jury did not find the aggravating factor. *Id.* n. 5.

[18] ***394** As stated above, a claim that has already been litigated cannot be revisited by alleging ineffective assistance of prior counsel and presenting new theories of relief. *Commonwealth v. Peterkin*, 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994). Even if it could, Appellant's claim does not have arguable merit. Regardless of the applicability of *Rolan*, the Commonwealth was entitled to introduce facts surrounding the burglary conviction. *See Commonwealth v. Jones*, 542 Pa. 464, 523-24, 668 A.2d 491, 520 (1995); *Commonwealth v. Beasley*, 505 Pa. 279, 288, 479 A.2d 460, 465 (1984). The Commonwealth may place the underlying facts of prior convictions before the jury so that it is able to assess the weight to be given to the aggravating factor. *Jones*, 542 Pa. at 523-24, 668 A.2d at 520. Here, when Appellant's trial counsel objected to the testimony and then offered to stipulate that the burglary is a crime of violence, the Commonwealth properly argued that the jury was entitled to know the underlying facts. *See* N.T., 11/1/88 at 33-38. Thus, no relief is due on this claim. [FN9]

> FN9. To the extent the Court's decision on direct appeal in this case departs from *Rolan*, this Court has since affirmed the principles in *Rolan*. *See, e.g., Commonwealth v. Gibson*, 720 A.2d 473 (Pa. 1998).

Appellant next argues that his due process rights were violated because the trial court did not answer the jury's question about his parole eligibility. During jury deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" N.T., 11/2/88 at 73. The trial court responded:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I--if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

****795** *Id.* at 73-74. Appellant argues that the jurors should have been told that a life sentence means life without parole under ***395** *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), which mandates such an instruction when a defendant requests it and his future dangerousness is at issue.

[19][20] Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998). Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The Court rejected this argument in *Commonwealth v. May*, 551 Pa. 286, 710 A.2d 44, 47 (Pa.1998). As stated in that case, this aggravating circumstance only addresses Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due. [FN10]

> FN10. This author agrees with the dissent's position that a *Simmons* instruction should be given in all cases and has previously so stated. *See Clark*, 710 A.2d at 43-44 (Nigro, J., concurring, joined by Flaherty, J. and joined in relevant part by Zappala, J.); *May*, 710 A.2d at 49 (Nigro, J., concurring, joined by Zappala, J.). Under the current state of the law, however, Appellant's argument that he was entitled to the instruction because the Commonwealth argued the aggravating circumstance identified above, is without merit. *See May*, 710 A.2d at 47.

[21] Next, Appellant argues that the trial court erred in failing to excuse a juror for cause and that trial counsel failed to challenge him for cause. This argument was not raised in Appellant's PCRA petition or in the proceedings before the PCRA court. Thus, Appellant has waived this claim. *See Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998)

Appellant next argues that this case should be remanded to the Court of Common Pleas for a hearing on recently discovered claims related to alleged violations of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This issue has already been litigated. Appellant filed a remand motion in this Court on March 10, 1997 alleging the possibility of misconduct by the Federal Bureau of Investigation in the handling of evidence in this case. This Court entered an ***396** order denying the motion for remand on May 20, 1997. Appellant now summarizes his remand motion and offers no reason why this Court should reconsider its earlier ruling. No relief is due on this claim.

[22] Lastly, Appellant argues that he is entitled to a new trial and sentencing proceeding because the prejudicial effects of the cumulative errors in this case undermine confidence in the outcome at both stages of the trial. The Court rejected a similar argument in *Commonwealth v. McGill*, 545 Pa. 180, 680 A.2d 1131 (Pa.1996). In that case, the defendant's individual claims of error failed for lack of merit. As such, there could be no prejudicial cumulative effect when there was no harm in the first place. *Id.* 680 A.2d at 1136. The same is true here.

Having found that none of Appellant's claims warrants relief, the order of the Court of Common Pleas is affirmed.

Chief Justice FLAHERTY files a Dissenting Opinion.

Justice ZAPPALA and Justice NEWMAN concur in the result.

FLAHERTY, Chief Justice, dissenting.

I believe the majority is in error in its treatment of the issue pertaining to the jury's question about the defendant's parole eligibility. Under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998), the court must tell a jury that a life sentence means life without parole, if the defendant requests the instruction and his future dangerousness is at issue. Here, during deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" I view this question as a clear expression of the jury's concern about the defendant's future dangerousness. I would

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

therefore hold that the trial court's refusal to explain the meaning of life without **796 parole constituted error under *Commonwealth v. Clark, supra*. I would therefore reverse the order of the *397 court of common pleas and remand for proceedings consistent with this opinion.

I would go further and require an explanation of the meaning of a life sentence in all capital cases. There can be no harm in instructing juries that in Pennsylvania appellant would be statutorily ineligible for parole if sentenced to life in prison, but that a life sentence might nonetheless be commuted by the governor. On the other hand, if we do not so instruct, a jury, erroneously believing that a prisoner sentenced to life may be paroled within a period of years, may impose the death penalty for reasons which are not based in law.

721 A.2d 786, 554 Pa. 378

Briefs and Other Related Documents (Back to top)

. 1997 WL 33544694T2 (Appellate Brief) Reply Brief of Appellant (Aug. 08, 1997)Original Image of this Document (PDF)

. 1997 WL 33544693T2 (Appellate Brief) Initial Brief of Appellant (Jun. 03, 1997)Original Image of this Document with Appendix (PDF)

. 1996 WL 33418286T2 (Appellate Brief) Commonwealth's Brief in Opposition to Initial Brief of Appellant (1996)Original Image of this Document (PDF)

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

Ronald ROMPILLA, Petitioner,
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections; Philip L. Johnson, Superintendent of the State Correctional Institution at Greene, and
Joseph P. Mazurkiewicz, Superintendent of the State Correctional Institution at Rockview, Respondents.

No. CIV.A.99-737.

July 11, 2000.

MEMORANDUM

BUCKWALTER

**1 On February 12, 1999, Ronald Rompilla (Petitioner) filed a Motion to Proceed *In Forma Pauperis;* For Stay of Execution; For Appointment of Federal Habeas Corpus Counsel; and for 120 days to file his habeas corpus petition.

This motion was granted and ultimately, all briefs, exhibits and records necessary to render this decision were filed no later than February 8, 2000. [FN1]

FN1. The court also received a letter dated February 3, 2000 from counsel for petitioner which follows:
We are writing to address the issue discussed in the telephone conference convened by the Court on January 21, 2000. In that conference, your Honor alerted the parties that the son of the Lehigh County District Attorney who was in office at the time of Mr. Rompilla's trial is presently one of your law clerks. The Court also indicated that this clerk has not had, and will not have, any involvement with Mr. Rompilla's case. Finally, the Court requested that we discuss these circumstances with Mr. Rompilla to determine whether a recusal motion, or a similar application, would be appropriate.
We discussed these facts with Mr. Rompilla by telephone on January 27, 2000. Based upon the telephone conference with the Court and our discussion with Mr. Rompilla, Petitioner is satisfied with the Court keeping this matter and will make no application for recusal or related relief.
NOTE: The clerk referred to has had no involvement in this opinion. Indeed, the only involvement of my other law clerk has been the securing of copies of the opinion of the court in *Williams v. Taylor, supra.* and the ABA Standards.

Before proceeding with my review of this case, I awaited a decision then pending before the United States Supreme Court in *Terry Williams v. Taylor,* 120 S.Ct. 1495 (2000), which was decided April 18, 2000. This case will be referred to both in the Standard of Review and the Claim I discussion. In light of *Williams, supra,* I accepted additional briefing and held oral argument on July 10, 2000.

I. BACKGROUND

Petitioner, represented by court-appointed counsel, was convicted of first degree murder and related offenses, and was sentenced to death, in the Lehigh County Court of Common Pleas, No. 682/1988 (Honorable David E. Mellenberg, J.). The conviction and sentence were affirmed on direct appeal to the Pennsylvania Supreme Court. *Commonwealth v. Rompilla,* 539 Pa. 499, 653 A.2d 626 (1995).

While his case was still pending on direct appeal, Petitioner filed a petition for writ of habeas corpus in this court, which was dismissed without prejudice for lack of exhaustion on September 19, 1994. *Rompilla v. Love,* No. 94-CV-4194 (E.D.Pa.).

On December 5, 1995, Petitioner filed a petition for state post-conviction relief in the Lehigh County Court of Common Pleas. On March 28 and 29, 1996, the Court of Common Pleas (Honorable Thomas A. Wallitsch, J.) held an evidentiary hearing on Petitioner's post-conviction claims. Further evidence was taken (with the consent of the parties and the court's permission) by way of depositions, which were filed with the Court. *See* Deposition of Carol Armstrong, Ph.D. (April 2, 1996) (Exhibit 3); Deposition of Barry Crown, Ph.D. (April 2, 1996) (Exhibit 4); Deposition of Paul K. Gross, M.D. (April 1, 1996) (Exhibit 5); Deposition of Gerald Cooke, Ph.D. (April 3, 1996) (Exhibit 7); Deposition of Robert Sadoff, M.D. (April 23, 1996) (Exhibit 8); Deposition of Frank M. Dattilio, M.D. (May 7, 1996) (Exhibit 9). Numerous exhibits were introduced.

On August 21, 1996, Judge Wallitsch issued an

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Opinion and Order denying Petitioner's claims for post-conviction relief. The Pennsylvania Supreme Court affirmed on December 10, 1998 and denied reargument on January 19, 1999. *Commonwealth v. Rompilla*, 554 Pa. 378, 721 A.2d 786 (1998).

Pennsylvania Governor Thomas Ridge issued a death warrant, scheduling Petitioner's execution for March 16, 1999, after which the February 12, 1999 petition referred to above was filed.

The date of petitioner's murder conviction was November 1, 1988. [FN2] The Supreme Court of Pennsylvania, in petitioner's direct appeal, wrote this about the evidence in the case:

> FN2. In all, petitioner was convicted of murder in the first degree, burglary, criminal trespass, two counts of theft and two counts of receiving stolen property.

***2** In the early morning hours of January 14, 1988, the victim, James Scanlon, was murdered in his bar, the Cozy Corner Cafe, located in Allentown, Pennsylvania. At approximately 6:30 a.m. on that same morning, the victim's son discovered the body of his father lying behind the bar in a pool of blood. The victim had been stabbed repeatedly and set on fire. The victim's wallet had been stolen and approximately $500 to $1,000 had been stolen from the bar.
The Commonwealth's case consisted almost entirely of circumstantial evidence as there were no eyewitnesses to this killing. Appellant was seen in the Cozy Corner Cafe on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.
When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he had been in the Cozy Corner Cafe on the night of the murder and left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only $2.00 to buy breakfast at a local diner. A cab driver testified that he picked up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of $9.10.
Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid $121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.
The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.
The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr. Scanlon's wallet was found by a grounds keeper in the bushes, six to eight feet outside the room that Appellant had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives that was used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told police concerning his activities on January 14 and 15, 1988, and the testimony of other witnesses.
When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence clearly supports Appellant's conviction for first degree murder.

Petitioner now makes 11 claims which he contends merit habeas corpus relief.

II. STANDARD OF REVIEW

Before undertaking an analysis of petitioner's claim, it is appropriate to set forth the standard of review for § 2254 petitions:

> ***3** (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West Supp.1998).

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Moreover, "a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In accordance with *Matteo v. Superintendent S.C.I. Albion*, 171 F.3d 877 (3d Cir.1999), *cert. denied.*, 120 S.Ct. 73 (1999), this court should first review a State court decision to determine if it was contrary to Supreme Court precedent governing the claim for relief, such that a contrary outcome is required. If the initial review finds that the State court decision is not contrary to the precedent, then no habeas relief should be granted "unless the State court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified under existing Supreme Court precedent." The court went on to say in *Matteo* that even if the federal habeas court disagrees with the State court decision, relief is not appropriate. Thus, we must undertake a two-step review under the "contrary to" clause and the "unreasonable application" clause. *Matteo* further warns that although a reviewing court may consider "the decisions of inferior federal courts" when deciding whether the State court reasonably applied Supreme Court precedent, "federal courts may not grant habeas corpus relief based on the State court's failure to adhere to the precedent of a lower federal court in an issue that the United States Supreme Court has not addressed."

Finally, § 2254(d) refers to "any claim that was adjudicated on the merits in State court proceedings." If a claim was disposed of by a State court without an explanation as to the legal or factual basis for its disposition, my view is that a habeas court may then undertake a *de novo* review.

In *Williams*, Justice O'Connor, delivering the opinion of the court as to Part II, summed up the above, as follows:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

***4** I will now discuss each claim in order.

CLAIM I. TRIAL COUNSEL WERE INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT MITIGATING EVIDENCE RELATED TO PETITIONER'S TRAUMATIC CHILDHOOD, ALCOHOLISM, MENTAL RETARDATION, COGNITIVE IMPAIRMENT AND ORGANIC BRAIN DAMAGE.

For purposes of analyzing Claim I, it is important to know just exactly what evidence trial counsel did produce at the sentencing hearing. The record reveals that Petitioner's counsel called five witnesses on his behalf at that hearing: Darlene Rompilla, his sister-in-law; Nicholas Rompilla, Junior, an older brother; Robert Rompilla, a younger brother; Sandy Whitby, a sister; and Aaron Rompilla, a son who was 14 at that time. The total examination of those witnesses is encompassed in about 26 pages of Notes of Testimony, Volume VII. Not one witness discussed Petitioner's traumatic childhood, his alcoholism, mental retardation, cognitive impairment or organic brain disorder. What they did say were, "He was a good family member"; "We never had a problem"; I don't think my brother did it"; "Have mercy on him"; "I was close to him, he loved my family, he just didn't have a chance"; "They didn't give him no rehabilitation"; "Why can't he get help like all the rest of the people get help"; "I love him very much" (crying); "I've never seen the bad side of my brother, never"; "He just loves us like we love him."

The testimony was apparently presented to engender sympathy for the Petitioner. From the record, it appears that it may have been uncomfortable for all involved. A person identified on the record as Ms. Hass says (referring to the jury, apparently), "They

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

said they need a break. They said that they can't take no more of this right now." At side bar, the court said, "They wanted a break" to which trial counsel replied, "Me too."

The recitation above is to explain the nature of the sentencing hearing. It seemed to be designed primarily as an emotional appeal to the jury to show mercy to Petitioner--he wasn't as bad as he seemed and his family loved him. On its face at least, the hearing seems unreasonably brief and lacking in real substance considering the nature of the proceedings.

Indeed, in an opinion written after a PCRA hearing, the Honorable Thomas A. Wallitsch, Judge of the Court of Common Pleas of Lehigh County, presiding over that hearing in place of his late colleague, The Honorable David E. Mellenberg, the trial judge, found that the Petitioner was entitled to have relevant information of mental infirmity presented to a jury. In applying Pennsylvania law, *Commonwealth v. Buehl*, 450 Pa. 493, 658 A.2d 771 (1995), he nevertheless found that counsel had a reasonable basis for proceeding as they did. In affirming Judge Wallitsch, the Supreme Court of Pennsylvania stated as follows:

> "It [the PCRA court] explained that trial counsel employed two recognized experts in the field of psychiatry and psychology who administered tests, evaluated Appellant, and reported that there was nothing that could be used as mitigation evidence. Rather, the experts told counsel that Appellant was a sociopath. Counsel also obtained an evaluation by another psychiatrist who after evaluating Appellant, found nothing that would be beneficial in the penalty phase. Although counsel did not obtain the records identified above [records that Petitioner maintains would have aided the mental health experts, including school records reflecting a low IQ, a hospital record reflecting a fever at age two, and Department of Corrections records reflecting low achievement test scores and alcohol abuse], the PCRA court found them not entirely helpful to Appellant and further found that counsel gave the experts whatever information they requested.

*5 With respect to Appellant's siblings' testimony about his childhood, the PCRA court accepted trial counsel's testimony that when they questioned Appellant and his family before trial, they did not reveal the information that they now claim should have been told to the jury. The court rejected the siblings' testimony to the contrary. The court also stated that Appellant made contradictory statements to counsel during his representation and that counsel was reasonable in believing that their only avenue was to ask the jury to have mercy on him.

We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. In addition to concluding that counsel acted reasonably, we further find that Appellant's claim lacks arguable merit. As recognized by the PCRA court, trial counsel employed three experts to evaluate Appellant. N.T., 3/28/96 at 68-69, 120-21. Based upon their testing, the experts found nothing helpful to Appellant's case and diagnosed him as a sociopath. *Id.* at 122-23. The fact that Appellant now has found two experts who conclude that he has brain damage does not negate the fact that trial counsel investigated Appellant's cognitive abilities with other experts. In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances. *See* N.T., 3/29/96 at 27-28, 33, 38- 39. Thus, Appellant's claim that trial counsel failed to investigate his mental health is without arguable merit.

With respect to the mitigation evidence brought forth by Appellant's siblings, the PCRA court accepted as credible trial counsels' testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-19, 133, 143; N.T., 3/29/96 at 111. Thus, Appellant's claim that trial counsel failed to investigate his family background also lacks arguable merit.

Related to this claim, Appellant next argues that because trial counsel failed to investigate his background, he received inadequate evaluations by mental health professionals in violation of his constitutional rights. Having found above that trial counsel did not fail to investigate, this claim similarly has no merit.

In testimony at the PCRA hearing, Maria Dantos, Esquire, who handled the sentencing hearing (penalty phase), testified that she graduated from law school in 1985, was then employed by the Lehigh County Office of the Public Defender and undertook representation of Petitioner (together with Chief Public Defender Frederick Charles) sometime after his arrest in January of 1988. She described her role

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

as handling the penalty phase including making the arguments and presenting witnesses. Attorney Charles, as her supervisor, was involved in all of the decisions and the discussions on how to proceed. This was Ms. Dantos' first capital case, and first homicide trial. She contacted three mental health professionals; Drs. Cooke, Sadoff and Gross prior to the trial to initially see if there was any issue of mental infirmity or mental insanity for the guilt phase and, mental infirmity for the penalty phase if the jury returned a first degree verdict. Apparently, she did not get Petitioner's school records and those records were never furnished to the three doctors aforesaid. The school records revealed, among other things, that Petitioner was in special education class and that his I.Q. was below the mentally retarded range at certain ages. The medical records of Petitioner were not obtained by trial counsel either. Those records revealed that at age 2, Petitioner was admitted to the hospital with a 105<<degrees>> fever and diarrhea. Finally, the Department of Corrections records, discussed at page 18, were not obtained by counsel.

*6 Ms. Dantos did talk to family members, but nothing exceptional was presented to her about alcoholism within the family. Also, it was never indicated that there was any sort of abuse within the family. Ms. Dantos did agree that if someone were an alcoholic, that might be potentially mitigating value.

Chief Public Defender Frederick E. Charles was also examined at great length at the PCRA hearing before Judge Wallitsch. My examination of his testimony leads me to conclude that he was a veteran attorney with significant criminal trial experience as a defense lawyer at the time of Petitioner's trial; that he was knowledgeable with regard to the law and savvy with regard to trial techniques and strategy. While not dispositive of the ineffectiveness issue, a letter sent by Sandra Whitby to Maria Dantos shows the impression the representation of Mr. Charles and Ms. Dantos made upon someone close to the case.

> "Dear Maria. It is the next day, and the pain and word "death" is still alive in my mind, but I had to take the time and write and tell Fred and you what supurb [sic] human beings you both are. You fought and felt everything our family did, and when we cried you cried along with us. You left a feeling in me I can't explain, and I want to thank you both for caring and for being there with us all the way. I'm sure I speak for all my family.
>
> I only hope that some day, as Fred promised, the word "death" can be erased from the sentence so we can live in peace that Ron will be there to write, visit and talk with. If he should die, a part of us will, too, cause in our hearts we feel he is innocent, and nothing will change that.
>
> Maria, I know at this point you want to put this matter aside and get on with your work, but I hope you don't give up on Ron, cause he called me and said you woke up feelings in him, and he trusts you with all his heart. We both know that was hard for him to say.
>
> I can't say it enough that Fred and you are both wonderful, caring people. Thank you again for everything, and please, please help us, and don't forget us.
>
> Love, Sandra Whitby."

The following excerpt from the lengthy testimony of Mr. Charles puts into perspective what was done on behalf of Petitioner compared to what Petitioner claims should have been done:

> Q. Okay. That's fine. Just so I fully understand--getting back to the penalty phase, just so I understand your position, you investigate based upon what your client tells you?
>
> A. No, that's not my position. Okay. I know how you want to simplify this. But--and so I don't know if I can answer you in the terms of your question. But I'll try. We investigate the evidence that we have, the evidence that's given in a preliminary hearing. We look at the probable cause affidavit. We look at the examination that we took in this case from the preliminary hearing. We looked at the evidence that came forth during the suppression hearing. We looked at the evidence that--
>
> *7 Q. I'm talking about the penalty phase.
>
> A. But whatever came, we--you know, you don't--we don't sit and separate it. It's an investigation. The penalty phase is something that we keep an eye on. But I have to tell you in this case you had a very, very objecting client. Whenever we tried to talk penalty phase and death penalty with him, he was resistant to that.
>
> Q. Let's discuss that.
>
> A. Sure.
>
> Q. Let's discuss that. What I thought you said just before was that you sit down with your client and you say, "Tell me how you schooling was," and your client would say, "I did okay in school." We're talking hypothetically. All right? If you have a client who is reluctant to discuss how his schooling was because he doesn't really want to talk about the penalty phase, do you, as counsel, have a duty to go further than just talking to your client about it?

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

A. It depends.
Q. Depends on what?
A. It depends on what evidence you have in the case. It depends on what he's told you.
Q. You--
A. Let me finish, Mr. Wiseman. He didn't tell us, "I'm not willing to talk to you about my schooling. I'm reluctant to talk about my this." He said there was nothing wrong. "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us? And he said, "No, there was nothing wrong." He was very, very, very smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me." He said, "I have home box in my room that I can watch, and I'm bored being here listening to it, and I'm going to go watch home box," and he walked out. That's why, when we tried to go through the death penalty phase with him and he left, we wrote it in that letter. And I said, "Since you won't hear it when we sit there, it bores you, I want you to at least read it." His reluctance wasn't an overall reluctance where he said, "I don't want to talk about my childhood, because it's too painful." There was no indicator from anything he told us that would send us searching for elementary school records, high school records, any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. And so no, we didn't go beyond that. And my professional opinion is that, given what Ron Rompilla told us during the numerous discussions we had with him and the countless discussions that John Whispell, our deceased investigator, had with him and was over to see him constantly, there was nothing that came across our table that would make us go looking for his elementary school records, his home life records or anything. And if he knew of anything or his family knew of anything, they never told us. And I know most certainly that we asked, and I know Miss Dantos asked.
Q. Asked what?
A. "What can you tell me about Ron? What was it like for him? What was his life like? What was it like growing up? What was his relationship? What kind of a brother was he? What kind of a brother-in-law was he? What do you know?" Their response was they hardly know him. I mean one said, "He was in a reformatory. He's been away the whole time. We didn't know him that well." Things of that nature. But I remember her specifically going one by one and talking to him. "Is there anything you can tell me? Tell me about yourself. Tell me about your background." She was, you know, meticulous to cover points. And she had a way of doing that, because she was legitimately concerned. And I thought it was disarming. They engaged in numerous what I considered to be cordial conversations. Some of the times I felt like I was in the way even being in the room, and I'd go get coffee. And she would sit down, and so would John Whispell. John Whispell was like a buddy with them, and they would go over and talk. "Tell me about yourself." We undertook to try and determine from him and his family whatever information we could. Nothing came across to us that made us do what you're asking about.
***8** Q. All right. Are you aware of the dynamics that exist among people who are subject to child abuse, that they don't readily like to talk about those kinds of things? Is that something that you--
A. Sure.
Q. --see in your experience?
A. Sure.
Q. So you go to an adult--well, let's say--well, you go to an adult who may have had an abusive childhood, and you say, "How was your childhood?" and the person says it was fine. Would you agree that, given your awareness of the abuse dynamics, that maybe it would be more prudent to go beyond the client and beyond those who may have abused the client to look for other indications of abuse?
A. It may in a vacuum. But, my goodness, you have--with 2,000 defendants you have over 50 percent that tell you, "Yes, I've been beaten. I've been raped. I've been molested." I mean, what's the difference? It's hard to determine when someone says, "No, I had a great childhood. I had no problems," the difference between that and being in denial. I mean we talked to him more than once, and we believed that there was nothing outstanding. His family didn't tell us anything. I mean maybe the family would say, "Hey, you know don't believe him, because he was one heck of an abused kid." That never was volunteered. It was never told during any of the times that we talked to them. You know, even if Ron denied it, I mean, somebody in the family would have known it. His wife would have known it. Somebody would know it to tell us. And I don't think that it's looking back and I really think it's classic. I don't want to say that. You're looking back at it in a vacuum. Because when he says,

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

"No, there's nothing there," you know, what's the difference between the truth, there was nothing there, and classic denial. I'm not an expert. That's why I send them to an expert.
Q. All right.
A. And I figure that Dr. Cooke or Dr. Sadoff or Dr. Gross, who do this for a living, might be able to say, "There's something in the way he denied this that shows it's classic denial syndrome, and we ought to explore it a little bit." So I get him away from me making that call. I'm a lawyer. I'm not a psychiatrist or a psychologist. And so I get him to a pro, and then I get on with the business of preparing the rest of my case. And that's what we did with Ron Rompilla's case.

Petitioner argues now that this investigation did not fulfill counsel's obligation to conduct a thorough investigation of Petitioner's background. More specifically, trial counsel for Petitioner, his present counsel argue, should have obtained his school, medical, court and prison records as part of their investigation. The school records would have shown he was in special education and mentally retarded or borderline mentally retarded; the medical records would have revealed his early hospitalization at age 2; and the prison records would have shown scores on other tests, as well as other background information. There is reason to believe, from my reading of the depositions of Drs. Cooke, Sadoff and Gross, that information from those records may have been important in their respective diagnoses.

***9** At the beginning of this analysis, I said that the penalty hearing appeared to be unreasonably short and lacking in substantive evidence. The explanation of trial counsels' conduct is two-fold, it seems to me. First and foremost, Petitioner himself was not forthcoming; he just was of virtually no help in the penalty stage (*see* testimony of Attorney Charles at pp. 10-13 of this opinion). Second, despite the lack of cooperation of the Petitioner and his family members' failure to reveal anything about his life other than he was a good guy, trial counsel had three doctors examine Petitioner. None of these experts were able to offer any mitigating factors and one even concluded the Petitioner was a sociopath; hardly something counsel could use.

My review of the record reveals that trial counsel were intelligent, diligent and devoted to their task of representing Petitioner. But, did trial counsel comply with their obligation to conduct a thorough investigation? We know that they did not develop and present any mitigating evidence about Petitioner's childhood, alcoholism, mental retardation or possible organic brain damage.

Certainly, with regard to the first two, Petitioner himself and his relatives simply did not supply counsel with any meaningful information prior to the penalty hearing. As to the mental retardation and organic brain damage, counsels' response is that the three experts never requested this information and therefore they never sought it. Judge Wallitsch concluded in this regard that, "Given the fact that three health care professionals, all of whom were experienced forensic experts, had provided opinions to defense counsel, and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions." (Opinion of Thomas A. Wallitsch, J., p. 8).

In affirming Judge Wallitsch, the Supreme Court of Pennsylvania stated, "We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence.... In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant (Petitioner) and upon their experts to determine the records needed to evaluate the mental health and other potential mitigating circumstances." The Pennsylvania Supreme Court concluded that trial counsel did not fail to investigate.

What is missing from the court opinions in this case is at least two matters of concern. First, there is no in depth analysis of what the duty to investigate consists of in a case of this nature; and second, there is a lack of discussion of alcoholism as pertaining to the Petitioner. [FN3] A discussion of the duty to investigate should include reference to the ABA Standards for Criminal Justice. These standards were cited in *Williams v. Taylor, supra.* Writing for the majority on the particular issue of ineffective assistance of counsel, Justice Stevens said, referring to certain conduct of defense counsel:

FN3. The overall analysis of this Claim I involves clearly established federal law, namely *Strickland v. Washington, infra.* Justice Kennedy explained that rules of law may be sufficiently clear for habeas purposes even if it is a generalized standard. He said:
"If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

> tolerate a number of specific applications without saying that those applications themselves create a new rule... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 308-309, 112 S.Ct. 2482, 120 L.Ed. 2d 225 (1992) (opinion concurring in judgment)

***10** Whether or not those omissions were sufficiently prejudicial to have affected the outcome of the sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary p. 4-55 (2d ed.1980).

The ABA Standards for Criminal Justice 4-4.1, Duty to Investigate, and commentary 4.55 (2d ed.1980) provides as follows:

> Standard 4-4.1. Duty to investigate
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

The commentary to ~~the above~~ standard includes the following:

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

As early as *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984), the Supreme Court referred to ABA guidelines when it said:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4- 8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Clearly in the *Williams* case, *supra*, that duty was breached. In *Williams*, evidence not presented at the sentencing hearing included:

> (1) documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse and neglect during his early childhood;
> (2) testimony that he was "borderline mentally retarded"; and
> (3) had suffered repeated head injuries and might have mental impairments organic in nature.

Trial counsel in the *Williams* case failed to ascertain the social service records regarding number (1) above because he erroneously believed that the state law didn't permit it. Counsel also "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school." *Williams* at p. 30. The court said

> ***11** It is undisputed that Williams had a right--indeed, a constitutionally protected right--to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer, *id.* at p. 29.

Was Petitioner denied that right in this case because counsel was ineffective in performing their duty to investigate?

I am not sure why counsel did not seek out school or prison records in this case. It appears that they thought they could rely on the experts to determine Petitioner's general mental ability or capacity. Also bothersome is the apparent ignoring of Dr. Gross' advice (Exhibit 6 to Petition for Writ of Habeas Corpus) at the end of his letter:

> The possibility does remain, however, that Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior, although he himself strongly denies this. *My recommendation is that this area should be further evaluated before any definite conclusions are drawn.*

While acknowledging some potential mitigating

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

value in one's being an alcoholic (N.T. 3/28/96, p. 54), counsel did nothing to further explore it. Petitioner was, however, sent to Drs. Cooke and Sadoff. Counsel was also aware that Petitioner had spent quite a lot of time in jail (about 14 years prior to being released, three months before his arrest on this charge) (N.T. 3/28/96, pp. 47, 48), but never sought prison records, some of which would have alerted counsel to possible mitigating evidence.

For example, Exhibit 12 of Petitioner's Exhibits to Petition for Habeas Corpus, in an Initial Classification Summary dated March 3, 1976 identifies alcohol as a past or present problem area. This summary was prepared by the Bureau of Corrections, Commonwealth of Pennsylvania in connection with Petitioner's incarceration for rape. In Petitioner's Legal History Prior to Present Confinement and Offense Pattern, alcohol is also checked.

In a Program Planning and Expectations dated March 11, 1976 concerning his initial classification, under Other Programs, the following appears:

> Because of his abuse of alcohol, regular participation in the Alcoholic Anonymous program is strongly recommended.

The counselor's evaluation in that same report concludes:

> This 28 year old married non-veteran was the 6th of nine children reared in the slum environment of Allentown, Pa. vicinity. He early came to attention of juvenile authorities, quit school at 16, started a series of incarcerations in and out Penna. often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.

A summary prepared November 27, 1964 in connection with charges against Petitioner as a juvenile revealed the following family background:

> HOME AND FAMILY: In 1945 the City Health Department of Allentown, Pennsylvania became interested in this family then residing at 203 Green Street, Allentown, Pennsylvania. Following this, the Probation Office was alerted of neglected children. At this time, Miss Hahner of the Catholic Children's Bureau was interested in the family group and pleaded with the Probation Office that the family be given an opportunity to correct its home condition.
> ***12** September 6, 1945 the mother was picked up by the police in a drunken condition at which time the Probation Office was obliged to enter into the home and family; the children were placed in a hospital and the home of relatives at that time; at this time the husband and father of this family was in the United States Army.
> June 27, 1946 the children were returned to the mother were they resided in a basement apartment at 11 No. Fourth Street, Allentown; upon the husband's return home, upon discharge from the U.S. Army, things improved slightly.
> Over a period of years the mother was missing from home frequently for a period of one or several weeks at a time; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. Always upon return home the husband took her back into the house even though he complained about her absence; there was never any prosecution for her desertion of the family for her moral episodes. She has been reported over a period of years to be frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.
> PROBATION OFFICER'S NOTE: Ronald comes from the Notorious Rompilla Family which has been known to the Lehigh County Courts on many occasions. The parents appeared to be cooperative but their past record indicates failure of handling there off-spring.

This court is aware that Petitioner was born on April 14, 1948. Nevertheless, this information would have certainly been of assistance to trial counsel, had they known it, in evaluating Petitioner's background.

Once again, an answer from Mr. Charles puts in perspective the dilemma of public defenders, at least in 1988, when this case was tried:

> Q. Let me ask my question. What--leaving aside your resource question, do you have any reason why you wouldn't investigate whether your client was raised as a homeless child?
> A. I would investigate by asking my client, "How was your childhood? Were there any problems that you suffered? Any kind of abuse? Tell me something about--is there anything you can tell me from your youth till now that can help us? Tell me, is there anything that sticks out? Don't think whether it's important or not. You just tell us, and then we'll determine whether or not we can use it." Investigate it that way. Would I send somebody to the person's elementary school to talk to the teacher to see if they remember him

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

> from 25 years or 40 years before? No. I didn't have those resources in the office. So I would do an investigation. But again, "investigate" is a subjective term. Investigate given what your resources are in light of the office. I had two investigators and 2,000 cases. And I'm sure you know the difficulties with budgeting caseloads and having to get investigations done given the resource you have. I will talk to the client, talk to the family, and see if anything developed from there. If something did, we would then amplify on it and develop it. If it didn't, we would go from there. There's a certain point in time when you have two or three thousand cases in a year that you have to deal with some of the things your client tells you and give that some full faith and credit and rely on it.

***13** Acknowledging the difficulties of a public defender as explained by Mr. Charles, it seems to me on balance that they were obliged to go a bit farther to fulfill their duty to investigate. It is true, as the U.S. Supreme Court acknowledged in *Williams* that a lot of information they would discover would not be helpful to their client. It is also true that *Strickland* reminds us:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

In this case, however, there were pretty obvious signs, at least superficially from what counsel knew of Petitioner's criminal past, including his rape conviction, that Petitioner may have had a drinking problem, may have had a poor school record, and probably had a difficult childhood. More investigation into those areas would have uncovered information that at least counsel should have considered relative to mitigation, *i.e.*, his possible alcoholic problem, his family past, his borderline mental retardation. Obviously, we cannot consider the question of sound trial strategy when counsel did not have the information before it upon which to strategically decide how it should or should not be used.

It is a very close call in this case because trial counsel performed so admirably according to my review of the record. But, I think they had reason to know of Petitioner's past and should not have relied on defendant alone or his family to reveal the true nature of his background. Case law referred to in Petitioner's brief support his argument that in a capital case, courts have recognized a particular duty of counsel to thoroughly investigate defendant's background for any possible mitigating circumstances.

Even if counsel did not pass muster with regard to the first prong of the *Strickland* test in that their representation fell below an objective standard of reasonableness in regard to their duty to investigate Petitioner's background in preparation for the penalty phase, Petitioner must still show prejudice. To establish this, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984).

***14** The penalty phase of a first degree murder trial, it seems to me, is in many respects the same as a sentencing hearing in a non-capital case except the jury is for all practical purposes doing the sentencing in a capital case. To the extent the sentencing authority (whether judge or jury) does not have essential background information, the sentencing may be influenced one way or another. In this case, what the sentencing authority (the jury) lacked was the background history involving Petitioner's mental capacity and possible alcoholism. It also lacked information about his possible abusive childhood, although counsel was somewhat misled in this regard. The lack of information about these items is sufficient to undermine the confidence in a decision which was made in the absence of arguably important mitigation evidence.

Because I believe the correct governing legal

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

principle (*i.e.*, *Strickland*) was clearly established but unreasonably applied, Petitioner is entitled to relief on this claim.

CLAIM II. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND DEATH SENTENCE BECAUSE OF THE TRIAL COURT'S IMPROPER INSTRUCTION ON ACCOMPLICE LIABILITY.

Sometime after the jury began it deliberations, it forwarded the following question to the trial court:

> If defendant was an accomplice to the charge of Criminal Homicide, can he be charged with Murder in the First Degree?

Defense counsel, Mr. Charles, properly objected to the giving of the charge because accomplice liability was never part of the case and defendant therefore was neither alerted to address it through cross examination or otherwise. The trial court felt the jury was entitled to an answer and thus gave an answer including an incomplete charge on accomplice liability. He began his charge with this:

> Well, preliminarily, let me say this. If you recall, the Court, in it's Charge, at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice.

and concluded with this:

> I can only say this to you, that you should determine this case based on the Charge of the Court as it had given you originally. There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but it requires other proof or findings on your part that were not a part of this case nor were they made a part of this case.

As previously stated, I agree with Petitioner that the accomplice instruction was incomplete, but it did not, as Petitioner suggests, prevent the jury from considering and giving effect to exculpatory and mitigation evidence. Moreover, the incompleteness of the charge was cured by the admonition that it did not apply. Petitioner's argument that there was evidence of an accomplice is not supported by a careful reading of the record. His reference to the forensic evidence at p. 37 footnote 18 of his reply brief do not support an accomplice theory because:

***15** (1) Consistent with the location of the murder being a public bar, finding lots of hair and fibers not being identified as Petitioners is not unusual (Vol. I, 11/25/88 N.T., p. 111);

(2) Moreover, while Petitioner's blood was not found at the scene, the only blood that was found there was the victim's, nobody elses; *id.*, p. 146; and

(3) The finding of other shoe impressions at a crime scene other than the alleged defendant's is normal (Vol. III, 11/28/88 N.T., p. 50).

CLAIM III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE, EVEN AFTER THE JURY REPEATEDLY ASKED ABOUT PAROLE ELIGIBILITY; AND THE TRIAL COURT'S PROVISION, INSTEAD, OF INACCURATE AND MISLEADING INFORMATION, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This claim evolves around the following occurrence. Shortly after the jury had retired to consider the penalty, it requested the court to answer this question: If a life sentence is imposed, is there any possibility of the defendant ever being paroled? The court's response follows:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I--if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

Petitioner argues that under *Simmons v. South Carolina*, 512 U .S. 154, 114 S.Ct. 2187 (1994), where the state secured the death sentence, at least in part, based upon defendant's future dangerousness, failing to instruct the jury that under South Carolina law, life imprisonment meant no possibility of parole, denied defendant due process.

The prosecutor's summation in this case covers 16 pages of the notes of testimony and a fair reading of it leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable, savage and

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

cowardly beating the Petitioner inflicted upon his victim. This is a close issue, however, but the Supreme Court of Pennsylvania's decision in the PCRA case was not an unreasonable application of federal law.

CLAIM IV. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(8) AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED.

Petitioner in this claim asserts that the following instruction on torture was unconstitutionally vague:

> The second aggravated circumstance advanced by the Commonwealth was that the a--the offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not--the killer is not satisfied with the killing alone.

***16** Petitioner relies on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988) which the Supreme Court of Pennsylvania reasoned was not applicable to this case. The court wrote:

> Appellant appears to concede that the trial court gave an instruction defining torture that comports with *Pursell* and its progeny. Nonetheless, Appellant argues that the definition employed by the court is unconstitutionally vague under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Maynard*, however, found vague an aggravating circumstance in the Oklahoma death penalty statute that provided that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at 363-64, 108 S.Ct. 1853. The Court explained that these words alone did not guide the jury as almost every murder could be characterized as especially heinous, atrocious, or cruel. *Id.* *Maynard* did not involve an aggravating circumstance that an offense was committed by means of torture. In addition, the Court in *Maynard* agreed that a limiting instruction that the aggravating circumstance at issue required torture would be constitutionally acceptable. *Id.* at 364-6, 108 S.Ct. 1853. Thus, *Maynard* does not preclude defining torture as the infliction of pain that is unnecessarily heinous, atrocious or cruel, with the intent to cause pain and suffering in addition to the intent to kill. Appellant's claim is without merit.

I agree.

CLAIM V. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(9) "SIGNIFICANT HISTORY" OF FELONY CONVICTIONS AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE; THE JURY INSTRUCTIONS DID NOT CURE THIS VAGUENESS; AND THE JURY INSTRUCTIONS, TO THE EXTENT THEY PROVIDED GUIDANCE AT ALL, DIRECTED A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

The jury instruction involving this claim follows:

> And the third aggravating circumstance appointed to, by the Commonwealth, is that the Defendant has a significance history of felony convictions involving the use or threat of violence to the person. And in this regard, a significant history of prior criminal convictions involving the use or threat of violence to the person means one--more than one prior conviction. In other words, at least two prior convictions before that can become an aggravating circumstance.

Petitioner's claim of unconstitutionally vague must be viewed, as Petitioner agrees, by the standard, "did the adjudication by the state court result in a decision that involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States?" The thrust of Petitioner's argument is that in finding that the aggravating factor in question, namely; "The defendant has a significant history of felony convictions involving the use or threat of violence to the person", was not unconstitutionally vague, the Supreme Court of Pennsylvania relied on a U.S. Supreme Court case which dealt with a mitigating factor. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976). Petitioner is correct that *Proffitt* dealt with a mitigating factor. Specifically, Petitioner in *Proffitt* argued that neither a judge or jury was capable of determining whether he had a "significant history of prior criminal activity."

***17** In answering this and similar objections, the Supreme Court said

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed. *Id.* at 257-58.

Again, I do not find an unreasonable application of the law on the vagueness issue.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

> govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done ... He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

***18** In reviewing the 16-page closing of the prosecutor in this case, I find that it borders on but does not transgress the line which separates fair play from foul. Nevertheless, I am puzzled as to why prosecuting attorneys do not limit their closing argument to the framework of a capital case within the Pennsylvania statutory scheme of aggravating and mitigating factors. Without passion, but with cool, calm objectivity, a prosecutor in a case like the one now before the court can simply stress how clearly the Commonwealth has proven the aggravating factors and why any mitigating factors are far outweighed by the aggravating ones. The point can be made, the argument delivered, without resort to personal feelings or reference to inflammatory matters not within the record of the case.

More problematical is the actual charge of the court. While I have found that it was reasonable to conclude that the phrase "significant history" was not unconstitutionally vague and thus, there was in effect no vagueness for the jury instruction to cure, the charge of the court quoted above, when read alone, might support Petitioner's third argument in this claim. But I think that the entire charge makes it clear that the court is not in any way directing a finding on this issue. The charge makes the burden of proof on issues of aggravation quite clear.

CLAIM VI. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE OF IMPROPER PROSECUTORIAL ARGUMENT AT THE PENALTY PHASE.

As mentioned in *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir.1991), Justice Sutherland's oft-quoted phrase about the role of a United States Attorney is a good starting point for review of Claim VI. Justice Sutherland said

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to

Petitioner states on p. 54 of his reply brief that the Pennsylvania Supreme Court noted that it provides *less searching* review of the prosecutor's capital sentencing phase arguments. I did not find any such notation but in fact found the court's opinion to have thoroughly covered, with discussion, the alleged inappropriate remarks of counsel. Remarks of the prosecutor such as, "its not easy for me to argue for the death penalty" (a personal and unnecessary remark); "if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for ...." do not unfairly vouch for the propriety of the death sentence. The statement of the prosecutor to the effect that the jury should not show any mercy to Petitioner because, "did Petitioner show any mercy to the victim", does not entitle Petitioner to relief. *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 597 (1991). The prosecutors delved into areas not necessarily supported by the record, i.e., the Petitioner killed the victim so that there would be no witness and speculation on the impact on the victim's family. As I stated earlier, counsel should stick to the record in closing argument. But, even viewing the closing in its entirety, I believe the Pennsylvania

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Supreme Court's finding of no prejudice is a reasonable application of the law.

CLAIM VII. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTOR TO READ TO THE JURY THE INFLAMMATORY AND PREJUDICIAL TESTIMONY OF THE VICTIM OF A PRIOR RAPE AND COUNSEL WERE INEFFECTIVE FOR FAILING TO CITE CONTROLLING AUTHORITY THAT WOULD HAVE PREVENTED THE INTRODUCTION OF THE INFLAMMATORY AND PREJUDICIAL EVIDENCE.

The second part of this claim is not correct. Indeed, trial counsel attempted to stipulate that burglary was inherently a violent crime in order to prevent a reading of the record, but the prosecutor insisted upon it and the trial judge permitted it. Petitioner argues that trial counsel should have been aware of and cited to the trial court the case of *Commonwealth v. Rolan*, 520 Pa. 1, 549 A.2d 553 (1988) decided October 18, 1988, roughly two weeks before his trial. The *Rolan* case declared that burglary was a violent crime. It did not go on to say that therefore, the prosecutor could not reveal to a jury the underlying facts of the crime during the penalty phase. It was not improper to permit the reading of the testimony of the victim. Defense counsel appropriately argued strenuously against its use.

CLAIM VIII. THE SEATING OF THE JUROR WHO VISITED THE SCENE OF THE CRIME TEN TIMES, INCLUDING, DURING THE TRIAL PROCEEDINGS, WHO KNEW THE VICTIM OF THE OFFENSE AND THE VICTIM'S SON, WHO KNEW AN EMPLOYEE OF THE PROSECUTOR'S OFFICE AND WHO EXPRESSED SUBSTANTIAL DOUBTS REGARDING THE PRESUMPTION OF INNOCENCE; AND TRIAL COUNSEL'S FAILURE TO CHALLENGE THIS JUROR FOR CAUSE, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

***19** The claim as worded is somewhat of a distortion of the examination of the juror in question. It also doesn't mention the fact that this particular juror apparently got a ticket from a police officer and was found guilty. The police officer was from the Allentown Police Department, the same department of which the detective prosecuting the case belonged. Moreover, the following exchange took place during voir dire:

> Q. Okay. Now the judge told you this is going to last about two weeks starting tomorrow, probably. Say that you're in the end of the second week, you've been here for a long time, you've been deliberating and you are in the minority in your view. Okay? Your one view differs from the eleven others. Would you change your opinion simply because of the pressure from the other jurors on the lateness of the hour or would you hold firm to your beliefs?
> A. I would stick to my belief.
> Q. Okay. Are you sure about that?
> A. I don't think time would have anything to do with it.
> Q. Okay. Good. Because I'm sure that you realize this is a serious case. We want your mind focused on the evidence, okay, and not on the lateness of the hour or other pressures. So can I have your word that you'll hold firm?
> A. Yes ma'am.

The entire examination of this particular juror appearing at pages 220 to 247, Notes of Jury Voir Dire 10/24/88, makes it clear that the concerns raised in this claim are exaggerated. It appeared that he had been in the bar owned by the victim about 10 times over the last eight years (N.T. 222). About one week before his voir dire examination, he stopped in the bar for a six pack. He hadn't sat down and had a drink in the bar since about three years before the homicide (N.T. 225). He barely knew the owner, had no relationship with him other than to say hi (N.T. 226), and didn't think he ever met the owner's son except maybe one time (N.T. 226). He also said he knew an Emil Cantro (apparently an Assistant D.A.). The juror said, "I don't know who he is, I just met him one time" (N.T. 231). This juror did express a lack of understanding of the presumption of innocence initially, but his examination makes it clear that he understood it and could apply it after it was explained to him (N.T. 241- 246). This claim is without merit.

CLAIM IX. PETITIONER'S DEATH SENTENCE SHOULD BE VACATED BECAUSE THE ARBITRARY "PROPORTIONALITY REVIEW" PERFORMED BY THE PENNSYLVANIA SUPREME COURT VIOLATED HIS EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHTS.

The Petitioner points to no federal case law in support of this argument. As pointed out by the

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Supreme Court of Pennsylvania in *Commonwealth v. Gribble*, 550 Pa. 62, 703 A.2d 426 (1997), the United States Supreme Court has held that the Eighth Amendment as applied to the states through the Fourteenth Amendment does not require that a state death penalty statute contain proportionality review. The state court's decision in *Gribble* was not an unreasonable application of *Pulley v. Harris*, 465 U.S. 37, 104 S .Ct. 871 (1984). Referring to *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2690 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, the court in *Pulley* said, "... Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement." *Pulley* at 44-45, 876.

CLAIM X. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT THE PROSECUTION VIOLATED HIS DUE PROCESS BY INTRODUCING FALSE AND MISLEADING EVIDENCE.

***20** This claim, according to counsel for Petitioner, is described in the Petition itself in numbers 503-511.

What Petitioner is arguing is that the knife the Allentown police located broken in two in a snow bank outside the bar, had a brown handle according to testimony at the preliminary hearing. At the trial itself, the knife recovered at the scene had a black handle, according to testimony. Thus, Petitioner concludes that the knife identified at the trial was not the same one that was found in the snow bank.

The Notes of Testimony reveal that more than one knife was found at the scene and the identity of one of them as a *black*-handled knife found in the snow bank is acknowledged by the victim's son as one of the knives used at the bar (N.T. 10/25/88, p. 45). Another knife found at the scene was described by the victim's son as having "like a burned-orange type color" handle (N.T. 10/25/88, p. 57). Since the fingerprints of Petitioner were found on evidence that was not recovered at the scene (the black-handled knife), false evidence has been introduced, Petitioner argues. This is totally unsupported by a reading of the Notes of Testimony and appears to be based entirely on paragraphs 507 through 510 which follow:

507. In addition to the above-described fingerprint evidence, the FBI had extensive involvement in the investigation and prosecution of this case. Recent revelations of possible malfeasance and incompetence in the FBI labs raise the possibility that other false and misleading evidence was introduced at Petitioner's trial.

508. Over fifty items of evidence, including fibers, blood, hair, potential weapons (e.g., glass bottles, knives) broken glass, floor tile, sneakers, photographs, fingerprints, and clothing, were submitted to the FBI for analysis. (Copies of April 4, 1988 and May 5, 1988 reports from the FBI to Allentown's Chief of Police, listing evidence submitted for analysis in this case, are appended as combined Exhibit 19).

509. In addition to the lab work done in this case, five FBI agents testified for the prosecution. Paul A. Bennett, employed in the FBI's Laboratory Division, testified as to analysis of fibers found on some of the evidence gathered in this case. NT 10/25/88 at 96, 106-11. Robert R.J. Grispino, employed as a Supervisory Special Agent conducting forensic serology for the FBI, testified as to the origins and types of various blood samples that had been submitted to the FBI. *Id.* at 119, 124-36. As described above, Leonard P. Dreibelbis testified as an FBI fingerprint specialist and indicated that one of Mr. Rompilla's prints matched a latent print found on the alleged murder weapon. NT 10/26/88 at 6, 19-28. Richard Crum, a special agent employed in the Firearms and Tool Mark Identification Unit of the FBI laboratory, testified as to the origins of different pieces of knife that was purportedly the murder weapon. *Id.* at 152, 155-57. Gary Kanaskie, a special agent assigned to the Document Unit of the FBI lab with additional specific duties regarding shoe and tire print analysis, testified regarding the origins of various impressions left at the crime scene. NT 10/27/88 at 28-29, 32-50.

***21** 510. Given the FBI's pivotal role in the investigation and prosecution of this case, the integrity of the FBI's lab work and agent testimony is obviously a matter of great importance. There has been recent public disclosure of far-ranging allegations made by high level employees of the FBI that agents employed in the Bureau's Laboratory Division have routinely, and over a period of years, engaged in a multitude of corrupt practices. These allegations assert that FBI laboratory agents have falsified lab results and reports to meet the needs of prosecuting agencies; have suppressed exculpatory lab results, and have engaged in sub-standard laboratory practices effecting the substantive outcome of their work.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Such broad sweeping allegations form no grounds for an evidentiary hearing much less relief from conviction.

CLAIM XI. PETITIONER IS ENTITLED TO RELIEF BECAUSE OF CUMULATIVE PREJUDICIAL EFFECTS OF ERRORS IN THIS CASE.

This case in terms of having a fair if not perfect trial is almost error free. Only in the sentencing phase does the concept of a fair hearing come up somewhat short.

III. CONCLUSION

None of Petitioner's claims entitle him to relief from the jury's verdict of guilty of murder in the first degree. None of his claims make a substantial showing of the denial of any constitutional right with regard to the guilt determining phase of his trial. Those claims are:

(1) Improper instruction of accomplice liability (Claim II);
(2) Improper seating of a juror (Claim VIII);
(3) Introduction of false and misleading evidence (Claim X); and
(4) Cumulative effect of errors (Claim XI).

With regard to Claim III, the court believes that Petitioner has made a substantial showing relative to the trial court's failure to instruct the jury that life imprisonment means life without the possibility of parole, and therefore would grant a certificate of appealability with regard to that claim only. Claim III, together with Claims I, IV, V, VI, VII and IX deal with defects in the sentencing procedure. The relief hereafter granted may make the granting of a certificate of appealability as to Claim III superfluous.

ORDER

AND NOW, this 11th day of July, 2000, to the extent that the Petition addresses the guilt-determining phase of the trial, and the verdict convicting Petitioner of Murder in the First Degree, the Petition is DENIED; to the extent that the Petition addresses the penalty phase of the trial, and the death sentence imposed upon Petitioner, the Petition is GRANTED. The death sentence imposed upon Petitioner is VACATED, without prejudice, to the right of the Commonwealth of Pennsylvania to sentence the Petitioner to life imprisonment, or to conduct such further proceedings as may be appropriate under state law (including a new sentencing hearing), if initiated within 270 days of this order.

A certificate of appealability will issue to Petitioner (Appellant) under 28 U.S.C.A. 2253(c)(2) as to Claim III.

2000 WL 964750 (E.D.Pa.)

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Briefs and Other Related Documents

United States Court of Appeals,
Third Circuit.

Ronald ROMPILLA
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections
Martin Horn, Appellant/Cross-Appellee.

No. 00-9005, 00-9006.

Argued May 22, 2002.
Filed Jan. 13, 2004.

Background: Cross-appeals were taken from an order of the United States District Court for the Eastern District of Pennsylvania, Ronald L. Buckwalter, J., 2000 WL 964750, granting the petition for a writ of habeas corpus that was filed by a Pennsylvania prisoner who was sentenced to death.

Holdings: The Court of Appeals, Alito, Circuit Judge, held that:
(1) in penalty phase of capital trial, defense counsel were not constitutionally derelict in their investigation of petitioner's background of in failing to provide certain background information to the psychologist and the two psychiatrists whom they retained to examine petitioner;
(2) even if trial judge's comments about accomplice liability were constitutionally flawed, any error was cured by the judge's admonition to the jury that it should not consider that theory of liability; and
(3) Pennsylvania Supreme Court was reasonable in concluding that prosecutor, who attempted to establish the aggravating factor in capital murder trial that petitioner had a "significant history of felony convictions," did not argue that petitioner would present a future danger if not sentenced to death and therefore *Simmons* did not apply so as to require jury to be informed of petitioner's parole ineligibility upon a sentence of life imprisonment.

Affirmed in part and reversed in part.

Sloviter, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Habeas Corpus ⇐766
197k766

For purposes of habeas statute, a state court's "adjudication on the merits" means a decision finally resolving the parties' federal claim, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground. 28 U.S.C.A. § 2254.

[2] Habeas Corpus ⇐773
197k773

Although Pennsylvania Supreme Court referred to its own three-pronged ineffective assistance test, which it regarded as the same as *Strickland*, rather than the two-pronged *Strickland* test, Pennsylvania Supreme Court adjudicated petitioner's Sixth Amendment claim on the merits, and therefore restrictive standards of review set out habeas statute applied. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[3] Habeas Corpus ⇐486(1)
197k486(1)

Decision of the state supreme court on petitioner's ineffective assistance claim was not "contrary to" *Strickland* because it did not identify and apply actual Sixth Amendment standards; critical standard applied by the state supreme court, whether trial counsel had a reasonable basis for the acts or omissions in question, did not contradict *Strickland*, but, rather, was entirely consistent with *Strickland*. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[4] Criminal Law ⇐641.13(7)
110k641.13(7)

In penalty phase of capital trial, defense counsel were not constitutionally derelict in failing to obtain school, hospital, court, and prison records that revealed a number of IQ test results in the mentally retarded range, low achievement scores, placement in special education classes, childhood neglect, problems with alcohol, and an alcoholic mother nor were attorneys ineffective for failing to provide such records to the psychologist and the two psychiatrists whom they retained to examine petitioner or for allegedly failing to communicate adequately with those experts; defense counsel were not required to take all the steps that might have been pursued by the most resourceful defense attorneys with bountiful investigative support in order to present mitigating evidence. U.S.C.A. Const.Amend. 6.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

[5] Habeas Corpus ⚭421
197k421

Under habeas statute, a state may not be deemed to have waived exhaustion or be estopped from relying on exhaustion unless the State, through counsel, expressly waives the requirement. 28 U.S.C.A. § 2254(b)(3).

[6] Habeas Corpus ⚭382
197k382

In order to exhaust state remedies, a habeas petitioner must present the petitioner's federal claim in the state courts; it is not enough for a petitioner to advance a similar state-law claim, rather, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. 28 U.S.C.A. § 2254(b)(1).

[7] Habeas Corpus ⚭499
197k499

Even if trial judge's comments about accomplice liability were constitutionally flawed, any error was cured by the judge's admonition to the jury that it should not consider that theory of liability in murder trial, and thus, federal habeas relief was not warranted; furthermore, nothing that the judge said foreclosed consideration of exculpatory or mitigating evidence.

[8] Habeas Corpus ⚭508
197k508

Pennsylvania Supreme Court was reasonable in concluding that prosecutor, who attempted to establish the aggravating factor in capital murder trial that petitioner had a "significant history of felony convictions," did not argue that petitioner would present a future danger if not sentenced to death and therefore *Simmons* did not apply so as to require jury to be informed of petitioner's parole ineligibility upon a sentence of life imprisonment, and thus, habeas relief was not warranted; even if prosecutor's comments were meant to imply that petitioner would present a future danger if he was ever released from prison, prosecutor never actually argued that petitioner presented a future threat.

***235** Amy Zapp (Argued), Senior Deputy Attorney General, Office of Attorney General, Harrisburg, PA, for Appellant/Cross-Appellee.

Billy H. Nolas (Argued), David W. Wycoff, Michael Wiseman, Defender Association of Philadelphia, Federal Court Division, Philadelphia, PA, for Appellee/Cross-Appellant.

Before SLOVITER, ALITO, and STAPLETON, Circuit Judges.

OPINION OF THE COURT

ALITO, Circuit Judge.

The Commissioner of the Pennsylvania Department of Corrections (hereinafter "the Commonwealth") appeals from a District Court order granting the petition for a writ of habeas corpus that was filed by Ronald Rompilla, a Pennsylvania prisoner who was sentenced to death. The District Court ordered that Rompilla be released unless he is either resentenced to life imprisonment or a new penalty phase trial is held. Rompilla cross-appeals from the denial of his petition insofar as it challenged his conviction. We conclude that the Pennsylvania Supreme Court's decision regarding Rompilla's sentencing proceeding was not contrary to and did not involve an unreasonable application of clearly established Supreme Court precedent, and therefore we reverse the decision of the District Court with respect to Rompilla's sentence. We affirm the decision of the District Court with respect to his conviction. By separate order, however, we have granted Rompilla's application to file a successive petition for a writ of habeas corpus so that he will be able to assert his claim that, under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), he may not be executed because of mental retardation.

***236** I.

In 1988, Rompilla was tried for the murder of James Scanlon. Scanlon's body was found lying in a pool of blood in his bar, the Cozy Corner Cafe in Allentown, Pennsylvania. Scanlon had been stabbed repeatedly and set on fire. There were no eyewitnesses to the killing, but the Commonwealth introduced substantial circumstantial evidence of Rompilla's guilt. In its opinion on direct appeal, the state supreme court summarized the prosecution's evidence as follows:

> Appellant was seen in the Cozy Corner Cafe on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.
> When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he had been in the Cozy Corner Cafe on the night of the murder and left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only $2:00 to buy breakfast at a local diner. A cab driver testified that he picked up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of $9.10.
> Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid $121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.
> The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.
> The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr. Scanlon's wallet was found by a groundskeeper in the bushes, six to eight feet outside the room that Appellant had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told the police concerning his activities on January 14 and 15, 1988, and the testimony of other witnesses.

Commonwealth v. Rompilla, 539 Pa. 499, 653 A.2d 626, 629 (1995). The jury found Rompilla guilty of first degree murder and other related offenses.

At the penalty phase of the trial, the prosecution attempted to establish three aggravating factors: (1) that Rompilla committed the murder while perpetrating a felony, 42 Pa.C.S. § 9711(d)(6), namely, the burglary and robbery of the bar; (2) that he committed the murder by means of torture, 42 Pa.C.S. § 9711(d)(8); and (3) that he had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9). To establish torture, the Commonwealth called Dr. Isidore Mihalakis, a forensic pathologist, who testified to the multiple wounds inflicted on Scanlon ***237** and opined that Scanlon was conscious and alive when many of those wounds were inflicted. App. 698-707. Based on the nature of the wounds, Dr. Mihalakis also opined that Scanlon's killer had deliberately attempted to inflict pain before Scanlon died. *Id.* at 707-08. To show the defendant's prior history of violent felonies, the Commonwealth proved that he had been convicted in 1976 of rape, burglary, and theft. App. 651-52. *Commonwealth v. Rompilla*, 250 Pa.Super. 139, 378 A.2d 865 (1977). The testimony of the rape victim, which was read into the record, showed that Rompilla had burglarized a bar after closing and had raped the bar owner and slashed her with a knife. App. 662-696.

The defense presented the testimony of five members of the Rompilla family. Rompilla's older brother, Nicholas, and his wife, Darlene, testified that Rompilla had lived in their home with their children for the three and one-half months before the killing. Nicholas testified that he and the defendant had grown up together, that the defendant had worked for him as a house painter before his arrest, and that the defendant had also helped out around the house. App. 738-41. Nicholas said that he had visited his brother frequently in prison and that they had a good relationship. *Id.* at 739. Nicholas added that he did not think that his brother had killed Scanlon, whom he had known for about 10 or 11 years, and that his heart went out to the Scanlon family. *Id.* at 740. He concluded his testimony by asking the jury to have mercy on his brother. *Id.* at 741.

Darlene Scanlon testified that her children were "very attached" to the defendant and that he "was very good in our house." App. 734-35. Darlene said that he helped out in the home and that "he was a good family member" who felt "strongly about family" and "respected the family very well." *Id.* at 735. While the defendant was in prison, Darlene testified, he frequently wrote to her and spoke about "[f]amily, his son, his wife, his brothers and sisters." *Id.* She stated that the defendant's relationship with his son was good. *Id.* at 736. Like her husband, Darlene testified that she had known Scanlon, that she did not believe that the defendant had killed him, and that she felt for the Scanlon family "[v]ery, very much." *Id.* Weeping, she concluded her testimony by telling the jury: "We go to bed crying, we wake up crying, it's been very hard on my children.... [W]e want Ron alive even if it's in jail, we want him alive." *Id.*

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Another brother, Bobby, also took the stand. Bobby testified that during the time when the defendant was out of prison they had an "[e]xcellent relationship" and were "[v]ery close." App. 745. Before then, according to Bobby, he had visited the defendant in prison and the defendant had written him letters in which he expressed great concern for his son and other family members. *Id.*

The defendant's sister, Sandra Whitby, testified that she had grown up with the defendant. App. 754. Crying, she said that she loved him very much and that she thought that he was a "good person." *Id.* at 755. Asked what things were important for the defendant, she answered: "Family, his son, his wife, things my children were doing, my brothers." *Id.* She testified that she was praying for the Scanlon family and for her brother's life. *Id.* at 756. She added: "[W]e're not God, and we can't take people's lives (crying) ... I love my brother. Taking one life is never going to replace another life." *Id.*

Finally, Aaron Rompilla, the defendant's 14-year old son testified. He said that after his father's release from prison they had regular visits, which he enjoyed, that his father was proud of him, that he loved his father, and that he would visit him if he was sentenced to prison. *Id.* at 757-59. He said that he did not think it would be ***238** "right" to sentence his father to death, and when he was asked whether there was anything else he wanted to tell the jury, he simply cried. *Id.* at 759.

In her closing argument, defense counsel made an impassioned plea for Rompilla's life. Her closing appears to have had three major themes. First, she repeatedly stressed that, although the jury had found the defendant guilty, they must have had at least some lingering doubt about what had happened, and therefore they should not sentence him to death, which "is final, irreversible." *Id.* Second, she reminded the jury of the good qualities mentioned by Rompilla's family members. She argued that Rompilla was "more than this act that you have found him to have committed," *id.* at 769, and she emphasized the love of Rompilla's family members. *Id* at 773. She particularly asked the jury to keep in mind the defendant's 14 year old son, who had come to court to ask the jury "not to kill his father." *Id.* Third, she pled for mercy and warned the jury: "I tell you this from the bottom of my heart, if you order death, it will take a part of your life away. Don't stain your hands and your souls with this man's blood, don't do it please." *Id.* at 772.

After deliberating, the jury unanimously found all three of the aggravating circumstances alleged by the prosecution, and the jury stated that one or more members found two mitigating factors under the "catchall" provision of 42 Pa.C.S. § 9711(e)(8), i.e., "Rompilla's son being present and testifying" and the possibility of rehabilitation. The jury found that the aggravating circumstances outweighed the mitigating factors and sentenced Rompilla to death.

The Pennsylvania Supreme Court affirmed the conviction and sentence. *Commonwealth v. Rompilla,* 539 Pa. 499, 653 A.2d 626 (1995) (hereinafter *"Rompilla-1"*). [FN1] In December 1995, Rompilla filed a petition under the Pennsylvania Post-Conviction Relief Act ("PCRA"). After an evidentiary hearing, the PCRA denied the petition, and the Pennsylvania Supreme Court affirmed. *Commonwealth v. Rompilla,* 554 Pa. 378, 721 A.2d 786 (1998) (hereinafter *"Rompilla-2"*).

FN1. While the case was pending on direct appeal, Rompilla filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The District Court dismissed the petition without prejudice for lack of exhaustion. *Rompilla v. Love,* No. 94-cv-4196 (E.D.Pa.).

Rompilla then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. Rompilla's petition raised 11 claims. *Rompilla v. Horn,* No. Civ.A.99-737, 2000 WL 964750 (E.D.Pa. July 11, 2000). [FN2] The District Court denied relief as to the guilt phase but granted relief as to the penalty ***239** phase based on its conclusion that counsel had been ineffective in failing to investigate and present mitigating evidence. *Id.* at *14. The District Court thus ordered that a writ of habeas corpus would be granted unless the Commonwealth conducted a new sentencing hearing or resentenced Rompilla to life imprisonment. *Id.* at *21. The Commonwealth appealed, and Rompilla cross-appealed. Three questions are presented on appeal: (1) whether Rompilla's trial counsel was constitutionally ineffective during the penalty phase; (2) whether the trial court committed constitutional error in giving an accomplice liability instruction; and (3) whether the trial court erred in failing to instruct the jury that "life imprisonment" under Pennsylvania law meant life without the possibility of parole. [FN3]

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

FN2. The claims as identified by the District Court were as follows:
(1) Trial counsel were ineffective at the capital sentencing phase for failing to investigate, develop and present significant mitigating evidence related to petitioner's traumatic childhood, alcoholism, mental retardation, cognitive impairment and organic brain damage;
(2) Petitioner is entitled to relief from his conviction and death sentence because of the trial court's improper instruction on accomplice liability;
(3) The trial court's failure to instruct the jury that "life imprisonment" means life without possibility of parole, even after the jury repeatedly asked about parole eligibility; and the trial court's provision, instead, of inaccurate and misleading information, violated petitioner's Sixth, Eighth and Fourteenth Amendment rights;
(4) Petitioner is entitled to relief from his death sentence because the (d)(8) aggravating circumstance was unconstitutionally obtained;
(5) Petitioner is entitled to relief from his death sentence because the (d)(9) "significant history" of felony convictions aggravating circumstance is unconstitutionally vague; the jury instructions did not cure this vagueness; and the jury instructions, to the extent they provided guidance at all, directed a finding of this aggravating circumstance;
(6) Petitioner is entitled to relief from his death sentence because of improper prosecutorial argument at the penalty phase;
(7) Petitioner is entitled to relief from his death sentence because the trial court improperly allowed the prosecutor to read to the jury the inflammatory and prejudicial testimony of the victim of a prior rape and counsel were ineffective for failing to cite controlling authority that would have prevented the introduction of the inflammatory and prejudicial evidence;
(8) The seating of the juror who visited the scene of the crime ten times, including, during the trial proceedings, who knew the victim of the offense and the victim's son, who knew an employee of the prosecutor's office and who expressed substantial doubts regarding the presumption of innocence; and trial counsel's failure to challenge this juror for cause, violated petitioner's sixth, eighth and fourteenth amendment rights;
(9) Petitioner's death sentence should be vacated because the arbitrary "proportionality review" performed by the Pennsylvania Supreme Court violated his Eighth Amendment and Fourteenth Amendment rights;
(10) Petitioner is entitled to an evidentiary hearing on his claim that the prosecution violated his due process by introducing false and misleading evidence; and
(11) Petitioner is entitled to relief because of cumulative prejudicial effects of errors in this case.
Rompilla, 2000 WL 964750.

FN3. A certificate of appealability was not required for the Commonwealth's appeal of the ineffective assistance of counsel claim. Fed. R.App. P. 22(b)(3). The District Court granted a certificate of appealability as to the parole ineligibility claim, *Rompilla,* 2000 WL 964750, at *21, and we granted a certificate of appealability as to the accomplice liability instruction claim. 28 U.S.C. § 2253(c).

II.

Because the District Court did not conduct an evidentiary hearing, our review of that Court's decision is plenary. *Duncan v. Morton,* 256 F.3d 189, 196 (3d Cir.), *cert. denied,* 534 U.S. 919, 122 S.Ct. 269, 151 L.Ed.2d 197 (2001). However, our review of the decision of the Pennsylvania Supreme Court is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Hartey v. Vaughn,* 186 F.3d 367, 371 (3d Cir.1999). Under AEDPA, a federal court may not grant habeas relief on any claim adjudicated on the merits in state court unless the adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence ***240** presented in the State court proceeding.

28 U.S.C. § 2254(d). Under the "contrary to" clause of § 2254(d)(1), relief may be ordered if the state court arrived at "a conclusion opposite to that reached by [the Supreme] Court on a question of law" or if the state court decided "a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) . Under the "unreasonable application" clause of § 2254(d)(1), relief may be awarded if the state court identified the correct governing legal principle from Supreme Court decisions but unreasonably applied

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

that principle to the facts of the case, *id.*, or was "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000). Relief may not be granted under the "unreasonable application" clause merely because the federal court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 529 U.S. at 411, 120 S.Ct. 1495. *See also Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002) ("The focus ... is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one."). Furthermore, a federal court "must presume that the factual findings of both state trial and appellate courts are correct." *Everett v. Beard*, 290 F.3d 500, 508 (3d Cir.2002) (citing 28 U.S.C. § 2254(e)(1)). This presumption may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.

Rompilla claims that his trial attorneys were ineffective at the penalty phase. First, Rompilla alleges that his attorneys were derelict in failing to obtain school, hospital, court, and prison records that reveal a number of IQ test results in the mentally retarded range, low achievement scores, placement in special education classes, childhood neglect, problems with alcohol, and an alcoholic mother. Second, he faults his attorneys for failing to provide such records to the psychologist and the two psychiatrists whom they retained to examine him and for allegedly failing to communicate adequately with these experts. Third, he alleges that his attorneys were negligent in interviewing members of his family. He criticizes trial counsel because they did not interview two sisters who did not testify at the penalty phase, and because they did not ask sufficiently specific questions when they interviewed other family members. Fourth, Rompilla charges that his attorneys were derelict in failing to investigate the possible effects on Rompilla of childhood trauma and alcoholism.

A.

Rompilla was represented by two public defenders, Frederick Charles, who was then the Chief Public Defender for Lehigh County, and Maria Dantos, a full-time assistant public defender. App. 1055-56, 1059. Both testified at length at the PCRA hearing. For present purposes, two aspects of these attorneys' preparation for the penalty phase are most pertinent: first, their efforts to obtain information about Rompilla's childhood and schooling and, second, their communications with the three mental health professionals whom they consulted.

***241** Both Charles and Dantos explained that the defense had questioned Rompilla and numerous members of his family about his childhood, schooling, and background and had asked for any information that might be helpful at sentencing. According to their testimony, however, neither Rompilla himself nor any family member even hinted at the problems on which Rompilla's ineffective assistance claim is based. Dantos testified that she had developed a good relationship of trust with Rompilla, that she felt that she had gotten to know him, and that she had a lot of discussions with Rompilla "about who he was and his life." App. 1073, 1163. When she asked Rompilla about school, Dantos recounted, he told her "[t]hat there was nothing unusual about it." *Id.* at 1197. Dantos also said that she specifically asked Rompilla about drinking and that he responded that he sometimes drank but "could handle it" and was not an alcoholic. *Id.* at 100-01. On the night of the killing, Rompilla told her, he had consumed three or four beers over the course of the entire evening. *Id.* at 1101.

Charles added that Rompilla had responded to questions about his background by saying that nothing was wrong:

> "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me." ...
>
> There was no indicator from anything he told us that would send us searching for ... any kind of records. He said everything was fine. He had a normal childhood. There was nothing there....
>
> ... I remember [Dantos] specifically going one by one and talking to him. 'Is there anything you can tell me? Tell me about yourself. Tell by about your background.' She was, you know, meticulous to cover points.

App. 1303. Both Dantos and Charles said that

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

nothing in their discussions with Rompilla ever suggested that he was mentally retarded, *id.* at 1181, 1393, and Charles elaborated that Rompilla did not have difficulty in understanding what was said to him or in expressing his feelings. *Id.* at 1393.

Dantos and Charles also testified that members of Rompilla's family provided no hint that Rompilla had mental problems, had suffered child abuse, or was an alcoholic. Dantos stated that she spoke with three of Rompilla's siblings, his sister-in-law Darlene Rompilla, and his ex-wife and that she had formed a "very close" relationship with the family. App. 1092, 1065. She said that they had discussed the importance of mitigation evidence but that no one had provided any useful information about Rompilla's background. She testified that she had "spent hours with these family members," that they had "discussed the family dynamics and what [Rompilla's] family relationship was with his parents," and that there was no indication "that there was any sort of abuse within the family." *Id.* at 1097 Likewise, she stated that "there was nothing exceptional presented to [her] about drinking within the family." *Id.* Charles added that although the family members said that they did not know Rompilla well because he had spent so many years behind bars, the family was a "constant source of information." *Id.* at 1303, 1384.

Charles was questioned repeatedly and extensively by Rompilla's attorneys about the failure of the defense to look for ***242** school, prison, and medical records, and Charles explained his strategy as follows:

> I would investigate by asking my client, "how was your childhood? Were there any problems that you suffered? Any kind of abuse? ... [I]s there anything that sticks out? Don't think whether it's important or not. You just tell us, and then we'll determine whether or not we can use it." Investigate it that way. Would I send somebody to the person's elementary school to talk to the teacher to see if they remember him from 25 years or 40 years before. No. I didn't have those resources in the office.... I had two investigators and 2,000 cases.... I will talk to the client, talk to the family, and see if anything developed from there.

Id. at 1293-94. If these inquiries provided any hint that records would be helpful, he added, he would go anywhere to get the records. *Id.* at 1307.

With respect to the development of mitigation evidence regarding Rompilla's mental condition, Charles said that he had sent Rompilla to "the best forensic psychiatrist around here, to [another] tremendous psychiatrist and a fabulous forensic psychologist" and that he relied on them to detect any mental problems that might be useful to the defense and to request that the defense provide them with any records that they might need. App. 1307-08. He elaborated that when he sent Rompilla to the psychologist, he expected the psychologist to administer "a Reitan battery test to determine if there was any brain damage," [FN4] a personality test such as "the Minnesota Multiphasic Personality Inventory ("MMPI")", [FN5] a Rorschach test, [FN6] and an IQ test. *Id.* at 1323. He stated that he also expected that the results of this testing would be available to the psychiatrists. *Id.* If the mental health professionals needed any records or other information, he said, he expected them to ask for them, and he would have tried to provide whatever they sought. *Id.* He said that he also thought that the mental health professionals would interview Rompilla and that they would detect whether Rompilla's denial of anything unusual in his background seemed suspicious. *Id.* at 1308-09.

FN4. "The Reitan Battery measures organic impairment by means of a variety of exercises testing concentration, coordination, memory, motor control, abstract abilities and other cognitive and physical functions." *Barker v. Secy. of Health and Human Services*, 882 F.2d 1474, 1476 (9th Cir.1989).

FN5. The Minnesota Multiphasic Personality Inventory or "MMPI" is "one of the best known and widely used personality assessment tests." Richard Sloane, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY--1992 SUPPLEMENT 522 (1992).

FN6. The Rorschach test is "a projective psychological [test] in which the subject reveals his or her attitudes, emotions, and personality by reporting what is seen in each of 10 inkblot pictures." STEDMAN'S MEDICAL DICTIONARY 1808 (27th ed.2000).

All three of the mental health professionals to whom Rompilla had been sent by the defense testified at the PCRA hearing either in person or by deposition. All three stated that they had examined Rompilla and had found nothing useful to the defense, but as Rompilla now stresses, all three also testified that, if they had

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

been provided with Rompilla's school and other records, they would have done additional testing.

Dr. Gerald Cooke, an experienced clinical and forensic psychologist, no longer possessed records regarding his examination of Rompilla other than the letter that he had sent to the public defender's office after completing the examination, but he was able to state with "99 percent" certainty ***243** what he would have done in a case of that type. App. at 1797. In a death penalty case, he testified that one of the questions in his mind would have been whether the defendant "showed any mental illness, emotional disturbance, or other sorts of problems that might be a psychological mitigating circumstance." App. at 1808. He would have administered an MMPI, "an Incomplete Sentence Blank, [FN7] the Rorschach inkblot technique, and two or three subtests of the verbal subscale of the Wexler Adult Intelligence WAIS Revised." [FN8] *Id.* at 1797. Dr. Cooke testified that he knew that the IQ test that he would have administered to Rompilla had not produced a score in the mentally retarded range because, in that event, he would have given further tests. *Id.* at 1810. He explained that he had not prepared a report regarding his examination because it was his practice to discuss the results of an examination orally with the referring attorney and to leave it to the attorney to decide whether he should prepare a report. *Id.* at 1816. He interpreted the letter that he wrote in this case to mean that he "didn't have anything that [he] felt could be helpful." *Id.*

FN7. The Rotter Incomplete Sentences Blank Test tests maladjustment by providing the beginning of sentences (e.g., "I feel ...", "My nerves ...") that are completed by the subject. *See* www.cps.nova.edu/~ cpphelp/ ROTTER.html.

FN8. The Wechsler Adult Intelligence WAIS Revised is a test that measures general intelligence in adults. STEDMAN'S MEDICAL DICTIONARY, *supra*, 1596.

Dr. Robert Sadoff, an experienced board-certified forensic psychiatrist, also had no records about Rompilla but testified that in a case of that type he would have examined the defendant for competency to stand trial, criminal responsibility, and mitigating circumstances. App. 1841, 1859. He would have questioned and observed the defendant and would have requested psychological testing if he thought it was necessary. *Id.* From the letter that he sent to the Public Defender's Office, he said, it was fair to infer that he had found no mitigating evidence. *Id.* at 1859.

A second psychiatrist, Paul K. Gross, also testified that he had examined Rompilla prior to his trial at the request of the Public Defender's office to determine his mental status at the time but was not asked to look for mitigating factors. App. 1504, 1506, 1549. Dr. Gross stated that Rompilla "denied any abuse as a child, by either parent." *Id.* at 1517. According to Dr. Gross, Rompilla said that he had "a good relationship with his father" and a "fairly normal childhood except for the fact that he didn't like school, which he left in the ninth grade." *Id.* at 1517. Dr. Gross's conclusion at the time was that, although there was some evidence of antisocial behavior, "[t]here was no other evidence for underlying psychiatric or mental disorder." *Id.* at 1540. He added that he did not see anything in the materials shown to him by Rompilla's attorneys at the PCRA hearing that would have changed his opinion. *Id.* at 1539-40. Dr. Gross also reported that although Rompilla denied it, there was a possibility that he could become violent while under the influence of alcohol.

In the PCRA proceedings, Rompilla presented testimony of three family members: two sisters, Barbara Harris and Randi Rompilla, who testified that they were not interviewed before sentencing, and Nicholas Rompilla, who had testified at the sentencing hearing. These family members stated, among other things, that their parents were alcoholics; that their mother drank while pregnant with Rompilla; that their father was physically abusive to the children and their mother; that Rompilla ***244** was locked in an outdoor dog pen; and that Rompilla was told he was stupid and would not amount to anything and was a very nervous child who kept everything inside. Nicholas testified that during the pre-sentencing interview he was asked only about the three months prior to the offense and was not asked about Rompilla's childhood. App. 1462-63, 1467-71, 1477-78.

Rompilla also presented evidence from two psychologists, Carol L. Armstrong and Barry Crown, both of whom had evaluated and tested Rompilla after he was convicted and sentenced. These psychologists' evaluations included neuropsychological testing, review of Rompilla's school, medical, and prison records, and review of post-sentencing declarations by Barbara Harris,

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Darlene Rompilla, and Nicholas Rompilla. The psychologists stated that the low IQ and achievement test results documented in Rompilla's school records, his medical history, and his abusive background were all "red flags" indicating that further objective evaluation was necessary. App. at 1692, 1739, 1743.

Drs. Armstrong and Crown opined that Rompilla suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions. They expressed the view that Rompilla's problems relate back to his childhood and were likely caused by fetal alcohol syndrome, and they concluded that Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. *See* Rompilla Br. at 58-61.

B.

In evaluating Rompilla's ineffective assistance of counsel claim, the PCRA court noted that *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requires proof of deficient performance and prejudice. App. 2027. The court then observed that Pennsylvania cases employ a three-pronged test:

> First, a defendant must demonstrate that his claim is of arguable merit. In the event this threshold requirement is satisfied, a defendant must show that counsel had no reasonable basis for the act or omission in question. Finally a defendant must establish that but for counsel's act or omission, the outcome of the proceedings would have been different.

App. 2028 (quoting *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771 (1995)).

Applying this standard, the PCRA court concluded that Rompilla satisfied the first prong because he was "entitled to have relevant information of mental infirmity" presented to the jury, but the court held that the second prong was not met because "counsel had a reasonable basis for proceeding as they did during the penalty phase." App. 2028. The court made the following findings:

- . Drs. Cooke and Sadoff, are "recognized experts in the field of psychiatry and psychology."
- . "These experts administered tests, evaluated Mr. Rompilla, and reported back to defense counsel."
- . They found "no organic brain damage" and "nothing that could be used in mitigation."
- . They diagnosed Rompilla as a "sociopath," and this evidence "would not have been of benefit to Mr. Rompilla's case."
- . The defense attorneys provided Drs. Cooke and Sadoff "with whatever they asked for," and Drs. Cooke and Sadoff did not request the records later unearthed by PCRA counsel.
- ***245** . Trial counsel "also obtained an evaluation by Dr. Paul Gross, a well respected Lehigh Valley psychiatrist," and Dr. Gross "found nothing that would have been beneficial in the penalty phase."
- . Rompilla did not provide trial counsel with "any indication of mental problems or alcoholic blackouts" or anything else that was "particularly useful."
- . Trial counsel "spoke with members of the family in a detailed manner," and the family did not reveal the family background information adduced in the PCRA proceeding.
- . The family members' testimony at the PCRA hearing was not credible insofar as it "attempted to contradict what defense counsel indicated was asked of them during numerous communications prior to trial."

App. 2028-2029.

Based on these findings, the PCRA concluded:

- . "Given the fact that [the] three health care professionals [retained by trial counsel], all of whom were experienced forensic experts, had provided opinions ..., and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions."
- . Trial counsel was not ineffective in questioning family members because family members were questioned "in a detailed manner," and contrary testimony at the PCRA hearing was rejected.
- . "Defense counsel was reasonable in believing that the only avenue available to them was to ask the jury to show mercy upon Mr. Rompilla." "Under the circumstances of this case, this strategy was not only an appropriate one, but the only one reasonably available to counsel."

On appeal, the Pennsylvania Supreme Court also held that Rompilla's ineffective assistance claim lacked merit. The Court agreed with the PCRA court "that trial counsel was effective with respect to their investigation and presentation of mitigating evidence." *Rompilla-2*, 721 A.2d at 790. Noting that "trial counsel employed three experts to evaluate Appellant" and that "the experts found nothing helpful to Appellant's case," the Court added: "[W]e agree with the PCRA court that under the facts of this

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

case, counsel reasonably relied upon their discussion with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances." *Id.*

In the habeas proceeding, the District Court not only disagreed with the decisions of the PCRA court and the state supreme court on the ineffective assistance issue, but the District Court found that those decisions were unreasonable. *Rompilla*, 2000 WL 964750, at *14. However, the Court stated that its decision was "a very close call ... because trial counsel performed so admirably according to my review of the record" and further commented that its review of the record revealed that "trial counsel were intelligent, diligent and devoted to their task of representing [Rompilla]." *Id.* at *8, *12.

The District Court found two omissions in the opinions of the PCRA court and the state supreme court. First, the District Court stated, the prior opinions lacked "an in depth analysis of what the duty to investigate consists of in a case of this nature." *Id.* at *8. In particular, the District Court faulted the state courts for failing to "include a reference to the ABA Standards for Criminal Justice." *Id.* Second, the District Court found the state court opinions deficient for failing to discuss alcoholism. ***246** *Id.* at *8. Observing that it appeared that trial counsel "thought they could rely on the experts to determine [Rompilla's] general mental ability or capacity," the Court opined: "[I]t seems to me on balance that [trial counsel] were obliged to go a bit farther to fulfill their duty to investigate." *Id.* at *9, *12. Concluding that trial counsel's performance at the penalty phase had been inadequate and that Rompilla had been prejudiced, the Court held that Rompilla was entitled to habeas relief with respect to his sentence. *Id.* at *14.

IV.

Strickland is the Supreme Court precedent governing ineffective assistance of counsel claims, *Williams*, 529 U.S. at 391, 120 S.Ct. 1495, and in order to show ineffective assistance under *Strickland*, a defendant must demonstrate (1) that counsel's "representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. "Judicial scrutiny of a counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. "There is a 'strong presumption' that counsel's performance was reasonable." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir.2001). Thus, "a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Bell*, 122 S.Ct. at 1852 (quotations omitted).

"The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what [counsel] did was within the 'wide range of reasonable professional assistance.' " *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir.1995) (en banc) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Ultimately, the issue is not what conduct is "prudent or appropriate, but only what is constitutionally compelled," *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n. 38, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), and the Sixth Amendment "simply ... ensure [s] that criminal defendants receive a fair trial," *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. *See also Kokoraleis v. Gilmore*, 131 F.3d 692, 696 (7th Cir.1997) ("The sixth amendment does not guarantee success or entitle defendants to the best available counsel or the most prudent strategies.... [T]he Constitution is satisfied when the lawyer chooses a professionally competent strategy that secures for the accused the benefit of an adversarial trial.")

V.

In this appeal, the Commonwealth contends that the state courts reasonably applied the *Strickland* ineffective assistance standard to the facts of this case. According to the Commonwealth, the District Court erred by essentially considering the ineffective assistance issue as if it were conducting a de novo review--that is, by making its own independent application of the *Strickland* test to the facts rather than considering only whether the state supreme court's application of that test was reasonable. Rompilla of course disagrees, but he also goes further and argues that we need not reach the unreasonable application ***247** issue at all for two reasons: first, because the Pennsylvania Supreme Court did not

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

render a "decision" within the meaning of 28 U.S.C. § 2254(d)(1), and, second, because the state supreme court's decision is "contrary to" *Strickland*. We discuss each of these arguments below.

A.

Rompilla argues that the Pennsylvania Supreme Court did not render a "decision" on his Sixth Amendment claim because "[t]he Pennsylvania Court's opinion lacks any real Sixth Amendment analysis." Rompilla Br. at 98. Rompilla criticizes the state supreme court for applying the three-pronged test set out in its own cases rather than the two-pronged *Strickland* test. *Id.* He contends that the relationship between the three-part Pennsylvania formulation and the *Strickland* test is "not clear," and he faults that state supreme court for supposedly failing to address either prong of the *Strickland* test. *Id.* at 98-99. He asserts that the state supreme court mistakenly thought that his federal claim was that trial counsel did not conduct any investigation at all, whereas his actual claim was that trial counsel did not conduct a sufficiently "thorough" investigation. *Id.* at 100. Finally, he criticizes the state supreme court for failing "to render a 'decision' at all on critical aspects of this claim," *viz.*, the prejudice prong of *Strickland* and his arguments regarding alcoholism and intoxication. *Id.*

In order to address these arguments, we must first explain the critical difference under the habeas statute between, on the one hand, the failure of a state court to adjudicate a federal claim on the merits (something that may occur if the state court misconstrues the federal claim) and, on the other, the failure of a state court to hand down an opinion that discusses every argument, sub-argument, and legal authority offered by the habeas petitioner. For purposes of the habeas statute, a failure to decide affects the standard of review; a failure to discuss (either at all or to the satisfaction of the habeas petitioner or the federal court) is irrelevant.

[1] Under the habeas statute, as previously noted, if a claim was *"adjudicated on the merits"* in a state court proceeding, relief may not be granted "unless *the adjudication* of the claim ... *resulted in a decision* that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1)(emphasis added). An "adjudication on the merits" "has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir.2001). *See also Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir.2002) ("adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural"), *cert. denied*, 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772 (2003).

In *Chadwick v. Janecka*, 312 F.3d 597, 605-07 (3d Cir.2002), *cert. denied*, --- U.S. ----, 123 S.Ct. 1914, 155 L.Ed.2d 828 (2003), we discussed this issue in detail and reviewed both pertinent Supreme Court precedent and our own prior decisions in *Everett v. Beard*, 290 F.3d 500, 507-08 (3d Cir.2002), *cert. denied*, 537 U.S. 1107, 123 S.Ct. 877, 154 L.Ed.2d 777 (2003); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir.2001); and *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir.2000). We noted that under *Weeks v. Angelone*, 528 U.S. 225, 237, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), a state court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever. ***248** *Chadwick*, 312 F.3d at 606. We explained that if an examination of a state court opinion reveals that the state court did not decide a federal claim on the merits, the deferential standards of review set out in § 2254(d)(1) do not apply. *Id.* at 605-07. But if the state court decided the claim, the § 2254(d)(1) standards govern--regardless of the length, comprehensiveness, or quality of the state court's discussion. *Id. See also Sellan*, 261 F.3d at 312 (a state court adjudicates a claim on the merits when it "(1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment .... [e]ven if the state court does not explicitly refer to ... relevant federal case law."); *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir.2000) (en banc) (section 2254(d) "does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one."), *cert. denied sub nom., Bell v. Beck*, 534 U.S. 830, 122 S.Ct. 74, 151 L.Ed.2d 39 (2001); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir.1999) ("The focus is on the state court's *decision or resolution* of the case."); *Wright v. Secretary for Dep't of Corrections*, 278 F.3d 1245, 1255 (11th Cir.2002) (section 2254(d)(1) "focuses on the result, not on the reasoning that led to the result") *cert. denied*, 538 U.S. 906, 123 S.Ct. 1511, 155 L.Ed.2d 225 (2003).

[2] Here, it is abundantly clear that the state supreme court adjudicated Rompilla's Sixth Amendment claim

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

on the merits. Although the state supreme court referred to its own three-pronged ineffective assistance test rather than the two-pronged *Strickland* test, the Pennsylvania Supreme Court has explicitly held that the state standard is "the same" as *Strickland*' s and that Pennsylvania law does not provide "any greater or lesser protection" than the Sixth Amendment. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 976-77 (1987). As we put it in *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir.2000) *cert. denied*, 532 U.S. 980, 121 S.Ct. 1621, 149 L.Ed.2d 483 (2001), the Pennsylvania Supreme Court has "opined that the Pennsylvania standard judging ineffectiveness claims [is] identical to the ineffectiveness standard enunciated by the United States Supreme Court in *Strickland*." Since the brief filed in the state supreme court on Rompilla's behalf in the PCRA appeal left no doubt that the ineffectiveness claim asserted was based on federal law, it is perfectly clear that the state supreme court adjudicated that federal claim on the merits but simply chose to address the claim within the framework of its own, familiar three-part test, which it regards as "the same" as *Strickland*.

Moreover, it is apparent that this essentially stylistic choice on the part of the state supreme court had no effect on its decision. The state supreme court held that the second prong of the state formulation--requiring a showing that "counsel had no reasonable basis for the act or omission in question," *Rompilla-2*, 721 A.2d at 789--had not been met because Rompilla's trial "counsel acted reasonably" "with respect to their investigation and presentation of mitigation evidence." *Id.* at 790. The second prong of the state formulation is substantively indistinguishable from the first prong of *Strickland*--which requires a showing that counsel's "representation fell below an objective standard of reasonableness". *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Rompilla argues that the significance of the first Pennsylvania prong is unclear [FN9] and that ***249** the third Pennsylvania prong differs from *Strickland*' s prejudice prong, [FN10] Rompilla Br. at 98-99, but because the state supreme court held that Rompilla failed *the second* state prong, which is indistinguishable from the first *Strickland* prong, these arguments are entirely beside the point.

FN9. Rompilla takes exception with the first prong of the Pennsylvania formulations--whether the underlying claim has arguable merit. Although the question of the merit of an underlying claim is not an explicit step under *Strickland*, we have held that it is a determinative factor in the "deficient performance" prong of the *Strickland* analysis in at least some contexts. *See Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir.1998) (counsel not ineffective for failing to raise meritless claims).

FN10. Rompilla notes that the third Pennsylvania prong, as stated by the Pennsylvania Supreme Court's opinion, asks whether counsel's act or omission "would have" produced a different outcome, not whether, as stated in *Strickland*, there is a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Since neither the decision of the state supreme court nor our decision in this appeal turns on the issue of prejudice, we have no occasion to explore the question whether in practice prejudice is analyzed differently under these two standards.

Rompilla's remaining arguments on the question whether the state supreme rendered an "adjudication" or "decision" on the merits of his federal ineffectiveness claim require little additional discussion. There is plainly no merit to Rompilla's argument that the state supreme court mistakenly thought that his Sixth Amendment claim was that counsel failed to conduct any investigation at all regarding the matters at issue and did not appreciate that his claim was that counsel did not conduct a sufficiently thorough investigation. Although the state supreme court did use the phrase "failed to investigate," 721 A.2d at 790, it seems clear that this was simply a shorthand way of referring to the claim. The court's discussion of the various steps that counsel took and its conclusion that counsel acted "reasonably" make it clear that the court did not think that any investigation at all would suffice but instead understood that the extent of the investigation had to be "reasonabl[e]."

What we have said about the relationship between the Pennsylvania formulation of the test for ineffective assistance and the *Strickland* formulation is sufficient to dispose of Rompilla's criticism of the state supreme court for failing to discuss *Strickland* in so many words. Rompilla's criticism of the state supreme court for failing to decide whether the prejudice prong of *Strickland* was satisfied is further flawed because, in light of the state supreme court's holding that counsel's performance was reasonable, the court had no need to address the issue of prejudice. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sistrunk v. Vaughn*, 96 F.3d 666, 673 n. 8 (3d Cir.1996) (if counsel's performance is objectively reasonable, there is no need to decide prejudice).

Finally, Rompilla's complaint that the state supreme court "failed to discuss any aspect" of his arguments regarding evidence of alcoholism and intoxication goes to the style of the state court's opinion, not the question whether the state court rendered an adjudication on the merits. There are many different theories about how judicial opinions should be written. While some opinions make a point of specifically addressing every argument and every significant legal authority offered by counsel, others favor brevity and comment on only those points that the court finds most important. Because the state supreme court in this case rendered an "adjudication on the merits" of Rompilla's Sixth Amendment claim, Rompilla's criticisms of the state court's opinion cannot ***250** free him from the restrictive standards of review set out in 28 U.S.C. § 2254(d)(1).

B.

[3] There is similarly no merit in Rompilla's contention that the decision of the state supreme court was "contrary to" *Strickland* because it did not "identify and apply actual Sixth Amendment standards." Rompilla Br. at 101. A decision is "contrary to" a Supreme Court holding if the state court "contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a [different] result." *Williams*, 529 U.S. at 405-06, 120 S.Ct. 1495.

In this case, the critical standard applied by the state supreme court-- whether trial counsel had a "reasonable basis for the act[s] or omission[s] in question"--did not contradict *Strickland* but rather, as we have explained, was entirely consistent with *Strickland*. In *Werts v. Vaughn*, 228 F.3d at 202-04, as noted, we compared Pennsylvania's ineffective-assistance test with the test enunciated in *Strickland*, and we found that a state court decision that applied the Pennsylvania test did not apply a rule of law that contradicted *Strickland* and was thus not "contrary to" established Supreme Court precedent. *Id.* at 204. In the instant case, the state court applied the same state test. Accordingly, here, as in *Werts*, the state court's application of that test does not mean that its decision is "contrary to" established Supreme Court precedent.

Rompilla also argues that the state court decision is contrary to *Strickland* because counsel's failure to obtain records, without knowing the contents of the records, "*cannot* be deemed a reasonable strategy/tactic, *as a matter of Sixth Amendment law*," and because "Sixth Amendment law does *not* condition [the] obligation [to obtain records] in any way on counsel's duties with regard to expert evaluations." Rompilla Br. at 106, 108 (emphasis in original). Rompilla is essentially challenging the manner in which the state court applied the law to the facts, and thus this argument must be analyzed under the "unreasonable application" clause of § 2254(d)(1). *See Williams*, 529 U.S. at 406, 120 S.Ct. 1495 (a "run-of-the-mill state court decision" that is "in accord with ... *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim ... may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case" but is not contrary to *Strickland* itself). For these reasons, we reject Rompilla's arguments under the "contrary to" clause of § 2254(d)(1).

VI.

We now turn to the 'unreasonable application' clause of § 2254(d)(1). To obtain relief under this clause, Rompilla

> must do more than show that he would have satisfied *Strickland*' s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Bell, 122 S.Ct. at 1852 (citation omitted). In other words, Rompilla must demonstrate that "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under *Strickland*." *Werts*, 228 F.3d at 204.

***251** [4] We hold that the Pennsylvania Supreme Court's conclusion that trial counsel acted reasonably and rendered effective assistance was not an unreasonable application of *Strickland*. The findings of the PCRA court and uncontradicted testimony at the PCRA hearing establish that trial counsel

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

conducted an extensive investigation for mitigating evidence. According to their testimony, trial counsel got to know Rompilla well during the course of their representation and established a good relationship with him. Rompilla was questioned about his background but provided no useful information or leads. Trial counsel also spoke to three of Rompilla's siblings, as well as a sister-in-law and Rompilla's ex-wife. Family members were questioned "in a detailed manner," but they did not allude to any of the new evidence adduced at the PCRA proceeding.

Trial counsel retained three well-qualified mental health experts to examine Rompilla. Dr. Cooke, a psychologist, testified that in a case of this type he would have looked for mitigating evidence and would have performed a battery of tests, including an IQ test. Based on his letter to the Public Defender's office, he concluded that Rompilla's IQ test must not have shown mental retardation and that his evaluation must not have revealed any abnormalities that would have been useful in showing mitigation. Dr. Sadoff, a psychiatrist, interviewed Rompilla and evaluated him for the presence of mitigating factors, but Dr. Sadoff inferred that he also found nothing useful. A second psychiatrist, Dr. Gross, was also retained but similarly found nothing useful. In view of this record, we cannot say that the Pennsylvania Supreme Court unreasonably applied *Strickland* in concluding that trial counsel's investigation regarding mitigating evidence relating to Rompilla's family background and mental condition did not fall below the Sixth Amendment floor.

Rompilla criticizes many aspects of trial counsel's performance at the penalty phase, but we see no ground for relief under the habeas statute. Rompilla faults his trial attorneys for failing to interview two sisters who testified at the PCRA hearing--Barbara Harris, the oldest of Rompilla's siblings, and Randi Rompilla, the second youngest. But trial counsel did interview three other siblings, including two who were a few years older than Rompilla (Nicholas Rompilla and Sandra Whitby) and one Robert Rompilla, who was younger. At least some of the siblings who were interviewed must have been aware of the lurid conditions in the family home that were portrayed at the PCRA hearing, but they never mentioned anything about these matters to trial counsel despite being interviewed "in a detailed manner." It was thus not constitutionally ineffective for trial counsel to fail to anticipate that interviewing Barbara Harris or Randi Rompilla would have yielded important new information about the family home.

Rompilla also criticizes his trial attorneys for allegedly failing to ask sufficiently specific questions when interviewing family members and for allegedly failing to ask Nicholas Rompilla about any time period other than the three and one-half months just before the murder. This argument is defeated by findings of fact made by the state courts. The PCRA found that trial counsel "spoke with members of the family in a detailed manner." App. 2028. The PCRA court also rejected Nicholas Rompilla's testimony insofar as it contradicted "what defense counsel indicated was asked ... during numerous conversations prior to trial." *Id.* at 2030. Testimony at the PCRA hearing supports these findings. *See, e.g., id.* at 1303 ("I remember [Dantos] ***252** specifically going one by one and talking to him. 'Is there anything you can tell me? Tell me about yourself. Tell by about your background.' She was, you know, meticulous to cover points."). The state courts' findings must be presumed to be correct, and Rompilla has not rebutted that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). We accordingly reject Rompilla's argument regarding the interviewing of family members.

Rompilla contends that trial counsel should have sought out school, medical, police, and prison records, but this argument also falls short of meeting the AEDPA standard. With the benefit of hindsight, we know that these records contain useful information about Rompilla's childhood home environment, his mental problems, and his problems with alcohol, but trial counsel had grounds for believing that if there was any mitigating evidence of this sort to be found, at least a hint of its availability would be disclosed in the interviews with Rompilla and his family members or in the testing and evaluations performed by the three mental health experts whom they retained.

Charles, the lead trial attorney who had the final say on every issue in the case, App. 1258, explained why these records were not sought out. He testified that he would have done whatever was needed to get records if there had been any indication from the interviews or from the information provided by the mental health experts that such records would be helpful. *Id.* at 1307. But since these interviews and evaluations suggested that Rompilla's home environment, schooling, and mental condition were not promising avenues of investigation in the search for mitigating evidence, he did not think that obtaining those records would have represented a

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

sound allocation of his office's resources. *Id.* at 1293-94.

This explanation provides a reasonable basis for counsel's decision not to seek the records. Defense counsel was permitted to rely on statements made by their client in deciding on the extent of the investigation that should be conducted in particular areas. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); *id.* ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). As noted counsel's interviews with Rompilla himself and with family members provided no indication of Rompilla's abusive childhood or mental problems. *See Thomas*, 144 F.3d at 515 ("if the client and his family and friends throw the lawyer off the scent ... by denying the existence of psychological problems that might have provided an alternative theory of mitigation, the lawyer cannot be faulted for failing to go down the path thus closed off"). "The right to counsel does not require that a criminal defense attorney leave no stone unturned and no witness unpursued. [Although] it does require a reasoned judgment as to the amount of investigation the particular circumstances of a given case require[,][a]n attorney need not fully investigate every potential avenue if he or she has reasonable grounds for not doing so." *Berryman v. Morton*, 100 F.3d 1089, 1101 (3d Cir.1996). *See also Thomas v. Gilmore*, 144 F.3d 513, 515 (7th Cir.1998) ("A reasonable investigation is not ... the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would ***253** conduct.") *cert. denied*, 525 U.S. 1123, 119 S.Ct. 907, 142 L.Ed.2d 905 (1999).

It was likewise not unreasonable for trial counsel to rely on its mental health experts to detect whether there was any basis for further pursuit of mitigating evidence relating to their client's mental condition. Trial counsel retained no fewer than three highly qualified experts. Dr. Cooke and Dr. Sadoff looked for any evidence that could be used as mitigation but found none. A battery of tests was performed but yielded no indication of mental retardation or anything else that would have been useful for mitigation. Although all three of the experts testified that the records that PCRA counsel subsequently obtained would have caused them to do further investigation, none of the experts asked for records or suggested that any further testing be done.

In view of these circumstances, it was not unreasonable for the state courts to conclude that trial counsel did not fall below the constitutionally mandated level of representation by failing to search out the records at issue and by failing to provide those records to their mental health experts. This was not a case where counsel knew of the defendant's mental health or other problems and failed to inform or provide the experts with the information. *See Caro v. Calderon*, 165 F.3d 1223, 1228 (9th Cir.1999) ("A lawyer who knows of but does not inform his expert witnesses about ... essential pieces of information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment.") *cert. denied, sub nom, Woodford v. Caro*, 527 U.S. 1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). Despite counsel's attempts to find out otherwise, counsel had no knowledge of Rompilla's problems and/or childhood abuse. [FN11]

FN11. For this reason, the authority cited by Rompilla is inapposite. *See Jermyn*, 266 F.3d at 275 (counsel knew that expert was willing to testify regarding defendant's abusive childhood and its mitigating effects on the defendant's adult life); *Profitt v. Waldron*, 831 F.2d 1245, 1246-49 (5th Cir.1987) (counsel knew defendant escaped from mental hospital shortly before the crime); *Beavers v. Balkcom*, 636 F.2d 114, 115-16 (5th Cir.1981) (counsel knew of defendant's prior hospitalization in mental institution); *Glenn v. Tate*, 71 F.3d 1204, 1208 (6th Cir.1995) (counsel knew defendant had received mental health counseling) *cert. denied*, 519 U.S. 910, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996); *Antwine v. Delo*, 54 F.3d 1357, 1365-66 (8th Cir.1995) (counsel knew that defendant was acting "odd" prior to the offense) *cert. denied sub nom, Bowersox v. Antwine*, 516 U.S. 1067, 116 S.Ct. 753, 133 L.Ed.2d 700 (1996); *Hill v. Lockhart*, 28 F.3d 832, 838-40, 845 (8th Cir.1994) (counsel knew of defendant's prior hospitalization); *Kenley*, 937 F.2d at 1300, 1304-06 (counsel knew of but failed to contact a doctor who had previously treated the defendant); *Clabourne v. Lewis*, 64 F.3d 1373, 1377, 1388 (9th Cir.1995) (counsel knew defendant was mentally impaired at the time of the offense, and had "display[ed] a broad spectrum of psychiatric and emotional disorders"); *Wallace v. Stewart*, 184 F.3d

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

1112, 1114, 1116 (9th Cir.1999) (counsel knew from first sentencing hearing of defendant's "chaotic upbringing," substance abuse, and mother's mental illness) *cert. denied*, 528 U.S. 1105, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000).

In *Card v. Dugger*, 911 F.2d 1494 (11th Cir.1990), the court addressed an argument very similar to Rompilla's argument regarding trial counsel's failure to provide records to their mental health experts. In *Card*, a capital case, the mental health expert spoke to members of the defendant's family and was provided copies of pre-trial reports indicating that the defendant was competent to stand trial. *Id.* at 1512. The expert testified at the sentencing hearing that the defendant suffered from a sociopathic personality disorder and that his abusive childhood was consistent with the development of the disorder. *Id.* at 1508. The defendant claimed that ***254** counsel was ineffective in failing to provide the expert with various school, incarceration, army, and medical records and information from family members. *Id.* at 1512. This information, the defendant argued, would have enabled the expert to diagnose the defendant as suffering from organic brain damage and schizophrenia, rather than merely a sociopathic personality. *Id.* at 1512- 13. The Eleventh Circuit rejected this argument observing that

> [t]here is no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examinations. Nor is there any reason that, after receiving the experts' reports, counsel was obligated to track down every record that might possibly relate to [the defendant's] mental health and could affect a diagnosis.

Id. at 1512.

We find this reasoning persuasive. As in *Card*, there was no indication in the present case that Drs. Cooke, Sadoff, and Gross "felt incapable of basing their conclusions on the information they obtained through their own testing and examinations." *Card*, 911 F.2d at 1512. Thus, it was not unreasonable for counsel to rely on the expertise and experience of the mental health professionals in determining the need for any records. Such deference to the legitimate role of experts is well within the wide range of reasonable professional assistance.

Furthermore, it was permissible for Charles to consider his office's limited investigative resources in determining the extent of the investigation that should be conducted with respect to Rompilla's childhood, family, and mental condition. *See McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir.2002) ("the reasonableness of an investigation ... must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing"), *cert. denied*, 537 U.S. 893, 123 S.Ct. 162, 154 L.Ed.2d 158 (2002); *Mahaffey v. Page*, 151 F.3d 671, 685 (7th Cir.) ("A 'reasonable investigation' does not mandate a 'scorch-the-earth strategy,' a requirement that would fail to consider the limited time and resources that defense lawyers have in preparing for a sentencing hearing.") (citations omitted), *vacated in part on other grounds*, 162 F.3d 481 (7th Cir.1998); *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir.1994) (the focus on whether a decision not to conduct a particular investigation was reasonable "reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources").

Rompilla argues that his trial attorneys were deficient because they did not provide adequate information or instructions to Drs. Cooke, Sadoff, and Gross. Rompilla maintains that his attorneys should have instructed Dr. Cooke to test for brain damage, but Charles testified that he relied on the experts to do whatever testing was appropriate. App. 1307-08. Dr. Cooke was aware of the need for mitigating evidence. He testified that in a capital case he would have looked for indications of "any mental illness, emotional disturbance, or other sorts of problems that might be a psychological mitigating circumstance," and he performed the battery of tests that he felt was called for. *Id.* at 1808-09. He stated that if the results of some of those tests had provided a reason to do a "neuropsyche test," he would have done so. *Id.* at 1809. Thus, Rompilla is in effect faulting his trial attorneys for failing to instruct an expert to do a test that the expert apparently did not think was warranted under the circumstances. This argument demands much more than the Sixth Amendment requires.

***255** Rompilla criticizes his trial attorneys for allegedly failing to educate Dr. Sadoff about the meaning of mitigating evidence. Based on a snippet of Dr. Sadoff's testimony, Rompilla suggests that Dr. Sadoff thought that "mitigating evidence was *limited* to evidence *about the offense* itself," Rompilla Br. at 87 (citing App. 1874), whereas under the law, "mitigation is anything that 'might serve as a basis for a sentence less than death' and need 'not relate specifically to [the defendant's] culpability for the crime he committed.' " Rompilla Br. at 88 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)) (emphasis and brackets in original). There are at least three weaknesses in this argument.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

First, in light of Dr. Sadoff's background--which included extensive experience relating to the criminal justice system (*see* App. 1876-1892)--it is far from clear that trial counsel had a constitutional obligation to brief him on the meaning of exculpatory evidence. [FN12] Second, it also is not clear that Rompilla's argument accurately represents what Dr. Sadoff said. Asked by Rompilla's PCRA attorney whether he thought that evidence was mitigating only "if it relates to the defendant's state of mind at the time of the commission of the offense," Dr. Sadoff answered: "It relates to that *and the kind of person he is* ...." App. 1874. (emphasis added). He continued that in the past, he had not "used irrelevant material that had nothing to do with the crime itself as a mitigating factor. It had to be something that would have impacted on [the defendant's] state of mind at the time." *Id.* Thus, Dr. Sadoff did not say that he thought that mitigating evidence *had to be* evidence "about the offense." Rompilla Br. at 87 (emphasis in original removed). Rather, he said that the mitigating evidence that he had used in the past was evidence of something that had an impact on the defendant's mind at the time. App. at 1874. It is not apparent that mental health evidence is likely to be persuasive for mitigation purposes if it cannot have had any impact on a murderer's mind at the time of offense.

> FN12. Both Drs. Sadoff and Cooke had previously testified in criminal proceedings. *See, e.g., United States v. Green*, 544 F.2d 138, 144 (3d Cir.1976) (Sadoff and Cooke); *New Jersey v. Zola*, 112 N.J. 384, 548 A.2d 1022, 1030 (1988) (Sadoff and Cooke); *Commonwealth v. Comitz*, 365 Pa.Super. 599, 530 A.2d 473, 474-75 (1987) (Sadoff); *Commonwealth v. Stark*, 363 Pa.Super. 356, 526 A.2d 383 (1987) (Sadoff). They had also previously testified in capital cases. *See, e.g., New Jersey v. Pitts*, 116 N.J. 580, 562 A.2d 1320, 1325-27 (N.J.1989) (Sadoff and Cooke); *Commonwealth v. Aulisio*, 514 Pa. 84, 522 A.2d 1075, 1087 (1987) (Cooke); *Commonwealth v. Terry*, 513 Pa. 381, 521 A.2d 398, 405, 409 (1987) (Cooke); *Commonwealth v. Whitney*, 511 Pa. 232, 512 A.2d 1152, 1157 (1986) (Cooke); *Commonwealth v. Terry*, 501 Pa. 626, 462 A.2d 676 (1983) (Sadoff and Cooke).

Third and most important, even assuming for the sake of argument that Dr. Sadoff's understanding of the range of mental health evidence that can be mitigating was unduly narrow, we see absolutely no reason to believe that Dr. Sadoff's understanding contributed in any way to his failure to detect the conditions that Rompilla now claims. Rompilla argues that he "suffers from organic brain damage, including damage to the frontal lobes and parietal area" and that these impairments, among other things, prevent him from "adequately control[ling] and guid[ing] his behavior," "emotions," and "impulses." Rompilla Br. at 58. He argues that these conditions "substantially impair [ ] his capacity to appreciate criminality of conduct or conform conduct to the requirements of law." *Id.* at 96. Accordingly, these impairments surely would have "impacted" his mind at the time of the Scanlon murder and thus fall squarely ***256** within the scope of the sort of mitigating evidence to which Dr. Sadoff referred.

Rompilla argues that his trial attorneys were ineffective because they did not ask Dr. Gross to look for mitigating evidence. Rompilla Br. at 65 (citing App. 1535-36, 1545). However, Drs. Cooke and Sadoff did look specifically for mitigating evidence, and the scope of Dr. Gross's evaluation encompassed at least some mitigating evidence. He stated: "I was looking to see if he knew what he was doing, whether he was suffering from any kind of psychiatric disorder, whether he may have been intoxicated, exactly what his emotions and cognitive processes were." App. 1506. In light of what Drs. Cooke and Sadoff were asked to do and in fact did, trial counsel's instructions to Dr. Gross do not show that trial counsel were ineffective.

Finally, Rompilla argues that trial counsel were ineffective in failing to do further investigation relating to Rompilla's alcohol use. Rompilla never explains exactly what alcohol-related mitigation argument he believes his trial attorneys should have made, but he refers to information suggesting that there is a history of alcohol-abuse in the Rompilla family, that he is an alcoholic, that his alcoholism was caused by his traumatic childhood, that he suffers from alcohol-induced blackouts, and that he was intoxicated on the night of the murder. While these elements can be woven into an attractive mitigation argument, most of the elements are based on information in the records that trial counsel was not, for the reasons we have explained, constitutionally obligated to obtain. This includes evidence of drinking in the Rompilla family, Rompilla's abusive childhood home, blackouts, and Rompilla's

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

alcoholism.

The only alcohol-related mitigation argument that trial counsel could have made without obtaining the previously discussed records--namely, that Rompilla was so intoxicated at the time of the Scanlon murder that his judgment was impaired--would not have been particularly compelling. Moreover, while evidence to support this argument was available, [FN13] the argument would have to have been made without the support of testimony from Rompilla, who did not take the stand at either phase of the trial and denied intoxication or alcohol problems. We cannot say that it was objectively unreasonable for trial counsel not to put on such a defense.

FN13. As Rompilla points out, police reports on the Scanlon case indicated that "Rompilla was drinking heavily and was intoxicated and incoherent around the time of the offense." Rompilla Br. at 92.

Finally, Rompilla argues that the Supreme Court's recent decision in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), shows that his trial attorneys conducted an unreasonably abbreviated investigation of potential mitigating factors, but there is a sharp contrast between the conduct of the attorneys in *Wiggins* and those in this case. In *Wiggins*, the trial attorneys claimed that they made a tactical decision not to present mitigating evidence but instead to pursue the alternative strategy of attempting to prove that someone other than the defendant actually killed the victim. *Id.* at 2533. Accordingly, they made little effort to investigate the defendant's background although they had reason to believe that such an investigation would have been fruitful.

The Supreme Court found that defense counsel's investigation of their client's background was based entirely on the presentence investigation report (PSI) and documents from the Baltimore City Department of Social Services (DSS). *Id.* at 2540. Although funds were available for ***257** the preparation of a social history of the defendant, counsel did not commission such a report. *Id.* at 2536. But even the limited documents that counsel reviewed contained information that should have alerted counsel that an expanded investigation into their client's background was likely to yield mitigation evidence. The PSI reported that the defendant had spent most of his childhood in foster care and quoted the defendant as describing his background as "disgusting." *Id.* at 2536. The DSS records disclosed that the defendant's "mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food." *Id.* at 2537.

Wiggins's trial counsel nevertheless failed to follow these leads. Counsel moved for bifurcation of the penalty phase trial so that they could first attempt to show that their client did not kill the victim by his own hand and then, if that defense was rejected, offer evidence in mitigation. *Id.* at 2532. When bifurcation was denied, defense counsel made a brief reference in her penalty phase opening to the defendant's "difficult life" but "introduced no evidence of [his] life history." *Id.* And although counsel proffered some evidence that would have been introduced if the bifurcation had been allowed, no evidence of the defendant's life history or family background was included. *Id.* After the defendant was sentenced to death, new counsel commissioned the preparation of a social history. *Id.* at 2532. A social worker interviewed Wiggins and family members, obtained additional documents, and compiled evidence of severe physical and sexual abuse by Wiggins's mother. *Id.* at 2532, 2542.

Faced with these facts, the Supreme Court held that it was objectively unreasonable for counsel not to conduct a further investigation for mitigating evidence regarding Wiggins's background. *Id.* at 2541. The Court stated that "any reasonably competent attorney" would have realized that it was necessary to follow the leads in the PSI and DSS documents before making a choice among potential defenses. *Id.* at 2537. The Court stressed that "counsel uncovered no evidence in their investigation to suggest that ... further investigation would have been fruitless." *Id.* The Court also emphasized that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Id.* Instead, the Court reiterated that "[a] decision not to investigate ... 'must be directly assessed for reasonableness in all the circumstances.' " *Id.* (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052).

There are critical differences between the conduct of Wiggins's and Rompilla's trial attorneys. Wiggins's attorneys were presented with leads that "any reasonably competent attorney" would have realized

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

were promising. Rompilla's attorneys had no comparable leads. Wiggins described his childhood as "disgusting"; Rompilla insisted that his was "normal." In *Wiggins*, postconviction interviews with Wiggins himself and with members of his family produced evidence of severe abuse. 123 S.Ct. at 2542. In the present case, Rompilla's attorneys interviewed their client and numerous family members in detail before the penalty proceeding but discovered no mitigating evidence. Wiggins's attorneys "uncovered no evidence in their investigation to suggest that ... further investigation would have been fruitless." *Id.* at 2537. Rompilla's trial attorneys had a body of evidence that suggested that a ***258** further investigation into Rompilla's family background would not have been productive. Not only did Rompilla's attorneys probe their client for mitigating evidence, but they interviewed numerous members of his family, including siblings who bracketed him in age. At least one of these siblings, Nicholas Rompilla, later revealed that he knew about the conditions in the home on which Rompilla now relies, but he never provided that information to trial counsel, and although he now claims that trial counsel never asked him about any period of time other than the months immediately preceding the murder, the PCRA court found that this testimony was not believable.

In short, the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so. Rompilla's attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources. In our view, *Wiggins* is critically different from the present case.

Rompilla asserts that Dr. Gross's report "explicitly recommend[ed] that counsel investigate alcoholism," Rompilla Br. at 66, but this is not exactly what Dr. Gross wrote. Dr. Gross said that "[t]he possibility does remain ... that Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior although he himself strongly denies this." Dr. Gross added: "My recommendation is that this area should be further evaluated *before any definitive conclusions are drawn.*" (emphasis added). Thus, Dr. Gross did not say that further evaluation was likely to produce evidence that Rompilla becomes violent when drunk, only that this was a "possibility." Nor did he recommend further evaluation as a promising strategy for the defense. Instead, he merely said that "no definitive conclusions" should be drawn about this possibility unless there was a further evaluation. And finally, it should be noted that he referred to a further "evaluation" (a term that suggests a psychiatric examination), not an "investigation." Rompilla's brief repeatedly uses the term "investigate" in an apparent attempt to suggest that Dr. Gross recommended that trial counsel search for evidence such as the records discussed above. The use of this term obscures the fact that trial counsel did precisely what Dr. Gross recommended: they had Rompilla "evaluated" further, i.e., examined by another psychiatrist, Dr. Sadoff.

In conclusion, it appears to us that Rompilla is now arguing that his trial counsel were constitutionally derelict in failing to take all the steps that might have been pursued by the most resourceful defense attorneys with bountiful investigative support. But while we may hope for the day when every criminal defendant receives that level of representation, that is more than the Sixth Amendment demands. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 ("the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system"); *Burger*, 483 U.S. at 794, 107 S.Ct. 3114 ("The record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.' ") (quoting *Cronic*, 466 U.S. at 665 n. 38, 104 S.Ct. 2039) (alteration in original). The Sixth Amendment is satisfied when "counsel's conduct falls within the wide range of reasonable professional assistance," thereby "ensur[ing] that criminal ***259** defendants receive a fair trial." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. [FN14] *See also Waters*, 46 F.3d at 1512 ("The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.") (quoting *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir.1992)). Here, the state court's determination that counsel acted reasonably was not "contrary to" or an "unreasonable application" of *Strickland*.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

FN14. In finding the state courts' analysis unreasonable, the District Court relied in part on the absence of any "in depth analysis" of the duty to investigate, including the lack of any reference to the ABA Standards for Criminal Justice. *Rompilla*, 2000 WL 964750, at *9. Three important observations must be made about the District Court's treatment of this point. First, the state court's failure to *discuss* these standards does not mean that the standards themselves or the principles they embody were not considered. Second, we see nothing in the quoted portions of the ABA standards that dictates that records of the sort at issue here must always be sought. Third, although the ABA standards are important guides, they cannot be viewed as a codification of the requirements of the Sixth Amendment. In *Strickland*, the Supreme Court recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are *guides* to determining what is reasonable." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052 (emphasis added). *See also Williams*, 529 U.S. at 396, 120 S.Ct. 1495. However, the Supreme Court has made it clear that the ABA standards

are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.... [T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland, 466 U.S. at 688-89, 104 S.Ct. 2052 (citation omitted). *See also Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (the Court has "consistently declined to impose mechanical rules on counsel--even when those rules might lead to better representation").

VII.

Rompilla advances three claims related to the trial court's response to the jury's questions about accomplice liability. First, Rompilla argues that his federal constitutional right to due process was violated because the court instructed the jury on accomplice liability without providing "notice or fair warning that he might be subjected to liability as an accomplice." Rompilla Br. at 14. Second, he contends that his federal constitutional right to due process was abridged because the accomplice-liability comments did not state that "accomplice liability must be proven beyond a reasonable doubt and that conviction for murder, even based on accomplice liability, required proof of a specific intent to kill." *Id.* at 20. Third, he maintains that his rights under the Sixth, Eighth, and Fourteenth Amendments were violated because the trial judge's remarks prevented the jury "from considering and giving exculpatory and mitigating effect to evidence that someone other than Rompilla was the killer." *Id.* at 22 (emphasis in original removed).

A.

[5][6] Under 28 U.S.C. § 2254(b)(1), a state prisoner's application for a writ of ***260** habeas corpus "shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State" or the case falls within one of two exceptions to the exhaustion requirement, i.e., "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." Moreover, under 28 U.S.C. § 2254(b)(3), a state may not be deemed to have waived exhaustion or be estopped from relying on exhaustion "unless the State, through counsel, expressly waives the requirement." In order to exhaust state remedies, a habeas petitioner must present the petitioner's federal claim in the state courts. *See Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir.2001). It is not enough for a petitioner to advance a similar state-law claim. *Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Rather, a petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir.1999).

Three sections of Rompilla's brief on direct appeal to the state supreme court raised claims concerning the accomplice liability instruction. First, Rompilla argued that the judge erred in giving the instruction because the defense had no prior notice that this theory of liability was in the case and because the judge refused a defense request that "the jury be

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

specifically instructed that under an accomplice theory every element must be proven beyond a reasonable doubt." Appellant's Br. at 11, *Commonwealth v. Rompilla*, Supreme Court of Pennsylvania, Philadelphia District, No. 53 Capital Appeal Docket (hereinafter "Rompilla Direct Appeal Br."). Although this section of Rompilla's brief did refer to the requirement of proof beyond a reasonable doubt--something demanded by both the federal Constitution and Pennsylvania law [FN15]--the brief made no reference to the federal Constitution and did not cite any federal authorities. Second, Rompilla argued that the judge erred in refusing to poll the jury as to whether the guilty verdict was based on the theory of accomplice liability. Rompilla Direct Appeal Br. at 15-17. This contention was based exclusively on state law. Third, Rompilla repeated the argument that the trial judge erred in refusing to give the requested defense instruction to the effect that conviction as an accomplice required proof beyond a reasonable doubt. *Id.* at 17-18. Only state authorities grounded on state law were cited.

FN15. *See Commonwealth v. Bonomo*, 396 Pa. 222, 151 A.2d 441, 446 (1959).

Based on our examination of Rompilla's brief to the Pennsylvania Supreme Court, it is not clear that Rompilla properly presented any federal constitutional claim to that court. [FN16] Moreover, even if Rompilla's brief to the state supreme court is read as having raised the federal claim that the trial judge erred in refusing to give the requested instruction on the requirement of proof beyond a reasonable doubt, it seems clear that the remaining federal constitutional claims advanced by Rompilla in this appeal were not presented to the state supreme court. Rompilla's argument in the state supreme court concerning the lack of prior notice was based solely on state authorities, and the argument that Rompilla has made to us that the trial ***261** judge's instruction effectively prevented the jury from considering exculpatory and mitigating evidence was never made, either as a state- or federal-law claim, in Rompilla's direct appeal brief.

FN16. On direct appeal, the state supreme court described Rompilla's argument as follows:

by being instructed on an accomplice theory and then being told to disregard it, the jury might have been confused and convicted [Rompilla] as an accomplice.

Rompilla-1, 653 A.2d at 631.

In view of these deficiencies, if Rompilla could still return to the state courts and present the federal constitutional claims that he has made here, we would probably be obligated to regard those claims as unexhausted. It is clear, however, that Rompilla can no longer raise those claims in state court, 42 Pa. Cons.Stat. Ann. § 9545(b), and therefore it appears that those claims are exhausted but are probably procedurally defaulted. *See Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.2001). The Commonwealth has not raised the defense of procedural default, but we have the discretion to do so in appropriate circumstances. *See Sweger v. Chesney*, 294 F.3d 506, 520 (3d Cir.2002) *cert. denied*, --- U.S. ----, 123 S.Ct. 1902, 155 L.Ed.2d 830 (2003). Nevertheless, we do not rely on the doctrine of procedural default in deciding this appeal. Assuming for the sake of argument that our consideration of those claims on the merits is not barred, we find that the claims do not provide a basis for habeas relief.

B.

When language in jury instructions is challenged, the language in question "must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). We then consider " 'whether there is a *reasonable likelihood* that the jury has applied the challenged instructions in a way' that violates the Constitution." *Smith v. Horn*, 120 F.3d 400, 411 (3d Cir.1997) (quoting *McGuire*, 502 U.S. at 72, 112 S.Ct. 475.) Under these standards, the trial judge's comments about accomplice liability did not violate Rompilla's constitutional rights.

1.

[7] Since there were no eyewitnesses to the killing, the Commonwealth's case was based almost entirely on the previously noted circumstantial evidence. *See Rompilla-1*, 653 A.2d at 629. The defense argued that someone other than Rompilla was the actual assailant.

During jury deliberations in the guilt phase, the jury asked:

> If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?

App. at 585. In response, the trial judge began by informing the jury that the Commonwealth had not proceeded on the theory that Rompilla was liable for

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

the murder as an accomplice and that no instruction on accomplice liability had been given. The judge stated:

> Well, preliminarily, let me say this. If you recall, *the Court, in [its] Charge, at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice.* I'm not quite sure what prompted the question. If it arose because of something that was argued by Counsel in the closing speeches, if you recall, I indicated that you are to give--and you should be guided by each Lawyer's arguments to the extent they're supported by the evidence and in so far as they aid you in applying your own reason and common sense. However, you are not required to accept the arguments of either Lawyer. It is for you alone--you and you alone to decide this case based on the evidence as it was presented from this witness stand and in accordance ***262** with the instruction which the Court gave you. Now, again, as I say, I'm not quite sure what prompted the question, but you did ask the question, and I assume you want an answer, is that correct?

Id. at 585-86 (emphasis added). The jury foreman nodded in the affirmative, and the trial court then attempted to explain when an accomplice could be held liable for a crime committed by another. *Id.* at 586-87. The court concluded, however, with the following comments:

> I can only say this to you, that *you should determine this case based on the Charge of the Court as it had given you originally.* There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but *it requires other proof or findings on your part that were not a part of this case nor were they made a part of this case, all right.*

Id. at 587-88 (emphasis added).

On direct appeal, the state supreme court did not decide whether the trial judge's comments about accomplice liability were flawed but instead held that any error was cured by the judge's admonition to the jury that it should not consider that theory of liability. *Id.* [FN17] The District Court-- presented with arguments notably different from those advanced in the state supreme court--went beyond the state supreme court in holding that the judge's explanation of accomplice liability was incomplete, but the District Court agreed with the state supreme court that any flaw was cured by the trial court's admonition that the theory of accomplice liability was not before the jury in this case. *Rompilla,* 2000 WL 964750, at *14. Similarly, we conclude that, even assuming *arguendo* that the challenged comments were constitutionally flawed, there is no basis for habeas relief. The state supreme court's decision that any defect in the challenged comments was cured by the judge's admonition that the jury was not to consider the theory of accomplice liability did not "involve an unreasonable application of Federal law," 28 U.S.C. § 2254(d)(1), namely, the rule that jury instructions do not violate the Constitution unless there is a reasonable probability that they were applied in a way that abridged constitutional rights. Moreover, even under a standard of plenary review, we would find no constitutional violation.

> FN17. In the PCRA appeal, Rompilla again attempted to challenge the trial judge's instruction on accomplice liability, but the state supreme court held that relief was unavailable because the claim had already been litigated on direct appeal. *Commonwealth v. Rompilla,* 554 Pa. 378, 721 A.2d 786, 793 (1999).
>
> In the federal habeas proceeding, the District Court also found that the instruction did not prevent consideration of exculpatory and mitigating evidence and that Rompilla's claim that there was evidence of an accomplice was not supported by the record. *Id.*

Here, the clear thrust of the trial court's response to the jury's question was that the Commonwealth was not relying on the theory that Rompilla was liable as an accomplice and that the jury should not consider that theory as a possible basis for conviction. As noted, when the judge first responded to the jury's question, the judge began by reminding the jury that the court's instructions "at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice." App. 585-86. In addition, the judge told that jury that they were required to decide the case "in accordance ***263** with the instruction which the Court gave you." *Id.* Since "the instruction which the Court gave [the jury]" "at no time referred to any theory of accomplice in this case," *id.* at 585-86, the judge's comments meant that the jury was to decide the case without relying on the theory of accomplice liability. The judge's final statements regarding accomplice liability made exactly the same point. The judge stated: "I can only say this to you, that you should determine this case based on the Charge of the Court as it had given you originally." *Id.* at 587. Jurors are presumed to follow the court's instructions. *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In view of the instructions given here, it is not reasonably likely that the jury interpreted the judge's comments to mean anything other than that they were not to consider accomplice liability as a possible ground for conviction.

Once the meaning of the judge's comments is understood, it is apparent that there is no merit in Rompilla's argument that his right to due process was violated because he did receive prior notice that he might be subjected to liability as an accomplice or in his argument that the judge's explanation of accomplice liability was constitutionally flawed. Since the trial judge told the jury that it was to decide the case without relying on the theory of accomplice liability, these arguments fail.

Rompilla contends that the trial court told the jury that it should not consider accomplice liability because no evidence was presented during the trial to support such a finding. Rompilla Br. at 16. Rompilla then maintains that the trial judge gave contradictory instructions in that, on the one hand, he told the jury not to consider accomplice liability because there was no evidence to support such a finding and, on the other hand, he told the jury that it was the sole factfinder and its recollection of the evidence should therefore control. According to Rompilla, the jury was left with two irreconcilable options--either to disregard the theory of accomplice liability because the trial court believed there was no evidence to support the theory or to consider the theory if the jury, as sole factfinder, believed, as suggested by its question, that there was evidence of an accomplice.

This elaborate argument rests on the faulty premise that the trial judge instructed the jury that the reason why the theory of accomplice liability was not in the case was because there was no supporting evidence. In fact, however, the judge never made such a statement. The trial judge did state that "[t]here was no evidence in this case with regard to the question as posed," but he did not state that this was why the theory was not in the case. Rather, as noted, the judge twice told the jury that they were not to consider accomplice liability *because it was not in the original charge,* and the judge also noted that "[i]t [was] not the Commonwealth's theory in this case that the Defendant was an accomplice."

Rompilla's remaining argument (that the trial judge's statements prevented the jury from considering exculpatory and mitigating evidence) entirely misconstrues the judge's words. The judge did not, as Rompilla contends, say that there was no evidence that another person was involved. Rather, the judge stated that "[t]here was no evidence in this case *with regard to the question as posed.*" The "question as posed" was: "If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?" Thus, the judge essentially said that there was no evidence to support a conviction under an accomplice liability theory; the judge did not say that there was no evidence that might justify ***264** reasonable doubt, or residual doubt for purposes of sentencing mitigation, as to whether Rompilla committed the killing with the requisite intent. Accordingly, nothing that the judge said foreclosed consideration of exculpatory or mitigating evidence.

In sum, after considering all of Rompilla's arguments regarding accomplice liability, we see no ground for habeas relief.

VIII.

Rompilla contends, finally, that his future dangerousness was put at issue during the sentencing phase of his trial and that therefore, under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the trial court was required to inform the jury that "life" imprisonment under Pennsylvania law means "life without parole." We agree with the District Court, however, that the Pennsylvania Supreme Court's rejection of this claim cannot be disturbed under the narrow standard of review prescribed by AEDPA.

A.

[8] Rompilla maintains that the state supreme court's decision was "contrary to" and represented "an unreasonable application" of *Simmons.* [FN18] The actual holding in *Simmons,* however, as set out in Justice O'Connor's controlling opinion, is narrower than Rompilla acknowledges.

> FN18. *Simmons* applies here because it was decided before Rompilla's conviction became final upon conclusion of his direct appeal in 1995. *Cf. O'Dell v. Netherland,* 521 U.S. 151, 156-57, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

In *Simmons*, the defendant was convicted of capital murder for the killing of an elderly woman. *Simmons*, 512 U.S. at 156, 114 S.Ct. 2187. The defendant had a history of assaulting elderly women, and both defense and state witnesses agreed that the defendant posed a continuing danger to elderly women. *Id.* at 157, 114 S.Ct. 2187. During the penalty phase, the state argued that the question for the jury was "what to do with [the defendant] now that he is in our midst." *Id.* The state also urged that a death sentence would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* The defendant sought to rebut the state's argument by presenting evidence that his dangerousness was limited to elderly women and that there was no reason to expect acts of violence once he was in a prison setting. *Id.* The trial court denied defense counsel's request for a parole ineligibility instruction. *Id.* at 158-60, 114 S.Ct. 2187. During deliberations, the jury asked if a life sentence included the possibility of parole. *Id.* at 160, 114 S.Ct. 2187. The trial court instructed the jury not to consider parole or parole eligibility and told the jury that life imprisonment and death were to be understood in their plain and ordinary meaning. *Id.* Shortly thereafter, the jury returned with a sentence of death. *Id.*

The United States Supreme Court held that, under these circumstances, due process required the trial judge to inform the jury that the defendant would not have been eligible for parole if sentenced to imprisonment for life. The plurality opinion endorsed by four Justices reasoned that

> the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous ***265** misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and *by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed.*

Id. at 161-62, 114 S.Ct. 2187 (plurality)(emphasis added). The plurality found that the jury was then "left to speculate about ... parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer ... even when it was requested." *Id.* at 165-66, 114 S.Ct. 2187. Consequently, the plurality stated that "where the defendant's future dangerousness *is at issue*, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156, 114 S.Ct. 2187 (plurality)(emphasis added). *Id.* at 161-62, 114 S.Ct. 2187. [FN19]

> FN19. Justice Souter's concurring opinion, in which Justice Stevens joined, was phrased in seemingly broader terms. *See* 512 U.S. at 172, 114 S.Ct. 2187 (Souter, J., concurring)("at least when future dangerousness is an issue...."). The *Simmons* dissenters interpreted the plurality opinion as apparently requiring admission of parole ineligibility even when the prosecution does not argue future dangerousness. *Id.* at 183, 114 S.Ct. 2187 (Scalia, J., joined by Thomas, J., dissenting).

The controlling opinion in *Simmons*--Justice O'Connor's concurrence in the judgment, in which the Chief Justice and Justice Kennedy joined--seemed to phrase the holding more narrowly. Justice O'Connor stated that a "defendant should be allowed to bring his parole ineligibility to the jury's attention ... in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and *the prosecution argues* that the defendant will pose a threat to society in the future." *Id.* at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgement) (emphasis added). Other passages in Justice O'Connor's opinion pointed in the same direction. She referred to cases " '[w]here *the prosecution specifically relies on a prediction of future dangerousness* in asking for the death penalty,' " *id.* at 175, 114 S.Ct. 2187 (emphasis added) (citation omitted)(brackets in original) and cases where "the State seeks to show the defendant's future dangerousness." *Id.* at 177, 114 S.Ct. 2187. *See also id.* at 176, 114 S.Ct. 2187 ("the State sought to show that petitioner is a vicious predator who would pose a continuing threat to the community"); *id.* at 177, 114 S.Ct. 2187 ("The prosecutor in this case put petitioner's future dangerousness in issue").

In short, whereas the *Simmons* plurality opinion may be read to state that the *Simmons* rule applies whenever a defendant's future dangerousness is "at issue" (whether or not the prosecution makes that argument), Justice O'Connor's controlling opinion may be read more narrowly to hold that the rule governs only where the prosecution actually

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

"argue[s]" that a defendant poses a future threat. Neither position, of course, has perfectly clear boundaries. There is a sense in which future dangerousness is "at issue" at the penalty phase of virtually all capital cases. The possibility that a first-degree murderer will kill again is likely to be present in the jurors' mind in all cases except those where the defendant committed the murder for which he or she was convicted only because of unusual circumstances that are very unlikely to occur again even if the defendant is released from prison. As the Chief Justice has put it, "[i]t is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make [an inference of ***266** future dangerousness to society]." *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 735, 151 L.Ed.2d 670 (2002)(Rehnquist, C.J., dissenting). Thus, read liberally, the plurality's position in *Simmons* would mandate that the jury be informed about parole ineligibility in almost all capital cases in which the only possible sentences are death or life without parole.

On the other hand, the fine line that Justice O'Connor's opinion seemed to draw--between cases in which the prosecution "argue[s]" future dangerousness and cases in which future dangerousness is inferred by the jury from the evidence that is brought to its attention--is difficult to police and arguably superficial. A prosecutor may encourage a jury to think about future dangerousness without expressly referring to that concept.

Last year, in *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), [FN20] the Court arguably broadened the holding in *Simmons*. In *Kelly*, the state told the jurors in its opening at the penalty phase: "I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." *Kelly*, 122 S.Ct. at 729. The state then presented evidence that while in prison, Kelly had made a knife, had attempted to escape from prison, and had planned to hold a female guard as a hostage. *Id.* The state also brought out evidence of "Kelly's sadism at an early age, and his inclination to kill anyone who rubbed him the wrong way." *Id.* (citation omitted). During closing arguments, the state referred to Kelly as "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid." *Id.* The state also told the jurors that "Kelly doesn't have any mental illness. He's intelligent ... He's quick-witted. Doesn't that make somebody a little more dangerous .... for this lady ... doesn't that make him more unpredictable for [the victim] .... murderers will be murderers. And he is the cold-blooded one right over there." *Id.* at 729-30. The trial court did not give a parole ineligibility instruction. *Id.* at 730.

> FN20. *Kelly* was decided after briefing was completed and before oral argument in this case. Rompilla submitted a Notice of Supplemental Authority, pursuant to Fed. R.App. P. 28(j). After oral argument both parties submitted supplemental memoranda addressing the issue of whether *Kelly* was applicable to the instant matter.

The Supreme Court held that Kelly's future dangerousness was sufficiently put at issue that he was entitled to a parole ineligibility instruction. *Id.* at 731, 733-34. In the body of its opinion, the Court stated that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." *Id.* at 732. The Court recognized that "it may well be that the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to be dangerous in the future," but the Court declined to address the issue of whether a defendant is entitled to a parole ineligibility instruction when the state's evidence shows future dangerousness but the prosecutor does not argue it. *Id.* at 732 n. 4. The Court concluded that "[t]he prosecutor accentuated the clear inference of future dangerousness raised by the evidence and placed the case within the four corners of *Simmons*." *Id.* at 732.

The *Kelly* dissenters, including two of the Justices who had joined Justice O'Connor's opinion in *Simmons*, argued that the Court had improperly extended *Simmons*' s reach. *See id.* at 735 (Rehnquist, C.J., joined by Kennedy, J., dissenting) ("the test is no longer whether the State argues ***267** future dangerousness to society[,] [as the Court found in *Simmons*]; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society") and *id.* at 737 (Thomas, J., joined by Scalia, J., dissenting) ("the Court dilutes the *Simmons* test, now requiring that a parole ineligibility instruction be given where the prosecution makes arguments that have a *'tendency* to prove dangerousness in the future.' ").

Even if *Kelly* broadened *Simmons*, however, *Kelly* cannot aid Rompilla here. Under 28 U.S.C. § 2254(d)(1), our review is limited to deciding whether

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

a state court decision is "contrary to" or an "unreasonable application" of Supreme Court precedent *"as of the time of the relevant state-court decision."* *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (emphasis added). The state court decisions in this case preceded *Kelly*. Accordingly, regardless of whether *Kelly* expands the circumstances when future dangerousness is at issue for purposes of requiring a parole ineligibility instruction, the case is not applicable to the instant matter. We are limited to deciding whether the state court decisions in this case were contrary to or an unreasonable application of the holding in *Simmons* itself--which is to say Justice O'Connor's controlling concurrence. We must thus determine whether the Pennsylvania Supreme Court was reasonable in concluding that the prosecutor in the present case did not "argue[ ]" that Rompilla would present a future danger if not sentenced to death. We therefore turn to the relevant events at the penalty phase of Rompilla's trial.

B.

During the penalty phase, the Commonwealth attempted to establish the aggravating factor that Rompilla had a "significant history of felony convictions" as specified in 423 Pa.C.S. § 9711(d)(9). In doing this, the Commonwealth read into the record the testimony of J.M., a female bar owner whom Rompilla had previously robbed, slashed with a knife, and raped. During closing arguments, the Commonwealth argued:

> [T]he woman that was raped, was raped pretty brutally. She was raped at knife point.... [I]sn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing.... On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from [J.M.'s] Bar, takes a taxi the night of this crime. He slashes [J.M.] in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. But there is one difference, one major difference, [J.M.] lived through her experience. Jimmy Scanlon didn't.... I keep wondering, why did the Defendant wait till Jimmy Scanlon left the Bar? He knew he was closing up. Why didn't he just wait until he had left to break in and steal the money, no problem, nobody gets hurt? You have to ask yourselves, why didn't he wait for Jimmy Scanlon to leave? Was it his intent to kill right from the start? Was it his intent to do serious bodily injury right from the start? Because if he had waited maybe a half hour, an hour later, Jimmy Scanlon would have been gone. This wouldn't be a homicide case. Jimmy Scanlon would still be living. I think the Defendant learned a lesson from [J.M.] in that case, that Rape case. That lesson was, don't leave any witnesses. Don't ***268** leave anybody behind that can testify against you.

App. at 779-80.

During its deliberations the jury asked:

> If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?

Id. at 802. The trial judge answered:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I--if there were other alternatives that you should consider, we would have outlined them in the Charge, all right.

Id. at 802-03.

Several hours later, the jury asked to see the docket entries for Rompilla's prior convictions for the purpose of ascertaining Rompilla's prior sentence. The judge denied the request, and the following exchange took place:

> Juror No. 3: ... we want to know if it was--the sentence was--if he got released on behavioral--
> Foreman: It was commuted in any way, the original sentence.
> Court: Well, that we can't give you.
> Prosecutor: You can't tell them.

Id. at 823-24.

The next day, after two more hours of deliberation, the jury asked:

> Was the Defendant offered any type of rehabilitation either while in prison or after his release from prison?

Id. at 842. The following colloquy then occurred:

> Court: Well, I'm sorry to say, I can't answer that. I can only tell you that you're going to have to make your decision based upon the evidence that was presented and in accordance with the Law with respect to Sentencing Hearing. First of all, I couldn't even answer it if I wanted to or if I could, I don't know.
> Foreman: Could I change the question to this point that is--isn't rehabilitation available in prison?
> Court: Well, again, I would like to even answer that, and I can't. You're going to have to rely upon your own knowledge of that aspect if, indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be quite frank with you, is not an issue before--before you with respect to the Law that it's a decision that you must make. I can understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find. All right.

Id. at 842-43. Three hours later the jury returned a sentence of death.

The PCRA court found that *Simmons* did not apply because the prosecutor did not argue future dangerousness. App. at 2025. The District Court similarly found that a "fair reading of [the prosecutor's summation] leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness," but rather upon Rompilla's "despicable, savage and cowardly beating" of the victim. *Rompilla*, 2000 WL 964750, at *15. The District Court concluded that although a "close issue," the state supreme court's decision was not an unreasonable application of federal law. *Id.*

***269** C.

As noted, Rompilla relies on both the "contrary to" and "unreasonable application" prongs of 28 U.S.C. § 2254(d)(1). We will discuss each prong separately.

1.

A result is "contrary to" a Supreme Court holding if the state court "contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result." *Id.* at 405-06, 120 S.Ct. 1495. *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). This prong is not met here because the Pennsylvania Supreme Court applied the holding of *Simmons* and because the facts of *Simmons* and the present case are materially distinguishable.

Rompilla argues that the state supreme court's decision is "contrary to" *Simmons* because the state supreme court did not inquire whether there was "a 'reasonable likelihood' that parole and future dangerousness affected the sentencing decision." Rompilla Br. at 42 (citing *Simmons*, 512 U.S. at 170, 114 S.Ct. 2187). We reject this argument. Neither the *Simmons* plurality nor Justice O'Connor's concurrence stated that the test for entitlement to an instruction on parole ineligibility hinges on whether there is a reasonable likelihood that future dangerous might figure in the jury's verdict. Rather, the *Simmons* plurality opinion referred to the concept of "reasonable likelihood" in considering a different question--whether, once future dangerousness was put at issue, there was a "reasonable likelihood" that a jury instruction "directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning" dispelled any misunderstanding that the jurors might have had as to the meaning of life imprisonment. *Simmons*, 512 U.S. at 169-70, 114 S.Ct. 2187 (citing *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

Rompilla contends that the prosecution necessarily put his future dangerousness at issue by presenting evidence of his prior criminal conduct to establish the aggravating factor that he had a significant history of felony convictions. According to Rompilla, the state supreme court rendered a decision that was "contrary to" *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) and *Ramdass v. Angelone*, 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000), when it rejected this argument on the "formalistic" ground that this aggravator concerns past conduct rather than future behavior. Rompilla Br. at 42. This argument is also meritless. It overlooks the scope of Justice O'Connor's *Simmons* concurrence, which, as noted, can reasonably be read as focusing on the prosecution's arguments, not the inferences that arise from the facts that are proven. On this view, proving past crimes that may cause jurors to worry about future dangerousness is quite different from arguing that a defendant presents a future threat.

In addition, *Skipper* does not hold or even state that proving prior felony convictions is tantamount to arguing that a defendant presents a future threat for *Simmons* purposes. In *Skipper*, the Court held that the capital defendant's right to present all relevant mitigating evidence at the sentencing stage of the trial was violated by the state court's refusal to admit evidence that the defendant had made a good adjustment to jail during the time between his arrest and the trial. Thus, *Skipper* had nothing to do with an

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

instruction ***270** on parole ineligibility. [FN21]

FN21. Rompilla refers to the *Skipper* Court's statement that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." 476 U.S. at 5, 106 S.Ct. 1669. If this dictum is true--that people will inevitably draw inferences of probable future behavior from evidence of past conduct--it may argue against drawing the line suggested in Justice O'Connor's *Simmons* concurrence between cases in which the prosecution argues that a defendant presents a future danger and cases in which the facts give rise to an inference of future dangerousness. But that plainly does not make the decision of the Pennsylvania Supreme Court in this case "contrary to" *Skipper*, which was not even a *Simmons* case.

Rompilla's reliance on *Ramdass* is also misplaced. Not only does *Ramdass* post-date the decision of the Pennsylvania Supreme Court, but *Ramdass* does not address the question of when future dangerousness is sufficiently put in issue to require an instruction on parole ineligibility. In *Ramdass*, the prosecution expressly argued future dangerousness as an aggravating circumstance, and thus that point was not disputed. *Ramdass*, 530 U.S. at 161, 120 S.Ct. 2113. Instead, the issue in *Ramdass* was whether the defendant was eligible for parole at the time that was relevant for *Simmons* purposes. *See id.* at 166-68, 114 S.Ct. 2187.

Third, Rompilla argues that his case is "materially indistinguishable" from *Simmons*, but we disagree. In *Simmons*, as noted, the prosecution expressly argued that the defendant posed a future threat, stating that "a verdict for death would be 'a response of society to someone who is a threat. Your verdict will be an act of self-defense.' " *Simmons*, 512 U.S. at 157, 114 S.Ct. 2187. In this case, by contrast, the Commonwealth made no specific references to any possible future conduct by the defendant. We thus hold that the decision of the Pennsylvania Supreme Court was not "contrary to" *Simmons*.

2.

Rompilla next contends that the state supreme court's decision represents an "unreasonable application" of *Simmons*, but while we agree with the District Court that the application of *Simmons* to the present case would be "close" if we were exercising plenary review, we are convinced that the state supreme court's decision was reasonable.

Rompilla maintains that the state supreme court's decision was unreasonable because its opinion did not discuss all of evidence on which he relies in arguing that his future dangerousness was sufficiently put at issue during the penalty phase of his trial. Rompilla Br. at 45. As we have already explained, however, 28 U.S.C. § 2254(d)(1) calls upon us to decide whether the adjudication of a claim on the merits in state court "resulted in a decision" that "involved an unreasonable application of ... clearly established Federal law." This standard applies even when a claim is adjudicated on the merits without any discussion at all. *See Weeks*, 528 U.S. at 237, 120 S.Ct. 727; *Chadwick v. Janecka*, 312 F.3d at 606. Accordingly, we must look to the reasonableness of what the state supreme court decided, not the detail included in its opinion.

Rompilla argues that the prosecution raised the issue of future dangerousness in its closing by stating that Rompilla had "learned a lesson" from the prior rape, namely, that he should not leave any witnesses and by repeatedly asking the jury whether the similarities between the rape and his murder of Scanlon were not "frightening." Rompilla contends that these comments painted a picture of him as a "hardened, frightening, violent recidivist who, if ever released, would commit ***271** additional violent crimes and would not 'leave any witnesses.' " Rompilla Br. at 34-35.

We have given this argument careful consideration, but in the end it does not persuade us that the difficult standard of § 2254(d)(1) is met. Reading the Commonwealth's remarks in the context of the entire sentencing proceedings, it appears to us that the Commonwealth did not argue future dangerousness. In her emotional closing argument at the penalty phase, defense counsel argued over and over that, although the jury had found the defendant guilty, they must have had some doubts about his guilt in view of the evidence and that they should therefore not impose a sentence of death. She stated:

> You, as a Jury, convicted him of First Degree Murder. You convicted him, in your minds, beyond a reasonable doubt, but you must have some doubt. There has got to be some doubt there with no eye witness, with circumstantial evidence....
> So I know that you have to have some doubt as to what actually happened that night. We may never know what actually happened that night....
> Don't you want to be sure before you condemn that man to die because don't fool yourselves. A death sentence is death.... No more questions after that....
> I saw you all struggling with this. I saw it Monday night at 10:00 o'clock when we let you go for the evening. You looked tired, you looked nervous, and you looked like you've been struggling.... [I]f you're struggling with it, the fact that you had some doubt should also stay in your mind, now. If there was any doubt, and I submit to you that there has to be some doubt. There has to be. You don't know what happened. You'll never know exactly what happened. There's got to be some doubt here....
> What if you're wrong? Can you live with that?....
> You've rendered what you felt was a just verdict. I have no quarrel with you, that was your job, you came back with a verdict but none of you can tell me that you have no doubts and if you have a doubt, then you better think very, very, carefully about what you're going to do here....
> Don't take a chance that you may be making a wrong decision that you can't live with. Please, spare his life, thanks.

App. 767-774.

The prosecutor's remarks upon which Rompilla now relies came in response to these defense comments suggesting that the jury should still have doubts about the defendant's guilt. Seeking to dispel any such doubts, the prosecutor's obvious point in stressing the similarities between the circumstances of the rape for which Rompilla had previously been convicted and the Scanlon murder was to convince the jury that the same man had committed both crimes. Although the prosecutor at times termed the similarities between the two crimes "frightening," it seems clear that he did not use this term to suggest that Rompilla was "frightening" in the sense that he posed a future threat, but simply that the similarities were, as he more aptly put it at another point, "astounding." That his argument did not go to future dangerousness is illustrated by the fact that many of the features of the two crimes that he highlighted--both occurred at a bar, both took place at around closing time, and in both instances the perpetrator used a taxi--are not features that naturally suggest future dangerousness. The prosecutor's further comment that Rompilla had learned a lesson from the rape, i.e., ***272** that he should not leave any witnesses, came immediately after this litany of similarities, and the comment seems to have had two likely purposes: to explain why there was no eyewitness to the most recent crime and to explain why the two crimes differed in the important respect that one involved a killing and the other did not.

In any event, even if this interpretation of the prosecutor's comments is incorrect and even if they were meant to *imply* that Rompilla would present a future danger if he was ever released from prison, the fact remains that the prosecutor never actually argued that Rompilla presented a future threat. Concluding that these facts did not bring the case within the holding of *Simmons*, as set out in the controlling concurrence, is by no means "unreasonable." Particularly in view of the fact that the Justices who endorsed the controlling concurrence in *Simmons* apparently felt that it was important to draw the line where they did, rather than approving the arguably broader reach of the plurality, the state court's failure to extend *Simmons* to situations in which the prosecution does not argue future dangerousness was not an "unreasonable application" of *Simmons*. [FN22]

FN22. Rompilla points to the testimony regarding his parole status and the lack of rehabilitative services as indicating that his future dangerousness was an issue for the jury. This evidence was brought out by defense counsel on direct examination of Rompilla's witnesses and was not argued by the Commonwealth. Rompilla also points to the jury's questions regarding parole and future dangerousness. Although the questions may demonstrate that the jury did not know the meaning of "life" imprisonment, *see Simmons*, 512 U.S. at 170 n. 10, 114 S.Ct. 2187; *id* at 178, 114 S.Ct. 2187 (O'Connor, J., concurring); *Rompilla-2*, 721 A.2d at 795 (Flaherty, C.J., dissenting), a jury's uncertainty as to parole ineligibility is insufficient to require an instruction under *Simmons*.

Rompilla also argues that the state supreme court's decision is an unreasonable application of Supreme Court law because it "flies in the face of" the state court's prior decisions regarding future dangerousness and prior criminal history and thus violates the Eighth and Fourteenth Amendment requirements that capital sentencing be applied consistently and with an even hand (citing *Eddings v. Oklahoma*, 455 U.S. 104, 126, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Gardner v. Florida*, 430 U.S. at 349, 361, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)). Rompilla Br. at 44.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

In making this argument, Rompilla points to the passage in the state supreme court opinion addressing his argument that his future dangerousness was put at issue for *Simmons* purposes by the prosecution's effort to prove as an aggravating circumstance that he had a significant history of violent felony convictions. *Rompilla- 2*, 721 A.2d at 795. Rejecting this contention, the state supreme court stated that "this aggravating circumstance only addresses Appellant's *past* conduct, not his *future* dangerousness." *Id.* Rompilla attacks this reasoning on the ground that the underlying rationale for this aggravating circumstance is that a history of violent felony convictions is a "barometer of future danger." Rompilla Br. at 44. He therefore contends that the state supreme court's holding in the present case violates the principle that a state must administer its death penalty statute evenhandedly. There is no merit in this argument.

The constitutional principle on which Rompilla relies demands consistency in a state's treatment of its capital cases, and we have not been presented with any evidence that Pennsylvania does not apply the *Simmons* standard evenhandedly. On the contrary, it appears to us that Pennsylvania has uniformly required a *Simmons* ***273** instruction when the prosecutor specifically raised the issue of future dangerousness, *see, e.g., Commonwealth v. Trivigno*, 561 Pa. 232, 750 A.2d 243, 252-54 (2000) (prosecutor asked jury to use prior convictions as a "weather vane looking into the future" and a "determinant of where [the defendant] is going, not just where he's been"); *Commonwealth v. Chandler*, 554 Pa. 401, 721 A.2d 1040, 1046-47 (1998) (prosecutor asked jury to "stop [the defendant] from ever killing another woman again"), and has not required the instruction when the prosecutor only presented evidence of prior convictions. *E.g., Commonwealth v. Robinson*, 554 Pa. 293, 721 A.2d 344, 355 (1999) (prosecutor only made references to defendant's past dangerousness); *Commonwealth v. King*, 554 Pa. 331, 721 A.2d 763, 779 (1998) (prosecutor only made reference to defendant's past violent acts); *May*, 710 A.2d at 47 (prosecutor did not argue future dangerousness). *See also Robinson*, 721 A.2d at 355 (recognizing that the court requires a *Simmons* instruction only when future dangerousness is "expressly implicated").

Rompilla does not dispute the fact that Pennsylvania applies the *Simmons* rule evenhandedly. Instead, his complaint is that there is, in his view, a logical inconsistency between the rationale for the aggravator in question and the Pennsylvania Supreme Court's interpretation of *Simmons*. This argument, however, is invalid for numerous reasons. First, the constitutional principle on which Rompilla relies concerns consistency in the treatment of cases, not logical consistency in all aspects of a state's death penalty jurisprudence. Second, Rompilla has not identified a logical inconsistency. The Legislature may have adopted the aggravating circumstance in question wholly or partially for the purpose of retribution, not to protect the public from those defendants who are likely to pose a threat. Moreover, even if this aggravating circumstance was intended solely to serve as a "barometer of future danger," there is nothing illogical about taking the position that, while proof of a defendant's past history of violence may tend to suggest that the defendant may pose a future danger if released, the jury should be instructed about parole only in those cases in which there is a particularly strong reason to think that concern about future danger will decisively influence the jury's sentence. Informing a jury about the correctional consequences of a verdict is an exception from usual practice, and it is not illogical to confine this exception to narrow circumstances. Third, if there is a logical inconsistency, it flows from the fine line drawn by the controlling opinion in *Simmons*, not from the Pennsylvania Supreme Court. For all these reasons, Rompilla's argument is rejected.

IX.

For the reasons set out above, the decision of the District Court is reversed with respect to the ineffective assistance of counsel claim and affirmed as to the accomplice liability instruction and parole ineligibility claims.

SLOVITER, Circuit Judge, dissenting.

I respectfully dissent from the well-crafted (albeit, in my view, flawed) decision of the Majority that, in effect, reinstates the death penalty for appellant Ronald Rompilla. There are two claims that I believe warrant the grant of a writ of habeas corpus. One, which was the basis for the District Court's grant of the writ requiring a new sentencing hearing, is the shocking ineffective assistance of counsel at the sentencing phase. Rompilla's trial counsel failed to obtain Rompilla's school, medical, court and prison records as part of their investigation and, as a result, ***274** failed to present to the jury any mitigating evidence regarding Rompilla's "childhood, alcoholism, mental retardation, or possible organic brain damage." *Rompilla v. Horn*, 2000 WL 964750, at *9. Counsel also failed to communicate with two of Rompilla's siblings who lived nearby and would have advised counsel of evidence that Rompilla was raised by alcoholic parents in a cold, violent, frightening and abusive home.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

The standard for establishing ineffective assistance of counsel was set forth in the Supreme Court's seminal decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* was applied in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), to the issue of the investigation required of counsel at the penalty phase. Holding, in "a straightforward application of *Strickland*," that trial counsel was ineffective because he "failed to discover or failed to offer" certain mitigating evidence, *id.* at 393, 120 S.Ct. 1495, the Court held that the Virginia Supreme Court decision denying the requested writ of habeas corpus was both contrary to and involved an unreasonable application of *Strickland*. *Id.* at 391, 120 S.Ct. 1495.

As I will discuss, the Pennsylvania Supreme Court's failure to grant relief to Rompilla because of trial counsel's grossly inadequate investigation also was both contrary to and involved an unreasonable application of *Strickland* and *Williams*. The Majority's decision overturning the District Court's grant of a writ of habeas corpus and rejecting Rompilla's claim of ineffective assistance of counsel is inexplicable in light of the Supreme Court's most recent application of *Strickland* in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), under circumstances remarkably similar to those presented here.

The second ground on which I would grant a writ of habeas corpus is the refusal of the trial judge to advise the jury as to the meaning of a life sentence in Pennsylvania, notwithstanding the jury's questions on that issue on three different occasions during its sentencing deliberations. As a result, the jury imposed a death sentence, rather than a life sentence, without ever being told by the trial court in response to the jury's question that a life sentence in Pennsylvania means life without parole. The Pennsylvania courts' rule in this respect is, in my judgment, an unreasonable application of the Supreme Court's decisions in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002). Because this appeal is literally, not figuratively, a matter of life or death, I elaborate on each of these grounds.

I.
Ineffective Assistance of Counsel

There is no need to restate the facts of this case and its procedural history, both of which are fully and accurately set forth in the majority opinion. The ineffective assistance of counsel claim is before us on the Commonwealth's appeal.

The applicable legal principles are not in dispute. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), the federal court may grant a petition for habeas corpus only if the state's adjudication resulted in a decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or § 2254(d)(2), the state decision was based on an unreasonable determination of the facts. Both parties agree that it is section 2254(d)(1) that is at issue here. *Strickland* ***275** supplies the standard for addressing a claim of ineffective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. 2052.

In *Williams*, the Supreme Court held that "the rule set forth in *Strickland* qualifies as clearly established federal law, as determined by the Supreme Court." 529 U.S. at 391, 120 S.Ct. 1495 (internal quotation marks omitted). The Court further held that a state decision is "contrary to ... clearly established" federal law if, *inter alia*, "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406, 120 S.Ct. 1495. As the decision in *Williams* made clear, relief should be granted under the "unreasonable application" clause "if the state court identifies the correct governing legal principle from [the Supreme

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1495. *Williams* instructs that "clearly established Federal law" refers "to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." 529 U.S. at 412, 120 S.Ct. 1495. The Court in *Wiggins* decided the ineffectiveness of counsel claim before it using the standards articulated in *Strickland*, noting that *Williams* did not create new law, but illustrated "the proper application" of these standards. 123 S.Ct. at 2535. Because *Williams* fell squarely within *Strickland*, *Williams*, 529 U.S. at 390, 120 S.Ct. 1495, and *Wiggins* was decided pursuant to the same standards of *Strickland*, these two later cases demonstrate how *Strickland* should be applied.

Under *Strickland*, a petitioner seeking to prove ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. To make the requisite showing of deficiency, the petitioner must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. Among counsel's responsibilities with regard to the sentencing phase is the "obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396, 120 S.Ct. 1495. Coincidentally, in both *Williams* and *Wiggins*, two of the principal Supreme Court cases dealing with ineffective assistance of counsel, the Court found that a writ of habeas corpus was appropriate because the failure of counsel to conduct the requisite thorough investigation was objectively unreasonable and prejudicial.

In *Williams*, the Court noted that counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395, 120 S.Ct. 1495. The Court continued,

> Had they done so, the jury would have learned that Williams' parents had ***276** been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abuse foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. (footnotes omitted). The Court, noting that mitigating evidence "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," *id.* at 398, 120 S.Ct. 1495, concluded that "the Virginia Supreme Court rendered a 'decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,' thereby violating Williams' constitutional right to the effective assistance of counsel as defined in *Strickland*." *Id.* at 399, 120 S.Ct. 1495.

Our court in *Jermyn v. Horn*, 266 F.3d 257 (3rd Cir.2001), a decision following *Williams*, concluded that Jermyn's trial counsel was ineffective "because he failed to conduct an investigation, failed to prepare adequately for the penalty phase of Jermyn's trial, and consequently, failed to present substantial mitigating evidence that would have directly undercut the state's penalty-phase case." *Id.* at 306. We explained,

> Counsel failed to investigate the circumstances surrounding Jermyn's childhood, even though counsel admitted at the PCRA hearing that he was aware that Jermyn had claimed that he was abused as a child. Dr. Phillips told counsel before the original trial that Jermyn had been abused as a child, and told counsel that the abuse was a critical component to understanding Jermyn's mental illness. Nonetheless, counsel did not attempt to locate any fact witness who witnessed the abuse and could testify about it specifically.

Id. at 306 (internal citation omitted).

We stated that if counsel had investigated further "he would have obtained powerful and, as the PCRA court noted, 'credible,' testimony" from witnesses who presented testimony at the PCRA hearing that

> was replete with first-hand accounts of instances of mental and physical abuse that Jermyn suffered at the hands of his father.... Counsel could have used that testimony to provide the jury with critical insight into the root of Jermyn's mental illness. The [witnesses'] testimony also offered valuable insight into Jermyn's mother's role in the household, and how she failed to intervene on Jermyn's behalf.

Id. at 306-07. Counsel in *Jermyn* "also did not seek to obtain records from the school which corroborate the fact that Jermyn was abused as a child, and that his mother did not intervene on his behalf." *Id.* at 307. Based on the ineffective assistance of counsel for this and other reasons set forth in that opinion, we

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

affirmed the District Court's grant of a writ of habeas corpus.

With these cases as a background, we turn to the conduct of Rompilla's trial counsel, informed by the Supreme Court's recent decision in *Wiggins*.

Counsel in this case were two public defenders. Frederick Charles, the senior of the two, was a veteran attorney with significant criminal trial experience as a defense lawyer, who never before tried a capital case. His role here was as the principal counsel for Rompilla at the guilt phase. His colleague, Maria Dantos, who ***277** was two and a half years out of law school at the time of the trial, App. at 1060-61, 1065-67, was given the responsibility of handling the penalty phase. She had the role of making the arguments and presenting witnesses at the penalty phase, under Charles' supervision. This was her first capital case and first homicide trial. Counsel's devotion to Rompilla's cause has not been challenged. They impressed the District Court as "intelligent, diligent and devoted to their task of representing [Rompilla]." 2000 WL 964750, at *9. It is their competence and effectiveness that are at issue.

The PCRA court determined that "counsel had a reasonable basis for proceeding as they did during the penalty phase," Maj. Op. at 244 (quoting App. at 2028), because counsel retained three health professionals, two of whom, Drs. Cooke and Sadoff, are "recognized experts in the fields of psychiatry and psychology," *id.*, who administered tests, evaluated Rompilla and reported back to defense counsel that they found that nothing could be used in mitigation. Counsel also obtained an evaluation by a local psychiatrist, Dr. Paul Gross, who found nothing that would have been beneficial in the penalty phase.

In affirming the PCRA court's determination rejecting, *inter alia*, Rompilla's claim of ineffective assistance of counsel, the Supreme Court of Pennsylvania concluded that counsel "reasonably relied upon their discussions with [Rompilla] and upon their experts to determine the records needed to evaluate mental health and other potential mitigating circumstances." *Commonwealth v. Rompilla*, 554 Pa. 378, 721 A.2d 786, 790 (1998).

In accepting the Pennsylvania courts' conclusions, the Majority also concludes that "trial counsel conducted an extensive investigation for mitigation evidence," Maj. Op. at 250-251, because trial counsel retained three well-qualified mental health experts to examine Rompilla. The Majority recognizes that counsel failed to seek out school, medical, police, and prison records, which they recognize "contain useful information about Rompilla's childhood home environment, his mental problems, and his problems with alcohol," Maj. Op. at 252. Nevertheless, the Majority characterizes counsel's decision as "reasonable" because Charles, who "had the final say on every issue in the case," Maj. Op. at 252, "did not think that obtaining those records would have represented a sound allocation of his office's resources." Maj. Op. at 252. The question before us is not whether we believe counsel's explanation for his failure to obtain the relevant records, some of which were available across the street from the trial and others in the same building as the trial, was "reasonable" but whether his failure to take such action to save money was objectively reasonable and consistent with his obligation to conduct a thorough investigation.

A comparison of counsel's actions in this case with those of counsel in *Wiggins*, where the Supreme Court concluded that counsel was ineffective, is instructive.

Wiggins, who was represented by two public defenders, was convicted of capital murder in 1989 by a Maryland judge, and the jury sentenced him to death the same afternoon. A divided Maryland Court of Appeals affirmed. He filed a motion for post-conviction relief in which he challenged the adequacy of his representation at sentencing, "arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background." *Wiggins*, 123 S.Ct. at 2532. At the PCRA hearing, a licensed social worker testified regarding an elaborate social history in which he chronicled Wiggins' "bleak life history" based on state ***278** social services, medical and school records and interviews with Wiggins and numerous family members. *Id.* at 2533. His mother, a chronic alcoholic, frequently left him and his siblings alone for days, forcing them to beg for food and to eat paint chips and garbage. Her abusive behavior included beating the children and having the children present while she engaged in her active sexual life. Wiggins suffered severe physical and sexual abuse at the hands of his mother and father and while in the care of a series of foster parents. The father in his second foster home repeatedly molested and raped him. In one foster home, he was gang raped on more than one occasion and was

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

sexually abused by his supervisor on a job corps program. *Id.*

Wiggins' counsel decided to focus their request for post-conviction relief on retrying the factual case and disputing Wiggins' direct responsibility for the murder. Notwithstanding that counsel, as a practical matter, did not compile a social history of Wiggins, the state post-conviction court concluded that when the decision not to investigate is a matter of trial tactics, there is no ineffective assistance of counsel. *Wiggins*, 123 S.Ct. at 2533. The Maryland Court of Appeals affirmed the denial of relief on the ground that trial counsel, although they knew of Wiggins' unfortunate childhood and had available both the presentence investigation report and the more detailed social service records, "made a reasoned choice to proceed with what they thought was their best defense." *Id.* at 2533-34.

In holding that Wiggins' trial counsel provided constitutionally ineffective assistance of counsel and that the Maryland Court of Appeals unreasonably applied *Strickland* in failing to so conclude, the Supreme Court specified why counsel's conduct was defective. The Court noted that trial counsel had limited their investigation to two sources. One was the presentence investigation report (PSI) prepared by the Division of Parole and Probation, "which included a one-page account of Wiggins' 'personal history' noting his 'misery as a youth,' quoting his description of his own background as 'disgusting,' and observing that he spent most of his life in foster care." 123 S.Ct. at 2536 (quoting PSI). The other source counsel examined was the records kept by the Baltimore City Department of Social Services (DSS) documenting Wiggins' various placements in the state foster care system. The Supreme Court noted that counsel chose not to expand their investigation beyond those records even though the Public Defender's Office made funds available for the retention of a forensic social worker. *Id.* The Supreme Court thus concluded that, "counsel abandoned their investigation of [Wiggins'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 2537.

The Supreme Court characterized the Maryland Court of Appeals' application of *Strickland*'s governing legal principles as "objectively unreasonable." *Id.* at 2538. That court merely assumed that counsel's investigation was adequate and failed to focus on counsel's failure to engage in further investigation, despite the information in the DSS records with respect to Wiggins' mother's alcoholism, his shuttling from foster home to foster home, and his lengthy absences from school. Further investigation would have discovered the sexual abuse that was later revealed during state post-conviction proceedings. *Id.*

The investigation by Rompilla's lawyers, albeit different from that conducted by Wiggins' lawyers, was similarly defective. They did not present at the penalty phase evidence that was available, had they investigated thoroughly, and which was presented ***279** for the first time at Rompilla's PCRA hearing. Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. App. at 1408, 1416-17, 1450, 1460, 1487, 1492, 1495-96. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags. These facts were not presented at the sentencing hearing because counsel did not know them and, more important for our purposes, failed to make the reasonable investigation that would have uncovered them.

Rompilla's counsel presented the testimony of three of Rompilla's siblings at the sentencing hearing but did not interview two of Rompilla's sisters, Barbara Harris and Randi Rompilla, both of whom lived nearby, prior to sentencing, App. at 1422, 1436-37, 1489-90, and did not present their testimony. Further, Rompilla's brother, Nicholas Rompilla, Jr., who had briefly testified at the sentencing hearing, claimed at the post-conviction hearing that Rompilla's counsel only asked him about the three months prior to the offense and did not ask him about Rompilla's childhood. App. at 1462-63. We must then ask

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

whether it was unreasonable for counsel not to have interviewed all of Rompilla's siblings. It was these family members who testified at the PCRA hearing that, among other things, their parents were alcoholics and their mother drank while pregnant with Rompilla. They detailed the physical abuse referred to above. Rompilla was told he was stupid and would not amount to anything; they also testified that Rompilla was a "very nervous child," who kept everything inside. App. at 1407-13, 1424, 1451, 1480-84, 1487-88.

It was Rompilla's PCRA counsel, not trial counsel, who presented evidence from two mental health experts, Drs. Armstrong and Crown, both of whom evaluated and tested Rompilla post-conviction. Their evaluations included neuropsychological testing, review of Rompilla's school, medical, and prison records (none of which had been examined by trial counsel), and review of declarations by Barbara Harris, Darlene Rompilla, and Nicholas Rompilla, Jr., App. at 1562-64, 1567, 1704, 1736, 1741, 1743, 1745; Commonwealth Response to Habeas Pet., Exh. B, C, & Pet., Exh. B, C, & D. The doctors stated that Rompilla's low IQ and achievement test results documented in his school records, his medical history, and his abusive background were all "red flags" indicating that further objective evaluation was necessary. App. at 1614, 1686, 1692-93, 1739, 1743, 1745-46.

These doctors determined that Rompilla suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions: impulsivity, reasoning and judgment, ability to make sense out of experience, ability to draw conclusions, ability to accept long-term consequences of immediate behavior, ***280** emotional liability, concentration, mental flexibility, recalling and integrating information, controlling behavior, and controlling motor movements (hands). App. at 1572-74, 1577-79, 1581-84, 1617-18, 1707, 1717-18, 1721-22, 1726, 1728-33. The doctors believe Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome. App. at 1601-02, 1606, 1615. They concluded that Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. App. at 1616, 1687-88, 1735-36.

The PCRA court, applying Pennsylvania's three-prong standard for ineffective assistance of counsel claims, stated that although Rompilla's claim arguably had merit because he was "entitled to have relevant information of mental infirmity" presented to the jury, App. at 2028, "[g]iven the fact that three health care professionals, all of whom were experienced forensic experts, had provided opinions to defense counsel, and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions." App. at 2030.

The PCRA court accepted Rompilla's trial counsel's testimony that they had spoken to family members in detail and that the family had not revealed the information that was claimed in the PCRA hearing. App. at 2029-30. The court also noted that Rompilla "made contradictory statements" to counsel during their representation, and that he had not indicated he had any mental problems or alcoholic blackouts. App. at 2029. The PCRA court concluded that counsel was reasonable in believing that seeking mercy was the only available strategy, and found that there was a reasonable basis for counsel's actions. App. at 2029-30.

The Pennsylvania Supreme Court, also citing the state's three-prong test for ineffective assistance of counsel claims, agreed with the PCRA court's conclusion that counsel was effective, concluding without discussion that counsel acted reasonably. *Rompilla*, 721 A.2d at 789-90. The Court, relying on the conclusions of the PCRA court, noted that counsel had investigated Rompilla's mental health by retaining three experts and reasonably relied on the experts and on their own discussions with Rompilla to determine the records needed to evaluate Rompilla, and it effectively adopted the PCRA court's credibility determination of trial counsel's conversations with family members, leading it to conclude that counsel had not failed to investigate. The Court rejected Rompilla's argument that the experts received inadequate information because of counsel's failure to investigate his background. *Id.*

An examination of the record shows that Rompilla's lawyers did less investigation into mitigating evidence than did counsel for Wiggins. The Pennsylvania Supreme Court, in affirming the decision of the PCRA court denying post-conviction relief, stated that there was no "arguable merit" in Rompilla's claim that trial counsel failed to investigate Rompilla's family background, *Rompilla*, 721 A.2d at 790. The Court never referred to counsel's failure to speak to two of Rompilla's siblings, Randi Rompilla and Barbara Harris, who

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

lived nearby and who attended the trial. Dantos, when questioned at the post-conviction hearing, said that she didn't remember whether she spoke to those sisters or not, App. at 1099-1100, but those sisters testified at the PCRA hearing that they would have testified at the penalty phase, if asked, and would have told counsel about Rompilla's dysfunctional background, if they had been asked.

***281** Counsel certainly had reason to inquire further as to the availability of other family members. Counsel was aware that the family members whom she interviewed did not know a great deal about Rompilla. Charles testified that the family said "they hardly know him." One said, "He was in a reformatory. He's been away the whole time. We didn't know him well." Even Dantos testified that "[T]he overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody ...," App. at 1094, and that the family had "limited knowledge of their brother." App. at 1098. Dantos stated that "it seemed pretty clear that [the family members she interviewed] didn't feel as though they knew Ron very well," App. at 1166. It is thus apparent that trial counsel had sufficient leads, as in *Wiggins*, to investigate further to find family members who did know more about Rompilla's youth. Counsel never explained why she did not interview the other sisters.

The Pennsylvania Supreme Court, in rejecting Rompilla's PCRA claim that counsel did not obtain records that would have aided the mental health experts who evaluated him, agreed with the PCRA court that counsel reasonably relied on their experts to determine the record needed to evaluate his mental health. *Rompilla*, 721 A.2d at 790. Counsel cannot so easily shed their constitutional obligations. Moreover, it appears that counsel directed the experts to the guilt phase, giving no or little attention to the penalty phase.

Rompilla's lawyers sought opinions from the mental health experts they hired primarily about Rompilla's "mental infirmity or mental insanity for the guilt phase." App. at 1069-71. Although Dantos stated that she also instructed the experts to see if there was any issue "to possibly use in mitigation any mental infirmity," *id.* at 1067, Dr. Gross' report says that counsel's instruction as to the evaluation was "to determine Mr. Rompilla's mental state during the time of the alleged charges." *Id.* at 1069. That is supported by Dantos' own testimony that the mental health professionals employed by the defense were asked to look into Rompilla's "mental state at the time of the commission of the offense." App. at 1071. Counsel did not themselves investigate Rompilla's medical history, drug use, birth trauma or developmental delays, did not request or instruct the medical experts they retained to investigate those issues, and the medical experts did not make any such investigation. Counsel did not provide Drs. Sadoff and Cooke, who saw Rompilla, with any of the records that would have shown Rompilla's long history of alcoholism and never themselves investigated the records that would have shown that history.

Rompilla's counsel did not seek or obtain any of Rompilla's school records and therefore did not learn that Rompilla was in special education, left school in the ninth grade, and that his abilities had not advanced beyond the third grade, suggesting mental retardation because of a possible organic brain disorder. *Rompilla*, 2000 WL 964750, at *4-*7. Because they did not obtain these records, they did not provide them to the health experts they retained.

The PCRA court, on which the Pennsylvania Supreme Court relied, did not explain its finding that the school records were "not entirely helpful" beyond noting that Rompilla's IQ can "simply be part of the Bell Curve and a learning disability is not necessarily caused by an organic defect," a statement made by Dr. Cooke, one of the experts retained by Rompilla's trial counsel. App. at 2029. Trial counsel ***282** failed to investigate further into Rompilla's retarded level IQ scores. Indeed, Dr. Cooke further testified at the PCRA hearing that had he been provided with Rompilla's IQ scores at trial he would have done testing for brain damage, looked for evidence of prenatal damage to Rompilla's brain, and looked at the family situation, whether it was an abusive situation, or dysfunctional situation. App. at 1800-01.

Counsel did not investigate records from the Pennsylvania Department of Corrections where Rompilla was incarcerated for 14 years and therefore did not learn that his adult scores on achievement tests were very low, his spelling and arithmetic achievement scores were below 96% of the population, App. at 1009, and that psychological tests performed showed serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales. *See* App. at 1595-99. The court

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

records, which counsel did not investigate, were used by the Commonwealth as an aggravating circumstance and were in the same courthouse where Rompilla's case was tried. Because counsel failed to investigate into Rompilla's prior correctional experience, they did not provide that information to the health experts they retained.

In *Wiggins*, the Supreme Court quoted from the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989), which provide that investigations into mitigating evidence " 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " 123 S.Ct. at 2537 (emphasis in original). Because Wiggins' counsel abandoned the investigation of his background by failing to pursue evidentiary leads provided in the DSS records, they fell short of these "well-defined norms." *Id.*

As shown by the above, the investigations by Rompilla's counsel were no more thorough, perhaps less, than those found inadequate by the Supreme Court in *Wiggins*. The Majority's attempt to reconcile its conclusion that Rompilla's counsel provided effective assistance of counsel with the conclusion in *Wiggins* that defendant's counsel were ineffective is nothing short of astonishing. The Majority states that "[t]here are critical differences between the conduct of Wiggins's and Rompilla's trial attorneys." Maj. Op. at 257- 258. It continues, "Wiggins's attorneys were presented with leads that 'any reasonably competent attorney' would have realized were promising. Rompilla's attorneys had no comparable leads." *Id.*

With due respect to my colleagues on the Majority, the distinction entirely misses the point. If it was ineffective for Wiggins' counsel to fail to follow up the leads they had, was it not even more ineffective, indeed inexcusable, for Rompilla's attorneys to fail to investigate to find the leads that could have been used by the experts they retained or to retain experts to testify at the penalty phase and present a viable case for mitigation? At the brief sentencing hearing, trial counsel called only five witnesses, Rompilla's sister Darlene, older brother Nicholas, Jr., younger brother Robert, sister Sandy Whitby and Aaron, Rompilla's fourteen-year old son. The total examination covered about 26 pages of notes of testimony. The witnesses testified in general that Rompilla was a good family member and never had a problem. As described by the District Court, the "testimony was apparently presented to engender sympathy for [Rompilla]." 2000 WL 964750, at *4. "It seemed to be designed primarily as an emotional appeal to the jury to show mercy to [Rompilla]--he wasn't as bad as he seemed and his family loved him." *Id.* In lieu of the ***283** case trial counsel presented in mitigation, a case that the District Court described as "unreasonably brief and lacking in real substance," 2000 WL 964750, at *4, had they investigated they could have presented a case such as that presented by the PCRA counsel. Rompilla's counsel shifted the responsibility for finding leads to the medical experts, and never even told their experts that they had the responsibility for uncovering that information.

In *Wiggins*, trial counsel made the tactical decision to forego mitigating evidence of Wiggins' dysfunctional background and mental health problems because they believed that Wiggins' "best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency." *Wiggins v. State*, 352 Md. 580, 724 A.2d 1, 15 (1999) , a decision the Maryland Supreme Court termed a "deliberate, tactical decision" which, under *Strickland*, should not be second guessed. *Id.* at 15, 17- 18. When the United States Supreme Court reviewed that decision under § 2254(d), it held that because counsel's investigation was inadequate, the state court's "subsequent deference to counsel's strategic decision ... despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable." *Wiggins*, 123 S.Ct. at 2538.

The PCRA court found that Rompilla's counsel "had a reasonable basis for proceeding as they did," App. at 2028, because they employed two experts and obtained an evaluation by another psychiatrist, who also advised counsel that he found nothing that would be beneficial in the penalty phase. The Pennsylvania Supreme Court agreed that "trial counsel was effective with respect to their investigation and presentation of mitigation evidence." *Rompilla*, 721 A.2d at 790. Notwithstanding the decision in *Wiggins*, the Majority, applying § 2254(d)(1), holds that "the state court's determination that counsel acted reasonably was not 'contrary to' or an 'unreasonable application' of *Strickland*." Maj. Op. at 259.

As noted above, I believe the Majority seriously errs. It is clearly established by both *Williams* and *Wiggins* that counsel or counsel's experts cannot make a

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

reasonable decision at the penalty phase if they do not investigate the relevant facts that could be used in mitigation. In holding that the Maryland Court of Appeals' application of *Strickland*' s governing legal principles was objectively unreasonable, Justice O'Connor, in *Wiggins*, stated that counsel's failure to thoroughly investigate made "a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 123 S. Ct at 2538. Therefore the state Supreme Court's holding "reflected an unreasonable application of *Strickland*." *Id.* What was true in *Wiggins* and before that in *Williams* is equally applicable here. It follows that the District Court properly determined that Rompilla's trial counsel did not meet the performance standards required under *Strickland*.

I believe that under the circumstances in which counsel presented an inadequate case for mitigation at the penalty phase of a capital sentencing hearing, the prejudice prong of constitutionally ineffective assistance of counsel is clearly met. The Pennsylvania Supreme Court did not reach this issue and therefore we may consider it *de novo*. A reasonable attorney, if aware of the evidence presented at the PCRA hearing following a thorough investigation, would have done more at sentencing than plead for mercy. As the Court stated in *Wiggins*, "had the jury been confronted with [the] considerable mitigating evidence, there is a reasonable probability that it would have returned with a different ***284** sentence." 123 S.Ct. at 2543. Quoting from *Williams*, the Court stated, "we must evaluate the totality of the evidence, both that adduced at trial, and the evidence adduced in the habeas proceeding." *Wiggins*, 123 S.Ct. at 2543, citing *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495. In *Williams*, the Court recognized that the graphic description of the defendant's childhood "filled with abuse and privation, or the reality that he was 'borderline mentally retarded' might well have influenced the jury's appraisal of his morale culpability." 529 U.S. at 398, 120 S.Ct. 1495 (citation omitted). The Court further stated that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.*

In considering prejudice to Rompilla from his trial counsel's performance, we should look at the totality of evidence adduced at trial as well as that adduced at the state post-conviction hearing where counsel, after a thorough investigation, found the evidence of Rompilla's abusive background, his disfunctional family situation, his low IQ, his meager reading and understanding ability found in the prison records, and the medical evidence of brain disfunction. The jury could certainly have considered this matter as sufficiently mitigating to warrant a different sentence. Therefore, I believe that the Supreme Court of Pennsylvania failed to reasonably apply the *Strickland* standard when it held that Rompilla had not shown ineffective assistance of counsel.

I therefore disagree with the Majority and would affirm the District Court's grant of a writ of habeas corpus because of trial counsel's ineffective assistance of counsel.

II.

Failure to Give a Simmons *Instruction*

Rompilla has cross-appealed from the District Court's denial of a writ of habeas corpus on Rompilla's claim that his right to due process was violated by the state trial court's refusal to inform the jury in response to the jury's inquiries that Rompilla was parole ineligible if sentenced to life imprisonment.

While the jury was deliberating Rompilla's penalty, life imprisonment or death, the jury asked in succession, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" App. at 802. The trial court responded:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I-if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

App. at 802-03.

The jury later requested to examine information with respect to Rompilla's prior sentence. The trial court refused because it was not entered into evidence. The jury foreman clarified that the jury wanted to know the sentence from Rompilla's prior conviction. The trial court stated that he cannot give that. A juror then asked "if he got released on behavioral ..." and the foreman added, "It was commuted in any way, the original sentence." App. at 823. As before, the trial court refused to give the requested information. App. at 824.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Finally, the next day, after more deliberation the jury asked, "Was the Defendant ***285** offered any type of rehabilitation either while in prison or after his release from prison?" App. at 842. Once again the trial court declined to answer, even after the foreman changed the question to ask "isn't rehabilitation available in prison?" App. at 842. The trial court again refused to provide the information sought by the jury. It was only after the trial court declined to provide the information requested by the jury time after time that the jury returned a sentence of death.

On Rompilla's appeal from the denial of his PCRA petition, the Supreme Court of Pennsylvania rejected Rompilla's contention that due process required that the jury be instructed that in Pennsylvania "life imprisonment means life," ruling as follows: Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998). Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The Court rejected this argument in *Commonwealth v. May*, 551 Pa. 286, 710 A.2d 44, 47 (Pa.1998). As stated in that case, this aggravating circumstance only addresses Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due.10

> FN10 This author [Justice Nigro] agrees with the dissent's position that a *Simmons* instruction should be given in all cases and has previously so stated. *See Clark*, 710 A.2d at 43-44 (Nigro, J., concurring, joined by Flaherty, J. and joined in relevant part by Zappala, J.); *May*, 710 A.2d at 49 (Nigro, J., concurring, joined by Zappala, J.). Under the current state of the law, however, Appellant's argument that he was entitled to the instruction because the Commonwealth argued the aggravating circumstance identified above, is without merit. *See May*, 710 A.2d at 47.

Commonwealth v. Rompilla, 554 Pa. 378, 721 A.2d 786, 795 (1998). In his dissent, Chief Justice Flaherty wrote:

> I believe the majority is in error in its treatment of the issue pertaining to the jury's question about the defendant's parole eligibility. Under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998), the court must tell a jury that a life sentence means life without parole, if the defendant requests the instruction and his future dangerousness is at issue. Here, during deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" I view this question as a clear expression of the jury's concern about the defendant's future dangerousness. I would therefore hold that the trial court's refusal to explain the meaning of life without parole constituted error under *Commonwealth v. Clark*, *supra*. I would therefore reverse the order of the court of common pleas and remand for proceedings consistent with this opinion.
>
> I would go further and require an explanation of the meaning of a life sentence in all capital cases. There can be no harm in instructing juries that in Pennsylvania appellant would be statutorily ineligible for parole if sentenced to life in prison, but that a life sentence might nonetheless be commuted by the governor. On the other hand, if we do not so instruct, a jury, erroneously believing that a prisoner sentenced to life may be paroled ***286** within a period of years, may impose the death penalty for reasons which are not based in law.

Id. at 795-96 (Flaherty, C.J., dissenting). [FN1]

> FN1. I find it difficult to glean much enlightenment from the two cases cited by the Pennsylvania Supreme Court. In *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31 (1998), the Court did not define what it meant to put future dangerousness "at issue" because the question did not arise. (In *Clark* it was not the Commonwealth that argued future dangerousness; rather, the defense argued the opposite, noting that chances of a commuted sentence in Pennsylvania were close to zero; the court gave an instruction defining life imprisonment.) As for *Commonwealth v. May*, 551 Pa. 286, 710 A.2d 44 (1998), its proposition that "[t]he aggravating circumstance of appellant's prior record for violent felonies addressed only appellant's past conduct, not his future dangerousness," is a mere unsupported assertion. *Id.* at 47.

I believe that the Pennsylvania Supreme Court's analysis of Rompilla's *Simmons* claim was an "unreasonable application" of Supreme Court precedent, specifically *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

(1994), and *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), and therefore that it must be reversed under the standards of AEDPA.

In *Simmons*, the Supreme Court held that the defendant's due process right to answer an allegation against him requires the trial court to instruct the jury that the alternative to the death penalty is life without parole (in states where that is the alternative) if the prosecutor argues that the defendant will pose a danger to others. As Justice Blackmun, who authored the plurality opinion, wrote: "The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Simmons*, 512 U.S. at 171, 114 S.Ct. 2187. In *Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001), the Supreme Court described *Simmons* as holding that when "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.' " *Id.* at 39, 121 S.Ct. 1263 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 165, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (plurality opinion)).

The *Simmons* plurality and Justice O'Connor, concurring, believed there was no question that the prosecutor had made an issue of Simmons's future dangerousness. As a result, the Court had no occasion to define what constitutes making an issue of future dangerousness. That issue was directly addressed eight years later in *Kelly*, an opinion of the Court authored by Justice Souter.

In *Kelly*, the prosecutor stated that he would not argue future dangerousness and "that takes it out of *Simmons* anyhow." *Kelly*, 534 U.S. at 249, 122 S.Ct. 726. The trial court then denied Kelly's counsel's request for a *Simmons* instruction, saying that the State's evidence went to Kelly's character and characteristics, not to future dangerousness. The South Carolina Supreme Court affirmed the conviction and death sentence, holding that the *Simmons* instruction was not required because future dangerousness was not at issue.

In reversing, Justice Souter stated that the South Carolina Supreme Court's statement that Kelly's future dangerousness was not at issue "is unsupportable on the record before us." *Id.* at 252, 122 S.Ct. 726. He continued, "It is not that the ***287** state court failed to pose the legal issue accurately, for in considering the applicability of *Simmons* it asked whether Kelly's future dangerousness was 'a logical inference from the evidence,' or was 'injected into the case through the State's closing argument.' " *Id.* at 252, 122 S.Ct. 726 (internal citations omitted). In support of the appropriateness of this statement of the legal issue, Justice Souter included the following citations and explanatory parentheses: "*Shafer*, [532 U.S.] at 54-55 [121 S.Ct. 1263] (whether prosecutor's evidence or argument placed future dangerousness in issue) [and] *Simmons*, 512 U.S. at 165, 171 [114 S.Ct. 2187], (plurality opinion) (future dangerousness in issue because 'State raised the specter of ... future dangerousness generally' and 'advanc[ed] generalized arguments regarding the [same]')." *Kelly*, 534 U.S. at 252, 122 S.Ct. 726.

In addressing the trial court's interpretation of the evidence, the *Kelly* Court explained why the trial court erred:

> To the extent that it thought that "[e]vidence that Kelly took part in escape attempts and carried a shank ... is not the type of future dangerousness evidence contemplated by *Simmons*," ... it overlooked that evidence of violent behavior in prison can raise a strong implication of "generalized ... future dangerousness." *Simmons*, [512 U.S.] at 171 [114 S.Ct. 2187]. (And, of course, the state court's reasoning says nothing about the evidence of the crime, or of Kelly's sadism generally, and his mercurial thirst for vengeance.) *A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior*, whether locked up or free, and whether free as a fugitive or as a parolee.

Id. at 253-54, 122 S.Ct. 726 (emphasis added).

In language particularly relevant to this case, the *Kelly* Court stated, "The fallacy of the State Supreme Court's attempt to portray the thrust of the evidence as so unrealistically limited harks back to a comparable mistake by the trial judge, who spoke of the evidence as going, not to future dangerousness, but 'to [Kelly's] character and characteristics.' " *Id.* at 254, 122 S.Ct. 726. The Court continued,

> The error in trying to distinguish *Simmons* this way lies in failing to recognize that evidence of dangerous "character" may show "characteristic" future dangerousness, as it did here. This, indeed, is the fault of the State's more general argument before us, that evidence of future dangerousness counts under *Simmons* only when the State "introduc[es] evidence for which there is *no other possible inference* but future dangerousness to society." ... Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms.

Id. (emphasis in original).

The *Kelly* Court thus made explicit what was implicit in *Simmons*: the prosecutor need not expressly and separately argue future dangerousness; rather, future dangerousness can be made an issue through implication by or inference from arguments addressing such independent matters as the defendant's character.

At Rompilla's sentencing hearing, the prosecutor, who was seeking the death penalty, focused on Rompilla's "significant history of felony convictions," as that is one of the statutory factors that can serve as "aggravators" in the balancing between ***288** mitigating factors and aggravating factors required under Pennsylvania's death penalty law. 42 Pa. Cons.Stat. Ann. § 9711(d)(9). During his closing argument the prosecutor referred to Rompilla's prior offense, which involved the robbery, rape and slashing with a knife of a female bar owner, in the following terms:

> Joe Macrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point.... [I]sn't it *frightening*, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing.... On both occasions, a knife was used. Steals money both times. Isn't it *frightening* the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely *frightening* to think of the similarities in those two crimes. But there is one difference, one major difference, Joe Macrenna lived through her experience. Jimmy Scanlon didn't.... I think the Defendant learned a lesson from Joe Macrenna in that case, that Rape case. *That lesson was, don't leave any witnesses.* Don't leave anybody behind that can testify against you.

App. at 779-80 (emphasis added).

At sentencing the jury also learned via testimony elicited by both parties that the instant crime occurred shortly after Rompilla had been released from prison, that there is a lack of rehabilitation services for prisoners, that Rompilla's children were initially frightened of him when he was released on parole, and that he had been paroled from his previous sentence only three weeks before the instant crime.

Rompilla argues that because the prosecutor placed Rompilla's future dangerousness at issue, the trial court was required under *Simmons* to inform the jury that Rompilla is parole ineligible. The PCRA court disagreed, reasoning that *Simmons* does not apply because the prosecutor did not argue future dangerousness. The court stated, "The prosecution merely argued that Mr. Rompilla had a significant history of felony convictions which was proper argument as an aggravating factor under Pennsylvania law." App. at 2025. The court did not find the jury's question concerning whether he had received rehabilitation supportive of Rompilla's argument: "This question ... relates more to the issues raised by the defense witnesses during the penalty phase who complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole after his 1974 rape and burglary convictions. In fact, that was a mitigating factor found by the jury rather than an aggravating factor." App. at 2026. The court did not address, perhaps did not recognize, the relevance of the jury's question concerning whether rehabilitation is available in prison to Rompilla's request for a *Simmons* instruction.

On appeal, the Pennsylvania Supreme Court summarized the facts and issue, and analyzed Rompilla's *Simmons* claim in one paragraph which I quoted in full near the beginning of this dissent. The Pennsylvania Supreme Court interpreted Pennsylvania law as requiring a *Simmons* instruction "only when the defendant's future dangerousness is at issue," and expressly rejected Rompilla's argument that in presenting Rompilla's extensive criminal history the prosecutor *ipso facto* made future dangerousness an issue. The Pennsylvania Supreme Court thus appears to have determined that future dangerousness must be argued expressly and separately ***289** and may not be implied by or inferred from other arguments; consequently, the prosecutor's recitation of defendant's past criminal conduct cannot, without more, also amount to making an issue of future dangerousness. It is unclear

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

whether the Pennsylvania Supreme Court believes this principle to be consistent with or required by *Simmons*.

When the *Simmons* issue was before the District Court on Rompilla's habeas petition, that court also gave the issue only brief analysis and concluded:

> The prosecutor's summation in this case covers 16 pages of the notes of testimony [FN2] and a fair reading of it leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable, savage and cowardly beating the Petitioner inflicted upon his victim. This is a close issue, however, but the Supreme Court of Pennsylvania's decision in the PCRA case was not an unreasonable application of federal law.
>
> FN2. That is not accurate: it covers eight pages. *See* App. at 774- 782.

Rompilla v. Horn, 2000 WL 964750, at *15 (E.D.Pa. July 11, 2000). The District Court appears to have agreed with the Pennsylvania Supreme Court that if the prosecutor "based his argument on" the despicable nature of the defendant's actions, he could not at the same time have made an issue of Rompilla's future dangerousness for *Simmons* purposes without providing a separate, express argument to that effect. The Majority appears to agree, as its opinion states: "even if [the prosecutor's comments] were meant to imply that Rompilla would present a future danger if he was ever released from prison, the fact remains that the prosecutor never expressly argued that Rompilla presented a future threat." Maj. Op. at 271-272.

I do not read *Simmons* as requiring an express argument of future dangerousness. In *Simmons*, the prosecutor put future dangerousness "at issue" in a few brief comments in his closing argument. As the *Simmons* plurality opinion describes it:

> In its closing argument the prosecution argued that petitioner's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. The question for the jury, said the prosecution, was "what to do with [petitioner] now that he is in our midst." ... The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 114 S.Ct. 2187.

In his dissent, Justice Scalia takes issue with the conclusion of those Justices who formed the majority that the above statements constituted an argument for future dangerousness. [FN3] The language used in the ***290** various opinions of the Justices who formed the *Simmons* majority does not suggest that the prosecutor must expressly argue that defendant will be a serious threat if not sentenced to death before the Court will hold that future dangerousness has been placed before the jury. For example, Justice Blackmun's opinion uses the following phrases (emphases added, *passim*): "where the defendant's future dangerousness *is at issue*," *id.* at 156, 114 S.Ct. 2187; "[t]he Due Process Clause does not allow the execution of a person *'on the basis of information* which he had no opportunity to deny or explain.' " *Id.* at 161, 114 S.Ct. 2187; "the State's *repeated suggestion* that petitioner would pose a future danger to society if he were not executed," *id.* at 162, 114 S.Ct. 2187; "[t]he State *raised the specter* of petitioner's future dangerousness generally ...," *id.* at 165, 114 S.Ct. 2187; "if the State *rests its case for imposing the death penalty at least in part* on the premise that the defendant will be dangerous in the future ...," *id.* at 168-69, 114 S.Ct. 2187; "[t]he State may not create a false dilemma *by advancing generalized arguments* regarding the defendant's future dangerousness ...," *id.* at 171, 114 S.Ct. 2187.

> FN3. The dissent states:
>
> Both Justice Blackmun and Justice O'Connor focus on two portions of the prosecutor's final argument to the jury in the sentencing phase. First, they stress that the prosecutor asked the jury to answer the question of "what to do with [petitioner] now that he is in our midst." That statement, however, was not made (as they imply) in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence. Read in context, the statement is not even relevant to the issue in this case:
>
> "The defense in this case as to sentence ... [is] a diversion. It's putting the blame on society, on his father, on his grandmother, on whoever else he can, spreading it out to avoid that personal responsibility. That he came from a deprived background. That he didn't have all of the breaks in life and certainly that helps shape someone. But we are not concerned about how he got shaped. We are concerned about what to do with him now that he is in our midst."....
>
> Both opinions also seize upon the prosecutor's comment that the jury's verdict would be "an act of self-defense." That statement came at the end of admonition of the jury to avoid emotional responses and enter a rational verdict: "Your verdict shouldn't be returned in anger. Your verdict shouldn't be an emotional catharsis. Your verdict shouldn't be ... a response to that eight-year-old kid [testifying in mitigation] and really shouldn't be a response to the gruesome grotesque handiwork of [petitioner]. Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense."....
>
> This reference to "self-defense" obviously alluded, neither to defense of the jurors' own persons, nor specifically to defense of persons outside the prison walls, but to defense of all members of society against this individual, wherever he or they might be. Thus, as I read the record (and bear in mind that the trial judge was on the lookout with respect to this point), the prosecutor did not *invite* the jury to believe that petitioner would be eligible for parole--he did not *mislead* the jury.
>
> *Simmons*, 512 U.S. at 181-182, 114 S.Ct. 2187 (Scalia, J., dissenting) (emphasis in original).

In his concurring opinion, Justice Souter writes, "when future dangerousness *is an issue* in a capital sentencing determination...." *Id.* at 172, 114 S.Ct. 2187 (emphasis added). Similarly, Justice O'Connor states, "When the State *seeks to show* the defendant's future dangerousness," and "a means of responding to the State's *showing* of future dangerousness." *Id.* at 177, 114 S.Ct. 2187. "Moreover, the prosecutor, by referring to a verdict of death as an act of 'self-defense,' *strongly implied* that petitioner *would* be let out eventually if the jury did not recommend a death sentence." *Id.* at 178, 114 S.Ct. 2187 (emphasis added).

There are indeed some statements that can be read to refer to arguments expressly made by the State as to Simmons's future dangerousness, particularly in the concurring opinion of Justice O'Connor, but even she uses the phrase "strongly implied." I therefore repeat my observation that neither Justice O'Connor nor the other Justices forming the majority suggest that the instruction must be given only if the prosecutor makes express, explicit, exclusive arguments for future dangerousness. Rather, the Court was willing to infer a future dangerousness argument from what was, on Justice Scalia's account, ***291** an argument about a different topic entirely (the merit of one of Simmons's mitigating factors). Nothing in the Justices' language supports the premise on which the Pennsylvania Supreme Court's decision turns. Any doubts on the matter were dispelled by the Supreme Court's subsequent decision in *Kelly* where the prosecutor did not expressly argue future dangerousness.

The Majority concedes that *Kelly* "arguably broadened the holding in *Simmons*," Maj. Op. at 265-266, and notes that two of the Justices who joined Justice O'Connor's concurring opinion in *Simmons* dissented in *Kelly* because "the test is no longer whether the State argues future dangerousness to society ... [but] whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." *Kelly*, 534 U.S. at 261, 122 S.Ct. 726 (Rehnquist, C.J., joined by Kennedy, J., dissenting).

The Majority declines to apply *Kelly* in Rompilla's favor, stating, "Even if *Kelly* broadened *Simmons* ... *Kelly* cannot aid Rompilla here" because *Kelly* was decided after the Pennsylvania Supreme Court's decision in Rompilla's case. Maj. Op. at 267. The Majority notes that under *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), federal review pursuant to section 2254(d)(1) is limited to the state court's application of federal law "as of the time of the relevant state-court decision." *Id.* at 412, 120 S.Ct. 1495.

The Supreme Court does not interpret the unreasonable application of Supreme Court precedent prong of § 2254(d)(1) as narrowly as does the Majority. In *Wiggins*, the Court viewed its opinion in *Williams* as "illustrative of the proper application" of the *Strickland* standard, notwithstanding that " *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case." *Wiggins*, 123 S.Ct. at 2535. Just as the *Williams* opinion noted that "the merits of [Williams's] claim are squarely governed by our holding in *Strickland v. Washington*," *Williams*, 529 U.S. at 390, 120 S.Ct. 1495, so also the Court's opinion in *Kelly* represented an application of *Simmons* and did not make new law. There is no indication anywhere in the opinion that the *Kelly* majority thought that they were doing anything other than applying *Simmons*. Rather, at every step of the way the *Kelly* majority cites *Simmons*. At one point, the *Kelly* majority states that the prosecutor "accentuated the clear implication of future dangerousness raised by the evidence and [thereby] placed the case within the four corners of *Simmons*."

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Kelly, 534 U.S. at 255, 122 S.Ct. 726. Therefore, even if *Kelly* "arguably" broadened *Simmons*, it is dispositive for present purposes that the majority of the Supreme Court believed otherwise.

To recapitulate, the Pennsylvania Supreme Court applied an unjustifiedly narrow test for determining whether the prosecutor made an issue of Rompilla's future dangerousness. That test represented an unreasonable application of *Simmons*, especially as *Simmons* was applied in *Kelly*.

In any event, I believe that the record shows that the prosecutor did make an issue of Rompilla's future dangerousness. It is noteworthy that the prosecutor referred to the similarities between this crime and Rompilla's previous crime as "frightening" no less than three times. The similarities can be "frightening" only if the prosecutor was sending the message that there is a possibility that Rompilla will repeat the crime. Similarly, the prosecutor's emphasis on the one major difference between this crime and his previous crime--the murder of the victim--and his statement to the jury that Rompilla had ***292** learned not to leave any witnesses were tantamount to a warning about what would happen if Rompilla were allowed to commit another crime, i.e., that Rompilla would be dangerous. Moreover, as the Supreme Court has recognized, evidence of past criminal conduct may be indicative of future dangerousness. *See Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

The Majority urges us to consider the prosecutor's comments in context, claiming he was merely responding to counsel's argument that the jury must have some doubt concerning Rompilla's guilt and that his comments were a rebuttal of that argument, not an argument for future dangerousness. The Majority states, "Seeking to dispel any such doubts, the prosecutor's obvious point in stressing the similarities between the circumstances of the rape for which Rompilla had previously been convicted and the Scanlon murder was to convince the jury that the same man had committed both crimes." Maj. Op. at 271.

The Majority's attempt to explain the remark is sheer conjecture. The prosecutor made his remarks in the course of outlining why three aggravating factors apply against Rompilla. After addressing the first two--torture and murder while committing other crimes--the prosecutor said:

> Commonwealth has more. Commonwealth submits to you that the Defendant has a significant history of felony convictions involving violence to the ... person or the threat of violence to the person.

App. at 779. The prosecutor then described the previous rape with his above-quoted use of "frightening" and gave the State's explanation that Rompilla did not wait at the bar until Scanlon closed up before breaking in to steal because Rompilla did not want to leave any witnesses. App. at 780. This suggests dangerousness, not rebuttal.

It is plain from *Simmons* and *Kelly* that the reasons for the prosecutor's statements are not dispositive of whether they put future dangerousness at issue for the jury. They could have done so even if their principal thrust were to dispel doubt raised by the defense. After all, in *Simmons* the prosecutor's remarks were made in response to defense counsel's mitigating evidence (*see* Justice Scalia's dissenting opinion, quoted above). Thus, even if the prosecutor in Rompilla's case did not make an express argument, *Simmons* is still applicable because, as explained above, *Simmons* does not require "express arguments."

The Majority also asserts that the prosecutor merely used the word "frightening" as a synonym for "astounding," a word that the prosecutor also used ("more aptly," as the Majority puts it). Maj. Op. at 271. Accepting *arguendo* the Majority's hypothesis, it does not negate the implication of future dangerousness. The meaning of a word or phrase depends in part on the reasonable understanding of the listener, not merely the intent of the speaker.

The Majority also attempts to discount any future dangerousness implications in the prosecutor's statement that by the time of this crime Rompilla had learned to kill any eyewitnesses by explaining that "the comment seems to have had two likely purposes: to explain why there was no eyewitness to the most recent crime and to explain why the two crimes differed in the important respect that one involved a killing and the other did not." Maj. Op. at 271. Again, even if those were the prosecutor's purposes, it does not follow that he did not also thereby inject future dangerousness into the proceedings. The more immediate message learned by the jury ***293** was surely that if they put Rompilla in a position from which he could commit another crime, the jurors had better not be among the witnesses. Their repeated questions to the judge concerning parole and rehabilitation suggests that they had learned that

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

lesson. [FN4]

> FN4. This court is limited to reviewing the Pennsylvania Supreme Court's opinion for its consistency with federal law, and has no role in its application of state law. It is of interest, however, that there is disagreement among the Pennsylvania Supreme Court justices themselves as to whether the jury need be instructed that in Pennsylvania the jury may not be informed that life imprisonment means life without parole. Pennsylvania is one of only two states out of the 50 United States where life imprisonment means life without parole that hold that the jury may not be so informed. South Carolina, the state that was the subject of the Supreme Court decisions in *Simmons*, *Kelly*, and *Skipper*, is the other such state.
>
> The Pennsylvania rule was enunciated in *Commonwealth v. Mills*, 350 Pa. 478, 39 A.2d 572 (1944), where the Pennsylvania Supreme Court stated that in a capital case the jury's only function was to decide whether the penalty should be life imprisonment or the death penalty. More recently, the Pennsylvania Supreme Court, in addressing the effect of *Simmons* on the rule announced in *Mills*, stated that "the per se rule announced in *Mills* [that any reference to the possibility of parole was an improper consideration for the jury in their deliberation of the defendant's guilt] has been superseded [by *Simmons*]." *Clark*, 710 A.2d at 36. The Pennsylvania Court then stated "that due process requires the court to instruct the jury on the law as it relates to the possibility of parole where that issue [the defendant's future dangerousness] clearly arises from the arguments of either counsel in the penalty phase." *Id.* Justice Nigro concurred, suggesting "that the better practice and policy is to require trial courts to give a *Simmons* instruction in all death penalty proceedings, regardless of whether counsel raises the issue of a defendant's potential future dangerousness during the penalty phase." *Id.* at 43. Justice Zappala concurred separately, agreeing with Justice Nigro that a *Simmons* charge should be mandated. *Id.*

Justice Souter, in his concurring opinion in *Simmons*, joined by Justice Stevens, wrote:

> The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); see also, *e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 427-428 [100 S.Ct. 1759, 64 L.Ed.2d 398] (1980); *Mills v. Maryland*, 486 U.S. 367, 383-384 [108 S.Ct. 1860, 100 L.Ed.2d 384] (1988). Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, 428 U.S. 153, 190 [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination," *Beck v. Alabama*, 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392] (1980).
>
> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever there is a reasonable likelihood ***294** that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or discriminatorily" and "wantonly and ... freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 249 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972) (Douglas, J., concurring) (internal quotation marks omitted); *id.*, at 310 [92 S.Ct. 2726] (Stewart, J., concurring). *Simmons*, 512 U.S. at 172-73, 114 S.Ct. 2187 (Souter, J., concurring).

In this case, the repeated questions by the jury as to the effect of a sentence by them of life imprisonment demonstrate unequivocally that the jury did not understand that under Pennsylvania law a life prison term means life without parole. I believe the rationale for requiring that the jury be instructed about parole ineligibility when the prosecutor puts future dangerousness in issue--i.e., to ensure that the jurors have accurate information as to the effect of their sentence--is similarly applicable in a case, such as this one, where the jurors have requested accurate information. I do not understand the State to be

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

arguing that the requested instruction was not legally accurate. The Majority has provided no rationale why the jury should not be informed of the applicable Pennsylvania law. Truth in advertising is now the byword of this generation. Truth in instructing the jury as to the effect of the sentence in a capital case is at least as important.

I would grant a writ of habeas corpus on this issue as well as on the ineffective assistance of counsel issue.

Briefs and Other Related Documents (Back to top)

. 00-9005 (Docket)
(Aug. 15, 2000)

. 00-9006 (Docket)
(Aug. 15, 2000)

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

H

Briefs and Other Related Documents

United States Court of Appeals,
Third Circuit.

Ronald ROMPILLA
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections Martin Horn, Appellant/Cross-Appellee.

No. 00-9005, 00-9006.

Feb. 25, 2004.

Billy H. Nolas, David W. Wycoff, Defender Association of Philadelphia, Federal Capital Habeas Corpus Unit, Philadelphia, PA, for Appellee.

Amy Zapp, Office of Attorney General of Pennsylvania, Harrisburg, PA, for Appellant.

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, and CHERTOFF Circuit Judges, and STAPLETON, Senior Circuit Judge. [FN*]

FN* Voted as to panel rehearing only.

SUR PETITION FOR REHEARING

ALITO, Circuit Judge.

The petition for rehearing filed by appellee/cross appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judges Sloviter and McKee would have granted rehearing en banc for the reasons set forth in the dissent. Judges Nygaard, Ambro and Smith would have granted rehearing en banc.

OPINION SUR DENIAL OF REHEARING

NYGAARD, Circuit Judge.

I share the concerns eloquently expressed by my colleague, Judge Sloviter, and agree fully with the analysis she offers in her dissenting opinion. Had I been on the panel, I would have joined her to form a majority. Now on petition for en banc review, however, I wish only to add my thoughts to hers why I firmly believe we should rehear this appeal en banc. The Rules provide that rehearing en banc is appropriate when a case "involves a question of exceptional importance." Fed. R.App. P. 35(a). To me, this case raises such a question. [FN1] The issue before us implicates the most fundamental and important of all rights - to be represented by effective counsel. All other rights will turn to ashes in the hands of a person who is without effective, professional, and zealous representation when accused of a crime. In my view, counsel here failed in all three areas.

FN1. Indeed, I suggest that every death case in which a divided panel of the court reverses a well-reasoned decision of the District Court that granted a writ of habeas corpus, should raise in our minds "a question of exceptional importance." As the Court has said, "death is different." *See, e.g., Wiggins v. Smith*, 539 U.S. 510, ----, 123 S.Ct. 2527, 2554, 156 L.Ed.2d 471 (2003).

Over seventy years ago, the United States Supreme Court reviewed a sensational criminal trial. Nine poor, young African American men were facing death sentences. They had been convicted of raping two white women in Alabama. The issue before the Supreme Court was simple: were the defendants entitled to the ***311** effective assistance of counsel as part of their constitutional right to due process? In a landmark ruling, Justice Sutherland famously declared that defendants in capital cases have the right to the "guiding hand of counsel at every step in the proceedings against [them]." *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *see also* Dan T. Carter, Scottsboro: A Tragedy of the American South, 5-6 (special ed., The Notable Trials Library 2000) (giving age range of Scottsboro defendants as 13-20). I am deeply concerned that Justice Sutherland's simple and eloquent idea of effective legal representation may not be the reality of our present-day jurisprudence. All too often, the "guiding hand" is either inexperienced, unmotivated or uncaring, and offers insufficient guidance to the indigent capital defendant.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

The need for reform of the "delivery system" of counsel to indigent capital defendants is well-known, and its failures are, unfortunately, no longer either surprising or shocking. Reports continually surface highlighting the subpar performances of capital defense counsel. *See, e.g.*, James S. Liebman et al., *A Broken System: Error Rates in Capital Cases*, 1973-1995, at ii (2000), *available at* http://www.justice.policy.net/jpreport/index.html (last visited Feb. 13, 2004). Too often appointed trial counsel lack the experience, training or financial resources necessary to adequately represent those defendants on trial for their life who face the powerful forces of the government. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1862 (1994). In my view, any level of inadequate representation not only undermines the reliability that must be the foundation of our adversarial process, but also heightens the risk that defendants will be convicted and sentenced to death despite their actual or incremental innocence. [FN2]

FN2. What I refer to as "incremental innocence" represents the degree of guilt found in excess of one's actual culpability, resulting in a punishment imposed that exceeds that which is indicated by their participation in the crime.

Ideally, the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), should act as a safety net to correct injustices caused by ineffective counsel. I view the results as less than ideal. I begin with the Supreme Court instruction to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. I submit, however, that where the sanction, once executed, is irreversible, the presumption must be defined narrowly--not widely. Unfortunately, in the twenty years since the standard was set out in *Strickland*, it has degraded. The range of what is deemed "effective" has widened to, in my view, an astonishing spectrum of shabby lawyering. Counsel has been deemed "effective" despite, for example, sleeping through a portion of the case. *See McFarland v. Texas*, 928 S.W.2d 482, 505 (Tex.Crim.App.1996) (recognizing that defense counsel slept through parts of defendant's capital trial, but deeming him "effective."). [FN3] Other shocking examples include cases where counsel was intoxicated during the capital trial, *see Haney v. Alabama*, 603 So.2d 368, 377-78 (Ala.Crim.App.1991); and cases where counsel presented no evidence whatsoever during the sentencing phase, ***312** *see Mitchell v. Kemp*, 762 F.2d 886, 888 (11th Cir.1985). In my view, the majority opinion in this case infuses our jurisprudence with this degraded standard.

FN3. Mr. McFarland's counsel later justified his actions by testifying that he "customarily takes a short nap in the afternoon." Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES (Valley Ed.), July 15, 2000, at A1.

These disturbing examples of inept lawyering in capital cases have propelled professional organizations to act. The American Bar Association has promulgated "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." These Guidelines upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L.REV. 913, 939 (2003) (outlining the 2003 Revisions to the Guidelines). Included in those guidelines is the requirement that the capital defendant should "receive the assistance of all expert, investigative, and other ancillary professional services ... appropriate ... at all stages of the proceedings." *Id.* at 952. Here, in my view, counsel's failure to conduct even the most rudimentary investigation into Rompilla's background falls short of being "effective" representation. I believe this level of representation violates not only the standards set out by the American Bar Association, but by accepting it as adequately effective, we continue to degrade the standard set out in *Strickland*, and ignore the sentiments expressed by Justice Sutherland.

I believe that a policy of this importance should not be decided by a divided panel of the court. This court, which has traditionally been in the van, and a steadfast guardian of constitutional rights, should have taken this opportunity to convene en banc to consider and carefully define the breadth of *Strickland's* presumption, and set forth a jurisprudentially sound and humanitarian threshold for what constitutes effective representation.

Sloviter, J., and McKee, J., join in this opinion.

359 F.3d 310

Briefs and Other Related Documents (Back to top)

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

. 00-9005 (Docket)
(Aug. 15, 2000)

. 00-9006 (Docket)
(Aug. 15, 2000)

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 16, 2004

Mr. Billy H. Nolas
Defender Association of Philadelphia
The Curtis Center, Suite 545-West
Independence Square West
Philadelphia, PA 19106

Re: Ronald Rompilla
v. Martin Horn, Commissioner, Pennsylvania Department of Corrections
Application No. 03A932

Dear Mr. Nolas:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on May 16, 2004 extended the time to and including July 24, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

Sandy Spagnolo
Case Analyst

ORIGINAL

(9)

No. 04-5462

AUG 26 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ROMPILLA,
Petitioner

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AUG 31 2004

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania

RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division

AMY ZAPP*
Chief Deputy Attorney General
Appeals & Legal Services Section

*Counsel of Record

OFFICE OF ATTORNEY GENERAL
16th Floor – Strawberry Square
Harrisburg, PA 17120
Phone: 717-705-4487
Fax: 717-783-5431
E-Mail: azapp@attorneygeneral.gov

DATE: August 26, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

This Case Presents No Important or Wide Reaching Issue of Law; Rather, the Decision of the Court of Appeals Properly Applied Well-Settled Legal Principles to the Specific Facts of This Case 8

1. The Court of Appeals Correctly Reversed the District Court's Ruling Awarding Relief to Petitioner as to His Ineffectiveness Claim Because the District Court Did Not Take Proper Measure of the State Court's Decision Under § 2254(d) 8

2. Nor Should The Court Review Rompilla's *Simmons* Claim; the Court of Appeals Correctly Determined That He Was Not Entitled to *Habeas* Relief 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Commonwealth v. Pierce, 515 Pa. 153 (1987) 10

Early v. Packer, 537 U.S. 3 (2002) 9

Kelly v. South Carolina, 534 U.S. 246 (2002) 15

Shafer v. South Carolina, 532 U.S. 36 (2001) 15

Simmons v. South Carolina, 512 U.S. 154 (1994) ..... *passim*

Strickland v. Washington, 466 U.S. 668 (1984) 10

Weeks v. Angelone, 528 U.S. 225 (2000) 9

Wiggins v. Smith, 539 U.S. 510 (2003) 11

Williams v. Taylor, 529 U.S. 362 (2000) 10, 13, 14, 15

Statutes

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d) 9, 10, 12

28 U.S.C. § 2254(d)(1) 7, 9, 15

42 PA. CONS. STAT. ANN. § 9541 3

42 PA. CONS. STAT. ANN. § 9711(d)(6) 1

42 PA. CONS. STAT. ANN. § 9711(d)(8) 1

42 PA. CONS. STAT. ANN. § 9711(d)(9) 1, 14

42 PA. CONS. STAT. ANN.§ 9711(e)(8) 3

STATEMENT OF THE CASE

This is a *habeas corpus* action brought pursuant to 28 U.S.C. § 2254 ("§ 2254") by Ronald Rompilla, a Pennsylvania prisoner sentenced to death for first degree murder. On November 1, 1988, a Lehigh County jury found Rompilla guilty of first degree murder in the death of James Scanlon, an Allentown bar owner. Scanlon's body was found in his place of business in the early morning hours of January 14, 1988. He had been stabbed repeatedly and his body had been set on fire while he was still alive and conscious. Scanlon's wallet and approximately $500 to $1000 from the bar were stolen. The jury also convicted Rompilla of burglary, criminal trespass, robbery, theft and receiving stolen property, for which terms of incarceration were imposed.

1. In the penalty phase of the state court trial, the Commonwealth sought to establish three aggravating circumstances: that the murder had been committed while in the perpetration of a felony, *see* 42 PA. CONS. STAT. ANN. § 9711(d)(6)(West. 1998 & Supp. 2003); that the offense was committed by means of torture, *see* 42 PA. CONS. STAT. ANN. § 9711(d)(8)(West 1998 & Supp. 2003); and that Rompilla had a significant history of felony convictions involving the use or threat of violence to the person, *see* 42 PA. CONS. STAT. ANN. § 9711(d)(9)(West 1998 & Supp. 2003). The evidence presented by the Commonwealth to establish the last of those aggravating circumstances, showed that in 1974, Rompilla had broken into the apartment of a female bar owner who lived above her business in order to steal money he believed to be located there. Upon learning that the money was located in the bar's cash register, he forced her to accompany him downstairs where the proceeded to steal the money in the register. He then made the victim return with him to her apartment where he raped her at knifepoint. In the course of this earlier crime, Rompilla also slashed the victim with the knife.

In the sentencing proceeding, Rompilla presented the testimony of five family members—three siblings, his sister-in-law, and Rompilla's 14-year old son—who described their longstanding close and loving relationships with him. Each made emotional pleas for the jury to spare Rompilla's life. Pet. App. 3 at 3-4. Trial counsel had settled on this strategy after efforts to develop other mitigation evidence proved fruitless. In repeated communications they had with Rompilla, and with several of his family members, counsel were informed that there was nothing in his upbringing or lifestyle that would be useful for purposes of presenting evidence in the penalty phase. Counsel stressed to both Rompilla and his family members the importance of developing this evidence. Examinations by three, highly-qualified mental health professionals similarly came up empty in terms of mitigation evidence. One, in fact, had concluded that Rompilla was a sociopath and so advised counsel.

During its deliberations, the sentencing jury interrupted its work three times to pose questions to the trial court. One question asked about the possibility Rompilla would be paroled if sentenced to life imprisonment; another asked for information about his prior sentences, specifically, seeking to know if he had been released based on his behavior; the last wanted to know whether he had received, or could be expected to receive rehabilitation while in prison. In each instance, the trial court explained to the jury that it could not furnish the information and that it had to render a decision based on the law as it was explained to them in its charge. Pet. App. 4 at 26-27.

The jury found all three of the aggravating circumstances advocated by the Commonwealth and two mitigating circumstances under a provision of state law which permitted them to consider any "evidence of mitigation concerning the character and record of the defendant and the circumstances his offense," *see* 42 PA. CONS. STAT. ANN.§ 9711(e)(8): that Rompilla's son had been present for his father's trial and testified on his behalf; and the possibility of rehabilitation. The aggravating circumstances, the jury ultimately found, outweighed the mitigating factors and imposed a sentence of death. On direct appeal, the Pennsylvania Supreme Court affirmed Rompilla's convictions and judgments of sentence. Pet. App. 1 at 3-9.

2. One of the claims Rompilla raised in the course of state collateral review,[1] was that his trial counsel had been ineffective in the penalty phase for failing to investigate and adduce evidence of mitigation. Pet. App. 2 at 4-5. Rompilla had been represented at trial by two attorneys, lead counsel Chief Public Defender Frederick E. Charles, and Maria Dantos, a colleague in the same office. For Ms. Dantos, this case was her first homicide trial and first death penalty case. Mr. Charles was "a veteran attorney with significant criminal experience as a defense attorney" and was "knowledgeable with regard to the law and savvy with regard to trial techniques and strategy." He has experience handling capital cases and in preparing mitigation evidence. In this case, he had the final say on every issue. *See* Pet. App. 4 at 13-19 (which, *inter alia*, summarizes evidence presented in the state collateral review proceedings).

[1] Rompilla sought collateral review of his case pursuant to the Pennsylvania Post Conviction Relief ("PCRA"), 42 PA. CONS. STAT. ANN. § 9541 *et seq.* (West 1998 & Supp. 2003).

Specifically, Rompilla faulted counsel: for failing to interview two of his siblings, and for not more completely interviewing other siblings, which, he said, would have elicited information about the adverse home situation in which he was raised, its effect on him and problems he had with alcohol; for failing to obtain various records and for not providing the same to experts retained on his behalf and for failing to adequately communicate with them. The PCRA conducted an evidentiary hearing, at which trial counsel both testified. They explained that, from the earliest stages of this case, they were concerned with the development of mitigation evidence and worked toward gathering the same. Based on past experience, they engaged Rompilla and numerous family members in discussions on this subject seeking to learn from them the possible areas on which they could most profitably focus their efforts and the resources available to them. Counsel explained that he did not generally canvass for Rompilla's records because in his past experience it was not necessarily the best way of locating useful material; that often times it produced information too remote in time to be of much value. Rather, as an initial step, he made it a practice to approach those who knew a defendant the best in order to pinpoint areas to be further explored. In their communications with Rompilla and his family, counsel stressed the importance of marshalling this information. They were constantly told by all concerned that there was nothing in his background that would help Rompilla's cause. *Id.* at 13-19.

Counsel also explained that, independently of those efforts, they had Rompilla evaluated by three highly-qualified mental health professionals, a psychologist and two psychiatrists, and that he relied on their expertise. The uncontradicted evidence reflected that trial counsel furnished those professionals with whatever they needed to evaluate

Rompilla. None asked for any of his records. Moreover, counsel indicated that had they said that they needed them, he would have sought and obtained them. None reported anything useful to Rompilla's case. In the wake of this, and a question from the jury about accomplice liability during its deliberations in the guilt phase, counsel decided that the best strategy was to make a plea for mercy and to try to capitalize on any residual doubt members of the jury might have. The PCRA court ruled, based on the record, that trial counsel was not ineffective. *Id.*; *see also* Pet. App. 2 at 4-5.

Rompilla also contended that the trial court had erred in failing to give an instruction to the jury that, in Pennsylvania, a term of life imprisonment carries with it no possibility of release on parole, in other words, that "life means life." He maintained that the Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), required this because, in his view, the prosecution had put his future dangerousness at issue when it sought to establish the "history of serious felonies" aggravating circumstance. The PCRA court rejected this claim as well. In his subsequent appeal to the Pennsylvania Supreme Court, the ruling of the PCRA court was affirmed in all respects.

3. The district court that considered Rompilla's § 2254 petition, which included his claims of counsel's ineffectiveness in the penalty phase and his *Simmons* claim, ruled without conducting an evidentiary hearing. The court granted *habeas* relief on the former claim, vacating Rompilla's sentence of death and awarding him a new penalty phase , and denied relief on the latter. While the district court acknowledged that its review was affected by changes to federal *habeas* law made by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, *see* Pet. App. 3 at 2-3, ultimately, it was guided by its own, independent evaluation of counsel's performance. *Id.* at 3-10.

Though the district court said that it was "a very close call in this case because trial counsel performed so admirably according to [its] review of the record," it nevertheless thought counsel should have taken other steps to discern Rompilla's background. *Id.* at 10. The district court held that the state court ruling which had reached the opposite conclusion was unreasonable. In its discussion of this claim, the district court identified what it saw as two important deficiencies in the decisions of the Pennsylvania courts: "no in depth analysis of what the duty to investigate consists of in a case of this nature; and . . . a lack of discussion of alcoholism pertaining to . . . [Rompilla]." *Id.* at 7.

With respect to Rompilla's *Simmons* claim, the district court determined that the Pennsylvania Supreme Court's ruling afforded no basis for *habeas* relief. After parsing the portions of the trial record which contained the prosecutor's closing argument in the penalty phase, the district court agreed with the state court's conclusion that he did not put Rompilla's future dangerousness at issue. Based on that record, and the narrow scope of review under AEDPA, the district court said that state court ruling on Rompilla's application for collateral relief "was not an unreasonable application of federal law." *Id.* at 11-12.

4. The Commonwealth appealed the district court's ruling on Rompilla's ineffectiveness claim to the Third Circuit; Rompilla cross-appealed on the *Simmons* issue.[2] Finding that the district court had improperly analyzed the ineffectiveness claim, the Court of Appeals reversed its ruling granting Rompilla relief and reinstated his death sentence. Pet. App. 4 at 6-20. The district court's evaluation of the state courts' rulings

[2] Rompilla was also permitted to appeal the district court's ruling on his claim that the trial court erred in instructing the jury on accomplice liability. *See* Pet. App. 4 at 20-23. His petition to this Court does not seek review of the Court of Appeals' ruling on that issue.

on Rompilla's ineffectiveness claim failed to give proper effect to the provisions of § 2254(d)(1). The state court decisions could not be disparaged, let alone labeled "unreasonable," because they failed to contain discussion of the subjects cited by the district court. This Court's jurisprudence has made it clear that a failure to refer to specific authority, or to discuss the same in a decision, is not part of the calculus in post-AEDPA *habeas* review. Rather, that the proper approach is to assess whether the state court's ruling is "contrary" to this Court's controlling precedent, as that term has been defined in its *habeas* jurisprudence, or constitutes an objectively unreasonable application of the controlling decisional law. Though a federal court may disagree with a state court's conclusion it has no authority to substitute its assessment if the state court's ruling falls within the range of objectively reasonable dispositions. Applying these principles in the specific context of Rompilla's case, the Third Circuit concluded, warranted no grant of *habeas* relief as to his ineffectiveness claim.

The Court of Appeals upheld the district court's disposition of Rompilla's *Simmons* claim, agreeing that its review of the state court ruling on this issue was sound. The district court had viewed this claim from the proper legal and temporal perspectives and correctly concluded that the state court's ruling was neither contrary to, nor an unreasonable application of, the then-existing controlling precedent of this Court. *Id.* at 23-30.

REASONS FOR DENYING THE WRIT

This Case Presents No Important or Wide Reaching Issue of Law; Rather, the Decision of the Court of Appeals Properly Applied Well-Settled Legal Principles to the Specific Facts of This Case.

The Third Circuit's ruling in this case broke no new legal ground nor deviated from the principles this Court has announced with respect both to federal *habeas* review of state court decisions and the particular substantive law governing the petitioner's claims. To the contrary, the Court of Appeals faithfully applied this Court's teachings in analyzing petitioner's claims that, in the penalty aspect of his state court trial, counsel was ineffective and that the jury was given inadequate instruction. Further review of this case is therefore unwarranted.

1. **The Court of Appeals Correctly Reversed the District Court's Ruling Awarding Relief to Petitioner as to His Ineffectiveness Claim Because the District Court Did Not Take Proper Measure of the State Court's Decision Under § 2254(d).**

Because the Pennsylvania courts had adjudicated Rompilla's claim that trial counsel were ineffective in the penalty phase on the merits, the Court of Appeals properly determined that the nature and scope of federal habeas review was not *de novo*, but whether the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court] . . . ." Pet. App. 4 at 5. It stressed that this standard does not permit a federal court to substitute its independent assessment of claims for that of the state court. *Id.* at 6. In this instance, as the Court of Appeals observed, the district court's ruling on this claim had not only expressed its disagreement with the decisions reached by the state courts, but also found them to be "unreasonable." *Id.* at 10. In so ruling, the district court had assigned significance to the

failure of the state courts to include in their decisions: any in-depth analysis of trial counsel's duty to investigate; any reference to or discussion of ABA Standards for Criminal Justice; and any discussion of alcoholism. *Id.*

The Court of Appeals quite correctly determined that the district court was not justified in discrediting the state court rulings for these perceived deficiencies in explication. *See Early v. Packer*, 537 U.S. 3, 8 (2002)(*per curiam*)(proper application of the provisions of § 2254(d)(1) "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them")(emphasis in original). *Accord Weeks v. Angelone*, 528 U.S. 225 (2000).

Likewise it properly rejected Rompilla's contentions that the state courts did not adjudicate the merits of Rompilla's ineffectiveness claim, making their rulings subject to the scrutiny mandated by § 2254(d). *See* Pet. App. 4 at 11-13 (where the court noted that the plain content of the state court decisions would lend themselves to no other interpretation).

As its opinion reflects, in examining the state court rulings pursuant to § 2254(d), the Third Circuit undertook a painstaking and extremely detailed review of the state court record. *Id.* at 6-20. In determining that the state court's disposition of this claim was neither contrary to, nor an unreasonable application of this Court's precedent, the Court of Appeals did precisely, what it was required to do. It first looked to see whether the state courts had issued a decision that "contradict[ed] the governing law set forth in [this Court's] cases" or one that "confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] a [different]

result . . . ." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). *See* Pet. App. 4 at 13. Its conclusion that the decision of the Pennsylvania courts was not contrary to the controlling decisions of this Court was sound. The Court of Appeals properly rejected Rompilla's contention that the Pennsylvania courts employed a different standard in deciding his ineffectiveness claim. *Id.* at 11-13. That argument, the Third Circuit explained was ill-conceived for two reasons. First, Pennsylvania law has repeatedly emphasized that the standard contained in state cases dealing with ineffectiveness claims and that in *Strickland v. Washington*, 466 U.S. 668 (1984), are one and the same, notwithstanding the fact that, to facilitate the examination of claims, Pennsylvania cases break down the review required under *Strickland*'s "performance" prong into two steps. *Id.* at p. 12 (citing *Commonwealth v. Pierce*, 515 Pa. 153 (1987)(which makes this explicit). This sub-division of the review of counsel's performance, as the Court of Appeals pointed out, is "essentially stylistic," not substantive. *Id.* Second, it is clear from the decisions of the state courts in this case, that they actually employed the analysis *Strickland* mandates. *Id.* at 11-13.

Equally well-grounded was the Court of Appeals' conclusion that Rompilla was entitled to no relief under § 2254(d)'s "unreasonable application" clause. The court carefully heeded this Court's instructions in *Strickland* that judicial review of an attorney's performance must be highly deferential and that the reviewing court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Its lengthy and thorough discussion of trial counsels' extensive efforts to obtain and marshal mitigation illustrates

that the conclusion reached by the state courts on Rompilla's ineffectiveness claim was not "unreasonable."

What is abundantly clear from the court's discussion in this regard is that the factual record showed, without contradiction, that counsel, from the earliest moments of this case sought to gather information about and evidence of mitigation. Contrary to the distorted picture the Rompilla's petition to this Court paints, these efforts were not careless, disorganized, unfocused or inexperienced. Pet. App. 4 at 13-20. The uncontradicted evidence in the state record showed that counsel conceived and carried out a responsible plan to investigate and gather information—a plan formulated based on past experience which sought to maximize the resources available. As part of that plan they engaged in frequent contacts with numerous close family members in order to learn what, if anything, in Rompilla's past might be fertile ground for mitigation evidence and had Rompilla evaluated by several well-qualified mental health professionals for the same purpose. *Id.*

This case does not involve the sort of situation the Court encountered in *Wiggins v. Smith*, 539 U.S. 510 (2003), or anything close to it and the Court of Appeals rightly rejected Rompilla's arguments that it did, underscoring important disparities between the cases:

> There are critical differences between the conduct of Wiggins's and Rompilla's trial attorneys. Wiggins's attorneys were presented with leads that 'any reasonably competent attorney' would have realized were promising. Rompilla's attorneys had no comparable leads. Wiggins described his childhood as 'disgusting'; Rompilla insisted that his was 'normal.' In *Wiggins*, post conviction interviews with Wiggins himself and with members of his family produced evidence of severe abuse. In the present case, Rompilla's attorneys interviewed their client and numerous family members in detail before the penalty proceeding but discovered no mitigating evidence. Wiggins's attorneys 'uncovered no evidence in their

> investigation to suggest that . . . further investigation would have been fruitless.' Rompilla's family background would not have been productive. Not only did Rompilla's attorneys probe their client for mitigating evidence, but they interviewed numerous members of his family, including siblings who bracketed him in age. At least one of these siblings, . . . later revealed that he knew about the conditions in the home on which Rompilla now relies, but he never provided that information t trial counsel, and although he now claims that trial counsel never asked him about any period of time other than the months immediately preceding the murder, the PCRA court found that this testimony was not believable.
>
> In short, the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so. Rompilla's attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources. In our view, Wiggins is critically different from the present case.

Pet. App. 4 at 18-19 (internal citations omitted).

In light of the factual record, the Court of Appeals made no error in concluding that the state courts had not unreasonably applied this Court's controlling precedents governing ineffectiveness claims. Its ruling on the same involved no novel or significant development in the law and certainly is of no widespread effect. There is no creditable basis therefore for further review of this claim.

2. Nor Should The Court Review Rompilla's *Simmons* Claim; the Court of Appeals Correctly Determined That He Was Not Entitled to *Habeas* Relief.

With respect to Rompilla's claim that the trial court was obliged by *Simmons* to give a "life means life" instruction, the decision by the Court of Appeals affirming the district court's denial of relief, similarly reflects no error. The Court of Appeals, like the district court, conducted its review of this claim pursuant to the provisions of § 2254(d), since the state courts had adjudicated the claim on the merits. Pet. App. 4 at 23-30. Importantly, both of the federal courts appreciated that, in deciding whether the state

court ruling was contrary to or an unreasonable application of controlling precedent of this Court, they were obliged to look at the precedent existing at the time of the state court rulings and to make the required assessments in that temporal context. Pet. App. 4 at 26 (quoting *Williams*, *supra*). At the time of the state court rulings on this issue, the controlling precedent at that time could be found in the Court's decision in *Simmons*, *supra*, and the state court decision expressly refers to and is guided by that ruling. Pet. App. 2 at 9. After finding that no issue of the defendant's future dangerousness had been made, the Pennsylvania courts concluded that no "life means life" instruction was required by *Simmons*. *Id.*

The Court of Appeals' careful review of *Simmons* explained that it could be understood to hold that a "life means life" instruction need only be given in situations where the prosecution has put into issue the defendant's future dangerousness. Pet. App. 4 at 23-26. *Simmons* did not speak to circumstances where the prosecution has not actively raised that issue, nor other situations, such as that presented in this case, where the jury of its own accord asks questions about the possibility of parole.[3] *Simmons* likewise did not hold, or even suggest, that a statutory aggravating circumstance focusing

[3] The Commonwealth takes issue with Rompilla's repeated and purely subjective characterization of the sentencing jury's questions as signaling concerns on its part about his future dangerousness. Certainly, that is one possible reason it sought the information it did. It is, however, equally possible that its questions were motivated by other concerns. For example, the jury may have wanted to be sure that "life imprisonment" in Pennsylvania would mean that the defendant would serve a lengthy term of incarceration, something, which in its view would be punishment commensurate with the horrible crime he had committed. It may have been seeking confirmation that he could not be paroled after just a few years in prison.

solely on a defendant's past criminal history, by itself, served to put a defendant's future dangerousness at issue.[4]

In view of this, the Court of Appeals was indisputably correct in holding that the state court decisions here were not contrary to the then-existing, controlling precedent of this Court. Pet. App. 4 at 27-28. Plainly, as the court's survey of the extant precedent on this point shows that, in ruling as they did, the Pennsylvania courts had neither "contradict[ed] the governing law set forth in [this Court's] cases" nor "confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] a [different] result . . . ." *Williams*, *supra*, 529 U.S. at 405-06. *See id.*

Nor, as the Court of Appeals' comprehensive discussion reflects, could it fairly be said that the state court's decision unreasonably applied *Simmons*. Pet. App. 4 at 28-30. As it pointed out, the prosecutor's remarks which Rompilla contends raised the specter of his future dangerousness, (*e.g.*, the prosecutor's use of the word "frightening" in comparing the crime in this case with an earlier crime Rompilla had committed), in fact did not have that effect when read in context. When the words and phrases he has selectively excised and cobbled together in aid of his argument are actually viewed in this manner, it soon becomes clear that the prosecutor's statements were responsive to

[4] As its opinion reflects, at the time the Pennsylvania Supreme Court ruled on Rompilla's *Simmons* claim, its jurisprudence included rulings that the "significant history of serious felonies" aggravating circumstance., *see* PA. CONS. STAT. ANN. § 9711(d)(9), did not put a capital defendant's future dangerousness at issue. This aggravating circumstance, the court had held, was retrospective—not prospective—in character. *See* Pet. App. 2 at 9. Simply put, this provision of state law helps a sentencing jury weigh whether there have been prior instances in which defendant has repeatedly displayed serious disregard for society's laws or whether the crimes for which a sentence is to be imposed is a singular aberration in an otherwise law-abiding life.

arguments of residual doubt that Rompilla made to the jury and were not an invitation to the jury to impose a death sentence as 'a response of society to someone who is a threat," or as "an act of self-defense" as was the case in *Simmons Id.* at 28-29 (where the court explained that use of the word "frightening" in this situation equated with "astounding"). The Court of Appeals correctly determined that, based on their respective trial records, there was no parity between this case and *Simmons*.

In turn taking up and rejecting each of the reasons Rompilla advanced as part of his argument that he was entitled to relief under this clause of § 2254(d)(1), the court surveyed the controlling precedent of this Court as it existed *at the time the state courts ruled on the issue* and evaluated whether the decision reached by the state courts was unreasonable given how the law was defined *at that time*. In his petition to this Court, as he did in the court below, Rompilla blends a highly subjective interpretation of what occurred in this case with post-*Simmons* jurisprudence, including the Court's decisions in *Shafer v. South Carolina*, 532 U.S. 36 (2001) and *Kelly v. South Carolina*, 534 U.S. 246 (2002)--rulings issued years *after* the state court decisions in this case--in faulting the failure to grant *habeas* relief on this claim. This attempt at retrofitting the circumstances in which the state court ruled is ill-conceived and contrary to the clear admonition in *Williams* about focusing on the proper point in time when conducting review under § 2254(d)(1). The Court of Appeals did not stray from the proper path in its evaluation of this claim either. Its ruling does not give rise to any legal issue worthy of further review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania

RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division

By: _____
AMY ZAPP
Chief Deputy Attorney General
Appeals & Legal Services Section

OFFICE OF ATTORNEY GENERAL
16th Floor – Strawberry Square
Harrisburg, PA 17120
Phone: 717-705-4487
Fax: 717-783-5431
E-Mail: azapp@attorneygeneral.gov

DATE: August 26, 2004

DISTRIBUTED SEP 21 2004

ORIGINAL

Supreme Court, U.S.
FILED
SEP 14 2004
OFFICE OF THE CLERK

NO. 04-5462

IN THE SUPREME COURT OF THE UNITED STATES

RONALD ROMPILLA,

Petitioner,

v.

Jeffrey A. Beard
~~MARTIN HORN~~, Commissioner, Pennsylvania Department of Corrections,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, Ronald Rompilla

Dated: September 14, 2004

RECEIVED
SEP 21 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

CONCLUSION 2

TABLE OF AUTHORITIES

Wiggins v. Smith, 123 S.Ct. 2527 (2003) 2

Wiggins v. Smith, Respondent's Brief, 2003 WL 543903 (U.S. Feb. 18, 2003) 2

Petitioner, Ronald Rompilla, files this reply brief in support of his Petition for Writ of Certiorari, and prays that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit, which reversed the District Court's grant of habeas corpus relief in this capital case. The Circuit panel was divided 2-1 on both issues presented in Mr. Rompilla's Petition for Writ of Certiorari, and the en banc Circuit denied rehearing by a 6-5 vote.[1]

ARGUMENT

For the most part, Respondent's arguments do not require any response. Petitioner submits this short reply only to correct a factual misstatement made by Respondent regarding the supposed past "experience" of Petitioner's trial counsel and the significance of that supposed "experience" to their mitigation investigation. See Petition for Writ of Certiorari, Argument § II.

At trial and capital sentencing, Petitioner was represented by two public defenders, Maria Dantos and Fred Charles. The undisputed record is that:

> Ms. Dantos was primarily responsible for the penalty-phase; she was just 2½ years out of law school; this was her first homicide trial and first capital case.
>
> Mr. Charles was primarily responsible for the guilt-phase, but had the ultimate say on all tactical/strategic matters; he had represented a few "potentially" capital clients, but had never prepared for or conducted a capital sentencing proceeding.

A1060-67, A1257-58, A1284-85; Rompilla v. Horn, 355 F.3d 233, 276-77 (3d Cir. 2004) (Sloviter, J, dissenting). Thus, both lawyers were novices when it came to preparing for capital sentencing.

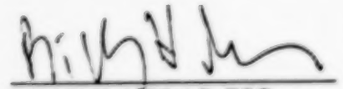
Respondent admits that Ms. Dantos lacked capital case experience, but claims that Mr. Charles had "experience handling capital cases and in preparing mitigation evidence." Brief in Opposition at 3. This is erroneous and contrary to the record which, as stated, shows that Mr. Charles had never prepared for or conducted a capital sentencing proceeding. Moreover, Respondent uses this erroneous assertion about Mr. Charles' supposed capital case "experience" to make the misleading claim that the mitigation investigation was a "plan" that was "formulated based on [that] past experience." Brief in Opposition at 11; see also id. at 4 (asserting that mitigation investigation was "[b]ased on" this supposed capital case "experience" and "practice").

Of course, even lawyers who do have significant capital case experience may be ineffective, as were counsel in Wiggins v. Smith, 123 S.Ct. 2527 (2003). See, e.g., Wiggins v. Smith, Respondent's Brief, 2003 WL 543903, *1 (U.S. Feb. 18, 2003) (Wiggins had a "trial team of two attorneys, one with eight years of trial experience in over 800 felony cases (including a previous capital case) and the other with four years of experience (including appellate work on death penalty cases)"). Petitioner's lawyers, however, had no capital case experience. They completely failed to investigate the aggravation, and they did not reasonably investigate mitigation.

CONCLUSION

This Court should issue its writ of certiorari and review the decision of the Third Circuit.

Respectfully submitted,



BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, Ronald Rompilla

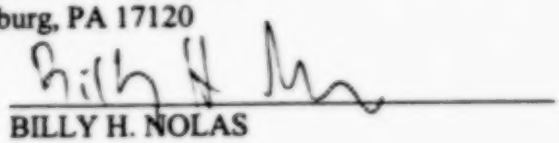
Dated: September 14, 2004

[1] All emphasis herein is supplied unless otherwise indicated. Relevant parts of the state court record were included in an Appendix filed in the Third Circuit under that Circuit's rules, and are cited herein as "A" followed by the Third Circuit Appendix page number.

CERTIFICATE OF SERVICE

I, BILLY H. NOLAS, Esq., certify that on this 14th day of September, 2004, I have caused the foregoing Reply Brief to be served by FIRST CLASS MAIL on the following person:

Amy Zapp, Esq.
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120



BILLY H. NOLAS

(8)

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME I, PAGE 1 TO 268

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Relevant District Court Docket Entries 1

Notes of Testimony (11/1/88, penalty-phase)..... 2

Notes of Testimony (11/2/88, penalty-phase)..... 120

Notes of Testimony (11/3/88, penalty-phase)..... 211

Pennsylvania Supreme Court direct appeal opinion, *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) 241

Court of Common Pleas post-conviction opinion 257

Volume II

Pennsylvania Supreme Court post-conviction opinion, *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998)..... 269

Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 5) 288

Commonwealth's Response to Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 9)..... 441

Volume III

Relevant District Court Exhibits (District Court docket entry 17):

Notes of Testimony (3/28/96) 456

Volume IV

Notes of Testimony (3/29/96) 653

Deposition of Dr. Barry Crown 824

TABLE OF CONTENTS – Continued

Page

Volume V

Deposition of Dr. Carol Armstrong 939

Deposition of Dr. Paul Gross 1015

Deposition of Dr. Gerald Cooke 1057

Deposition of Dr. Robert Sadoff 1102

Deposition of Dr. Frank Dattilio.....1162

Lodging

Sacred Heart Hospital Records on Ronald Rompilla ... *L1

School Records on Ronald Rompilla..... L11

Pennsylvania Department of Corrections Records (Initial Transfer Petition and Initial Classification Summary) L31

Juvenile Court records on Ronald Rompilla L41

Juvenile Court records on Nick Rompilla L49

Police reports provided to trial counsel through discovery L111

Reports and Commutation Recommendation prepared by Dr. Kate Erwin (1995) L121

Volume VI

District Court Opinion 1280

Third Circuit Panel opinion and dissent 1325

Third Circuit *en banc* ruling and dissent 1448

* Items paginated with L numbers are bound in a separate volume.

RELEVANT DISTRICT COURT DOCKET ENTRIES

Entry 5 (6/23/99)	Petition for Writ of Habeas Corpus and Consolidated Preliminary Memorandum of Law
Entry 9 (7/30/99)	Response to Petition for Writ of Habeas Corpus and Consolidated Preliminary Memorandum of Law
Entry 17 (2/8/00)	Exhibits to Petition for Writ of Habeas Corpus
Entry 20 (7/11/00)	District Court Memorandum and Order

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	NO. 682/1988
vs	)	Jury Trial November 1, 1988
RONALD ROMPILLA	)	

VOLUME VI
VERDICT AND NOTES OF TESTIMONY
HEARD BEFORE THE
HONORABLE DAVID E. MELLENBERG, J.

APPEARANCES:

For the Commonwealth:

MICHAEL MOYER, ESQUIRE
District Attorney's Office
Lehigh County Courthouse
P.O. Box 1548
455 Hamilton Street
Allentown, PA 18105

For the Defendant:

FREDERICK CHARLES, ESQUIRE
MARIA DANTOS, ESQUIRE
Public Defender's Office
Lehigh County Courthouse
P.O. Box 1548
455 Hamilton Street
Allentown, PA 18105

Court Monitor:

Lori A. Reichl

[2] INDEX

WITNESSES:	PAGE
CONFERENCE IN CHAMBERS	18
DORIS GLAESSMAN	
Direct Examination by Mr. Moyer	50
JAMES BELTZ	
Direct Examination by Mr. Moyer	55
KELLY WALDRON	
Reading the Transcript in Case Number 1487/1974	62
ISIDORE MIHALAKIS	
Direct Examination by Mr. Moyer	100
Cross Examination by Miss Dantos	110
Redirect Examination by Mr. Moyer	114
Recross Examination by Miss Dantos	123

EXHIBITS

	MARKED	ADMITTED
COMMONWEALTH EXHIBIT NUMBER 1		
Certified copy of Docket	52	54
COMMONWEALTH EXHIBIT NUMBER 2		
Certified copy of Docket	52	54

[3] (Court called to Order)

THE COURT: Very well, let the record reflect the Court has been informed that the Jury has arrived at a verdict. Now, you may bring the Jury in please and the record should also reflect that the Defendant is present

along with his Co-Counsel as well as the Prosecutor and the Assistant District Attorney.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, I understand you have arrived at a verdict, is that correct?

FOREMAN: Yes.

THE COURT: The clerk will receive the verdict please.

(Whereupon roll call of Jurors was taken)

THE COURT: Very well, the clerk will read the verdict and if the Jury agrees with it, it will be entered as a verdict of this Jury.

CLERK: Commonwealth of Pennsylvania vs. Ronald Rompilla, Case Number 682 of 1988. And now, November 1st, 1988, we the Jurors empanelled in the above [4] case, find the Defendant, Ronald Rompilla, guilty of Criminal Homicide. We find the Defendant guilty of Murder of the First Degree. Count 2, Burglary, Guilty of Count 2 Burglary, Guilty of Count 3, Criminal Trespass, Guilty of Count 4, Theft, Guilty of Count 5, Receiving, Guilty of Count 6, Robbery.

THE COURT: Now, Count 7 and 8 are not filled in, was that –

FOREMAN: They were the same. That was my mistake.

THE COURT: You're saying they were all guilt – that was guilty, too.

FOREMAN: Correct.

THE COURT: That was an oversight you're saying?

FOREMAN: Exactly, they were all guilty.

THE COURT: So say you all then as to all 8 Counts.

JURY: (Nods affirmative).

THE COURT: Very well. Let the –

MR. CHARLES: Your Honor, I'd like the Jury polled.

THE COURT: As to –

MR. CHARLES : May we approach?

THE COURT: Very well. The Jury may be [5] seated please.

(Whereupon Counsel approach side-bar)

MR. CHARLES: First, I would like the Jury polled, and I would like to know whether or not they found him guilty as an accomplice or as an actor in this matter, in reaching their decision on First Degree.

THE COURT: They were instructed not to. Now, I'm not sure – what's the basis for that?

MR. CHARLES: Well, I know they were considering it. I'd like to know whether they considered him as acting as an accomplice or as an actor.

MR. MOYER: I don't think there's any basis for that.

MR. CHARLES: I think it – it'll not only will become – it's not only important now, it would become important on the next phase. I would like to know what, in reaching their verdict, whether or not they have found him to be an actor or an accomplice in reaching their verdict of guilty of the First Degree.

THE COURT: I, initially, the answer is no. I think –

MR. MOYER: They would have to be excused to deliberate again on that question, and they would have [6] to actually return a verdict on that, and I would object to that.

THE COURT: Well, you – first of all, you'd like to have them polled?

MR. CHARLES: Yes, I'd also –

THE COURT: As to every one?

MR. CHARLES: Yes, as to the charges, yes.

MR. MOYER: I have no objection to them being polled, but I think they can be polled and answer of one because all the verdicts are the same. They can answer one –

THE COURT: Do you have any objection to that?

MR. MOYER: – verdict for all charges.

THE COURT: How do you find the Defendant guilty –

MR. CHARLES: I would like the Murder in the First Degree mentioned, not just all the – and the rest of the charges.

THE COURT: All right.

MR. CHARLES: I'd like Murder in the First Degree.

THE COURT: All right. You're entitled to that and ask that specifically and as to all of the charges?

[7] MR. CHARLES: Yes.

THE COURT: All right. And then what we'll do, hold your Motion –

MR. CHARLES: Okay.

THE COURT: – in abeyance. When we adjourn, we can see – discuss it.

MR. CHARLES: Okay.

THE COURT: All right?

MR. CHARLES: Okay.

(Whereupon side-bar conference concludes)

THE COURT: Now, if I understand you ladies and gentlemen, just so that I – the Court now then will – if I understand you correctly, enter the word Guilty as to Count Number 7 and Guilty to Count Number 8, and you say that was an inadvertence. We will be polling the Jury as to your findings at this juncture. I instructed the clerk to pose the question as to how do they find with respect to the Criminal Homicide in Murder of the First Degree,

Guilty or Not Guilty and as to all other charges, Guilty or Not Guilty, all right.

(Whereupon the Jury is being polled)

[8] THE COURT: All right. We will recess with respect to a Motion that's before the Court so that the Court has an opportunity to review and consider.

MR. MOYER: Your Honor, before we recess, I would ask that the verdict be recorded as it has been stated by the Jury.

THE COURT: Well, I think I already instructed that if the Jury agrees with the verdict, it shall be recorded as the verdict of the Jury. I think I originally said that, did I not?

MR. MOYER: I don't remember.

THE COURT: I usually do. I usually preface my – the polling of the Jury with that remark. In any event, if I didn't, let the record reflect that this was the Jury – the verdict of the Jury, all right. We're going to take a recess, I think until 11:00 o'clock. Mrs. Haas, could I see you up here a second? I would like the Jury to remain because the Motion that is before the Court may very well concern you. Get coffee and doughnuts and what have you, I don't know.

MS. HAAS: Okay.

THE COURT: All right, Mr. Schaeffer, we will take a recess until 11:00 o'clock.

COURT CRIER: All rise please, this Court will be in recess until 11:00 o'clock this morning.

[9] (Whereupon the Jury leaves the Courtroom)

(Whereupon the Court is in recess)

COURT CRIER: All rise please, this Court is again in session, you may be seated.

THE COURT: All right.

MR. CHARLES: Your Honor, did your – did your Honor want to put on the record your response to my Motion to have an Interrogatory sent out with the Jury to determine whether they found the Defendant Guilty of Murder in the First Degree as an actor or as a – as an accessory – as an accomplice basically, not an accessory as an accomplice.

THE COURT: Very good, Motion denied. I have no – that's fine, Motion denied. Now, you may bring the Jury in please.

MS. DANTOS: Well, wait, he's in handcuffs.

MR. CHARLES: Your Honor, –

MS. HAAS: Judge, –

MS. DANTOS: Judge, the Defendant's in handcuffs. Can we have the handcuffs removed before the Jury comes in?

THE COURT: Pardon?

MR. CHARLES: Your Honor, –

[10] MS. DANTOS: Judge, can we approach the bench for a minute.

(Whereupon Counsel approach side-bar)

MS. DANTOS: Bring the Jury in – what are we bringing the Jury in for?

THE COURT: I have to let them know what's going on.

MS. DANTOS: Okay.

THE COURT: We're going to be imposing on them for rest of the day, tonight, tomorrow morning. I think they're entitled to know that.

MS. DANTOS: Okay. But as far as –

THE COURT: Would like to tell them logistics of what we're going to do.

MS. DANTOS: Okay, but as far as my objection to his aggravating factor, we're going to do that at 1:30, correct?

THE COURT: Oh, we're going to rule on that, right.

MS. DANTOS: Okay. So, we're just bringing the Jury in to tell them what's going on.

THE COURT: Right, that they will be taking a lunch again.

[11] MR. CHARLES: What about the request for additional time –

MS. DANTOS: Yeah, I'll put a request on the record that I'm requesting on behalf of the Defendant that we have a break, and that we do not begin the penalty phase until tomorrow morning.

THE COURT: Well, I'll tell you what we'll do, you have until 1:30, of course, and prepare for his side. We're going ahead with the Commonwealth's side at 1:30, and I will grant then, if, indeed, he finishes early, we will

then let you go tomorrow morning, all right. Very good, all right.

(Whereupon side-bar conference concludes)

THE COURT: Lunch has been ordered, I understand.

MS. HAAS: Yes. Did you say you're going to put them up tonight again?

THE COURT: I'm afraid I have to.

MS. HAAS: You know what, you're going to have a problem with Juror Number 2.

THE COURT: Why?

MS. HAAS: Because he's a diabetic, and he said he can only stay over one night, because he said he [12] has other stuff at home that he does every other day or whatever the case may be. When I heard you say that –

THE COURT: Uh-oh. May I see Counsel up here –

MS. HAAS: And he never said this till he was –

THE COURT: Pardon?

MS. HAAS: He never told us this till he was empanelled or anything, you know.

THE COURT: All right.

(Whereupon Counsel approach side-bar)

THE COURT: There is a problem, I knew it, this is what I told you.

MR. MOYER: What's the matter?

THE COURT: Juror Number 2, says he cannot stay two nights in a row. He's the diabetic, he's the one who says he has other things he must take care of, and he can only do it at home.

MR. MOYER: Well, if the Defendant has no objection to the Jury being excused and being brought back – not being – than not being sequestered, then obviously, I think we're okay if the Defendant does not object. If he objects, then – then we don't have a choice.

[13] THE COURT: And I think the Defendant should be brought into the discussion.

MS. DANTOS: Well, why don't we talk to him?

MR. MOYER: Yeah, why don't you talk to him first.

THE COURT: Talk to him because he's going to have to put on the record, too, in all fairness.

MR. CHARLES: What are the – what are we talking about? What are the alternatives?

MR. MOYER: Either sequestered or –

THE COURT: That's it.

MR. MOYER: – they're not sequestered tonight.

THE COURT: Yeah. He wants to sequester, but he says he can't do it because of health reasons and if that's something, again, we go right ahead, that's the end, you finish today then.

MR. CHARLES: Finish today?

THE COURT: If, indeed, that's the case. I am not going to jeopardize this whole trial or this Jury because of that, I can't.

MR. MOYER: What – off the record.

THE COURT: You suggested before, though, that you were willing to waive the sequestration –

[14] (Whereupon proceedings are off the record)

COURT CRIER: Court is again in session, you may be seated.

THE COURT: Now, what do we have, Mr. Charles?

MS. DANTOS: Your Honor, we have no problem with letting the Jury go tonight to go home rather than be sequestered.

THE COURT: So, they don't have to be sequestered.

MS. DANTOS: Correct.

THE COURT: As I indicated the reason being one of health –

MS. DANTOS: Health.

THE COURT: – for, I think, one of the Jurors in any event.

MS. DANTOS: And I have explained that to the Defendant, and he is in agreement.

THE COURT: Mr. Rompilla, do you understand, we will not then sequester the Jury, and we'll start the hearing this afternoon with respect to the Commonwealth

and continue the matter until tomorrow morning then, upon their completion of their side of the case. You have no objection to then excusing the Jury with [15] instructions, of course, that they are not to read anything in the newspaper, appears in television, that I can do but that's about the only thing I can do under the circumstances, do you understand that?

MR. ROMPILLA: I understand.

THE COURT: Are you willing to waive that then?

MR. ROMPILLA: Yes.

THE COURT: Very good.

MR. MOYER: Judge, I think the record should also reflect that there was a conference held with Defendant, and his two Attorneys in a Conference Room that lasted about a minute, minute and a half, would that be accurate?

MS. DANTOS: Yeah.

THE COURT: All right, very well, the record should so indicate. You may bring the Jury in.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, as you know, you have found the Defendant Guilty of Murder in the First Degree, and your verdict has been recorded. We will hold a Sentencing Hearing, and we'll commence that at 1:30 during which Counsel may present additional evidence [16] to you and argument, and you will then decide whether the Defendant is to be sentenced to death or life imprisonment. Whether you sentence the Defendant

to death or to life imprisonment, will depend upon what, if any aggravating or mitigating circumstances you find are present in this case. In loosely speaking, when I say that, I mean loosely speaking, aggravating and mitigating circumstances are circumstances concerning the killing and the killer which make it First Degree Murder case either more serious or less serious. The Crimes Code defines more precisely what constitutes aggravating and mitigating circumstances. Although, I will give you a detailed instruction with regard to this aspect of the matter later in the hearing. I will tell you now that aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt as did the same burden apply with respect to everything else in this case with respect to the Commonwealth. That serves – same burden applies in this Sentencing Hearing. While mitigating circumstances must be proven by the Co – the Defendant by a Preponderance of the Evidence. A Preponderance of the Evidence is a less heavy and severe burden than by beyond a reasonable doubt burden. I, again, that will be more definitively defined at the Hearing this afternoon when we ultimately charge in this matter. You will be kept together, again, for [17] luncheon. We will commence the hearing this afternoon with the Commonwealth's side of the case and depending how far we go, but we will recess some time this afternoon and finish the case tomorrow. You will be excused to go home over the night by agreement of both the Defendant, his Counsel, as well as the Commonwealth's Counsel. You will go, of course, with the same instructions that you've had heretofore with respect to everything in this trial. You are instructed not to read anything that might appear in the newspaper about this case and about any circumstances surrounding this case or this Defendant and that applies this afternoon when you go for lunch,

same circumstances apply. Indeed, if you go home tonight, you are instructed, also, not to view anything that might appear in the newspaper – I mean on television or on the radio. Now, with that general – again, same admonishment that I've given you in the past, we will adjourn then until 1:30 and we've already made reservations for luncheon. Very good, all right. All right, Mr. Schaeffer, we will adjourn then until 1:30.

COURT CRIER: All rise please, this Court will adjourn until 1:30 this afternoon.

(Whereupon Court is adjourned until 1:30)

[18] (Conference which takes place in Chambers)

THE COURT: All right, now, you asked for this hearing for what purpose?

MS. DANTOS: For the purpose of attempting to exclude, first of all, the transcript and the Burglary and Rape Convictions from coming in at this point. First of all, the Law is clear that on aggravating factor, there has to be – it has to be a crime involving violence. The crime here –

MR. MOYER: Or threat of violence.

MS. DANTOS: I'm – let me finish.

THE COURT: Let her argue, all right.

MR. MOYER: Well, that's not accurate statement though.

MS. DANTOS: Well, your Honor, –

THE COURT: You can argue that, all right, go ahead.

MR. MOYER: All right.

MS. DANTOS: The violent act, you have a Burglary, you have a Burglary, you have to look at the category of the crime. A Burglary is a crime of entry, okay, with the intent to commit a crime inside. I believe Mr. Moyer could argue that a Burglary can be violent, I don't know. I haven't found that, but to say that someone's [19] committing a Burglary and while busting in the door they hurt someone, okay, maybe that's a crime of violence involving the Burglary. In this case, there's a Burglary, entered the Bar, the Rape is a crime of violence, I'll submit that, that's clear. I think we all agree that one conviction of a crime of violence is not enough for this aggravating factor. There has to be two. The Burglary by itself is not a crime of violence. The only reason to bring that in and to read the transcript from the Rape to the Jury to substantiate the charge of violence on the Burglary would do nothing but inflame the Jury on the Rape. The Rape is not enough, that's the only crime of violence we have here. Burglary is not a crime, it's a property crime.

THE COURT: That it?

MS. DANTOS: For now.

THE COURT: For now, you mean there's more – more to come, all right.

MR. MOYER: Is that it? Is that it Maria?

MS. DANTOS: Go ahead.

MR. MOYER: Is that it?

MS. DANTOS: Well, I do have a case.

MR. MOYER: Well, see, I want to make sure that's it. I don't want to interrupt you.

THE COURT: You have a case?

[20] MS. DANTOS: Yes, Commonwealth vs. Christie.

THE COURT: Right.

MR. MOYER: That's the same one I gave to you –

THE COURT: Right.

MS. DANTOS: Okay. Regarding a Burglary not being a crime of violence.

THE COURT: Okay, true. No question it does say that but then it goes on to say that, "threat of violence, in order for a felony to be includable, the Commonwealth must present evidence that the Defendant actually threatened another with violence or actually use violence on another."

MS. DANTOS: Correct.

THE COURT: Now, 97, – but now you notice that they say, "in order for a felony to be included under 9711 D.9," okay, that's an aggravating – now, they don't say that they mean Burglary here though either, do they?

MS. DANTOS: Well, your Honor, they're discussing the Burglary and two Escape Charges but –

THE COURT: Up to that point.

MS. DANTOS: Correct.

THE COURT: But they don't say that if you do show Burglary, you must show – you can also show then, [21] actual threatened another with violence or actually used violence on another.

MS. DANTOS: You must show that on the Burglary.

THE COURT: All right.

MS. DANTOS: Before he gets to use that.

THE COURT: Okay, that's your point. Now, –

MR. MOYER: I agree. I mean, the fact that its a Burglary in it of itself doesn't make it a crime and the Statute says, and I'll read the Statute, "the Defendant has a significant history of felony convictions involving the use or threat of violence to the person." So, you don't have to actually use violence, you can just threaten to use violence.

MR. CHARLES: But that, Judge, that's to the first –

MR. MOYER: Now, can I finish.

MR. CHARLES: That's to the –

THE COURT: All right.

MR. MOYER: Now, can I finish?

THE COURT: That's right now, we shut him up when –

MR. MOYER: Now, this case – in this case, the Commonwealth said, okay, we're going to present these [22] crimes, Escape and Burglary and nothing more did

they present on it. The Court said, you just can't present a Burglary, you've got to show – the Commonwealth has a burden to show that that Burglary involved threat of violence or violence itself, because it says here, force is not an element of either of these crimes. Indeed, both crimes can be committed without even encountering another person, no question about that. Every felony has the potential for violence if the actor is caught. This, however, is not what the Legislature intended by the words "threat of violence". In order for a felony to be included, the Commonwealth must – must present evidence that the Defendant actually threatened another with violence or actually used violence on another. We're under a duty to show that the Defendant used violence, because its not a crime in it of itself that has to do with violence, and I have a transcript from that trial. You know, I don't think the Burglary ends once the Burglar gets into the house or into the building. The Burglary takes place even after the entry and if there's any violence whatsoever that takes place during that Burglary, then that Burglary involves violence and in this particular case, Rompilla enters into the bedroom of the victim. She – this is her testimony "and I picked up my head to see what the noise was, and I seen a man walking toward me," and he [23] says, "face down on the pillow, I have a gun on you."

Question: Can you identify that man?

Answer: Yes, I could now.

Question: Who came in and would you point to him?

Answer: That gentlemen there (indicating).

Let the record show that the Witness pointed to the Defendant, Ronald Rompilla.

MR. MOYER: Judge, that is a clear case of violence or the threat of violence being used in this Burglary. In addition, afterwards, the Defendant proceeds to Rape this woman after burglarizing into the hou – in the bedroom, he rapes the woman. What more evidence is there of the use or threat of use of violence?

THE COURT: Now, the Burglary Charge as – in the raw, did – the purpose – the entry of the building for what purpose?

MR. MOYER: Well, –

THE COURT: To commit a crime but what crime?

MR. MOYER: Exactly.

THE COURT: But what crime?

MR. MOYER: I checked the Indictment on that, Judge and there was an Indictment, and it wasn't specified. All the Indictment said was, to commit a crime therein. It didn't specify whether it was threat or rape [24] or whether it was theft, rape or what it was. My position is, it doesn't matter because there was violence during the Burglary. I mean, once a Burglar enters into a home – enters into a house or a home, the Burglary doesn't stop then, he's still in the process of committing that Burglary. He's still in the process of trying to commit a crime that is his intent to commit when he gets into the house. So, I mean, it's all ongoing process.

THE COURT: You're saying that the initial crime that he went in there for that when he held a gun to her head?

MR. MOYER: This what – yeah, this is what he says, "face down on the pillow, I have a gun on you." And then he goes on to steal money from her and from the Bar. Then after taking the monies when he rapes her. My position is, that he goes in there not to rape her but to steal, that's the burglary, and he uses a threat with a gun and then he has the knife, and he uses the knife on the woman during the rape. I contend that the threat of – or the use of violence is not only the rape but also the aggravated theft, the robbery of her even though she's not – he's not charged with that, I mean, that was a Robbery.

MS. DANTOS: Well, he's not charged with that, Judge, –

MR. MOYER: I understand that.

[25] MS. DANTOS: – and I disagree that –

MR. CHARLES: Clearly –

THE COURT: Well, he entered for the purpose of committing a crime –

MS. DANTOS: Right and that's –

THE COURT: – in this case, it is an aggravating crime though, would you agree with that?

MS. DANTOS: Judge, – well, Judge, no because a Burglary is a crime of entry. A Burglary is not at all – if he commits a crime in there, he's going to be charged with that crime.

THE COURT: That's true, but you can enter a building for the purpose of stealing diamonds or you can be entering a building for the purpose of raping a woman –

MR. MOYER: Assaulting her.

THE COURT: – a robbery, now, there's a difference between the two in my mind. I think the one – the Burglary is now a crime of violence, could be.

MR. MOYER: In addition, Judge, the crime – the Firearms Statute lists Burglary as a crime of violence.

THE COURT: Well, the potentials there, there's no question in my mind. Okay, is that your argument? Okay, we'll permit it, Motion denied. Now, what else do you have? What else are you going to show? Do you [26] have any other motions?

MS. DANTOS: That's it, Judge.

THE COURT: That's it?

MS. DANTOS: I object on the record. For the record, I think it's clearly erroneous to let –

THE COURT: All right.

MS. DANTOS: – this in. The crime is a Burglary, its not a violent crime. The violence is the rape.

THE COURT: Well, I would agree except if he's going to carry it through, he would have to before I would permit it, and he says he's going to.

MS. DANTOS: Well, –

MR. MOYER: I'm going to read from the Statute, to prove that it is a crime of violence.

THE COURT: All right.

MS. DANTOS: Let me clear up one thing.

MR. MOYER: And that – the Christie Case says clearly, every felony has the potential, therefore, for every felony that in it of itself is not a crime of violence, Commonwealth has a duty to show that it was a crime of violence, and we have to put on this evidence.

THE COURT: Okay.

MS. DANTOS: What – let me ask one question. Was the Burglary Charge – what was he alleged [27] to have burglarized, the Bar?

THE COURT: No, he's just – he entered the building for the –

MS. DANTOS: Wait a minute, wait a minute.

THE COURT: – purpose of committing a crime.

MR. MOYER: Well, I don't know. Did you check the Indictment?

MR. CHARLES: Let's get the Indictment, your Honor. I don't know –

MS. DANTOS: Because that's my point, Judge. He – he's charged with committing a Burglary because he entered the Bar –

MR. MOYER: No, he was –

MS. DANTOS: – and then the woman lived upstairs and that's when the rape occurred.

THE COURT: Yeah, but not the rape, there's something bef – oh, he went upstairs and – all right.

MS. DANTOS: But the Burglary he was charged with –

MR. MOYER: He did upstairs – or got in upstairs somehow.

MS. DANTOS: – if he was charged and sentenced on the Burglary for entering the Bar, then you cannot tie that into a crime of violence.

[28] MR. MOYER: Judge, that is – really makes no difference whatsoever.

MS. DANTOS: Yes, it does.

MR. MOYER: Well, I know that's what your argument is. My argument is, that it doesn't make any difference and if I recall, because I looked at the Indictment over lunch, that it just listed the address. It did not specify either the Bar or the bedroom. I'm not sure about that. I made a copy of the Indictment, but I don't know if I have it with me.

THE COURT: Well, are you – do you have – what is it?

MS. DANTOS: I don't have a copy of the Indictment.

THE COURT: Well, if it's just the address, I'm not quite sure you're correct. The conclusion reached is, it's only the Bar.

MR. CHARLES: Your Honor, –

MR. MOYER: It doesn't – my position is that it wouldn't make any difference –

THE COURT: Well, I mean if that is the case –

MR. MOYER: – because the Burglary is an ongoing thing.

THE COURT: – then there is no merit to [29] their argument.

MR. MOYER: The Burglary doesn't end once you've gained entrance, that's their position. That once he's gained entrance, the burglary stops.

THE COURT: And if that were true, then I'd have to agree with your argument. In other words, if that's all that happened, he just entered for the purpose and then done nothing more and that's what your argument is. Now, you must go ahead with something –

MR. MOYER: But the burglary is ongoing, once he enters, once he commits the crimes there that it was his intent to commit in there.

MS. DANTOS: That's not –

MR. CHARLES: That's not true.

MR. MOYER: And that's the Rape and also the Theft.

MR. CHARLES: Your Honor, if he breaks in –

MR. MOYER: Who's making the argument? Is it going to be Maria or you or both of you.

THE COURT: Yeah, we're going to have to make up our minds here now, we're getting back into that same territory. One of these days, you're going to make up your mind, not both, one or the other.

MR. CHARLES: All right.

[30] MS. DANTOS: Judge, Burglary is an entry with the intent to commit a crime.

THE COURT: Okay.

MS. DANTOS: Burglary is an intent, okay, –

THE COURT: I understand.

MS. DANTOS: – you enter with an intent. You're – you're guilty of Burglary, all right.

THE COURT: All right.

MS. DANTOS: Whatever crime is then committed, is a separate crime.

THE COURT: Correct.

MS. DANTOS: Right. So, if he was charged with burglarizing by entering the Bar and then was charged with the Rape –

THE COURT: Well, you and I differ. If you enter – if it depends on what you're entering and what you intend to commit as far as a crime.

MS. DANTOS: To commit a crime.

THE COURT: Well, now there's a difference as I said. In my mind, if indeed, he was going there to fondle a little 13 year old girl, and it's not a violent thing say –

MS. DANTOS: Right.

THE COURT: – that's different than when [31] you go in and to rape somebody –

MS. DANTOS: Well, it –

THE COURT: – or hold a gun to somebody's head.

MS. DANTOS: Well, I think we need to look at the Indictment then. If he's charged with committing the Burglary –

THE COURT: Well, all right but you're going to get that up here –

THE COURT: – we'll take a look at it at that time.

MR. MOYER: I had a copy, and I forgot to bring it up with me.

THE COURT: All right.

MR. CHARLES: Can we see it, Judge?

THE COURT: Sure, he's going to get it.

MR. MOYER: It's a public record, Fred, you could have gone over lunch and looked at it just like I did.

THE COURT: Well, is she bringing it up?

MR. MOYER: Who, Doris?

THE COURT: Yeah.

MR. MOYER: Yeah, I had her bring up the whole file.

THE COURT: Okay; so it's over there now. [32] Let's take a look at it then but anything else, though, is that the end of your –

MS. DANTOS: Yes, Judge.

THE COURT: All right. And you intend – what else do you intend to show by way of aggravating circumstances?

MR. MOYER: Well, I'm going to have Mihalakis testify as to the substantial pain for the torture and that's it. So, I have Doris Glaessman, Jim Beltz, the reading of the Transcript of the victim and one of the other witnesses, and Mihalakis.

THE COURT: Are you going to – and then you're going to rely upon the – is he going to testify again as to the number of stab wounds?

MR. MOYER: That will come out, sure.

THE COURT: Okay. What about the burning?

MR. MOYER: Well, he'll testify to it, sure.

MR. CHARLES: Is there going to be a repeated testimony he had on direct?

THE COURT: Well, that's why I'm asking.

MR. MOYER: I'm sure there'll be some overlapping, of course. Of course there will.

MS. DANTOS: Judge, I have one other point.

THE COURT: Okay.

[33] MS. DANTOS: For the record I object to any reading of the Transcript. I don't think it's necessary. Rape is a crime of violence, we agreed to that. To read that in, is seriously prejudicial to the Defendant.

THE COURT: Well, now wait a minute. I agree, the Rape – you're not going to go into the rape, you're going to go into the gun at the head. That's what you're talking about, right?

MR. MOYER: No, because the Rape is part of that violence also, Judge, that's our position. Not only the theft of the money but the rape, as well, is part of the violence of this Burglary.

MS. DANTOS: And it's not –

MR. MOYER: We've got a duty to show that that Burglary was violent. There was violence or threat of violence to the person, and I can do that with the Rape and also with the gun, and I – that's what I intend to do. Now that – I think that's clear.

MS. DANTOS: Judge, –

MR. MOYER: How else am I going to show that it's violent?

MS. DANTOS: Judge, Rape by the nature of the charge is a crime of violence. To allow him to read in portions of the testimony from the Rape Trial, is nothing [34] further than to inflame the Jury, and it's seriously prejudicial against the Defendant.

THE COURT: Yeah, but isn't that the whole –

MS. DANTOS: It has – it serves no purpose.

THE COURT: – purpose of this penalty?

MS. DANTOS: No.

THE COURT: No.

MS. DANTOS: It doesn't –

THE COURT: You have some Law on that?

MS. DANTOS: What purpose does it serve – they do not have to put on the fact from – they have a

record of a conviction, they have a record of his sentence, they have a record that he was convicted of Rape, that's all they need to put on for the crime of violence.

MR. MOYER: For the Rape, that's true but for the Burglary, we have to put on that violence. We have to prove and Christie so instructs us that we have to show that that's a violent crime.

MS. DANTOS: Right, and can't you –

MR. MOYER: And that's what we're doing.

MS. DANTOS: – get that from showing just the gun? What purpose does it serve?

MR. MOYER: Why handcuff the Commonwealth? [35] shouldn't this Jury know the type of violence that this man is? Shouldn't they know how significant it is that the facts of that case are frighteningly similar to the facts of this case? The Bar, the knife, the stealth that was used by the Defendant.

MS. DANTOS: No, because –

MR. MOYER: I think those are all significant factors which go to the significant history. Not just the history but a significant history and the significance is, that they are very similar crimes, Judge.

MS. DANTOS: Your Honor, it doesn't matter whether they are or not, it's an aggravating factor. He has to show that there are significant number of convictions involving violence, not that they're similar in nature. That has nothing to do with it.

MR. MOYER: I don't think that's true and there's case law on that that significance doesn't have to

do with the number, but it also has to do with the type of crimes.

MS. DANTOS: Judge, can I request that you review the Transcript first?

MR. MOYER: I have no objection to that.

MS. DANTOS: I would also like to review whatever he's going to read from.

MR. MOYER: Well, I told you that I was [36] going to do this a long time ago. You certainly had the opportunity to review the Transcript and –

MS. DANTOS: Well, I would imagined you –

THE COURT: Is this the whole thing? Are you going to have this whole thing read?

MR. MOYER: That's her testimony.

MS. DANTOS: The entire Transcript.

MR. MOYER: Of the victim.

MS. DANTOS: That's –

MR. MOYER: The original is being brought up by Doris Glaessman.

THE COURT: Off record.

MR. MOYER: Obviously, that's right. There are obviously things that are off the record that I don't think the Jury should be entitled to hear. And if objections are sustained, those questions shouldn't be heard either, I agree with that.

THE COURT: All right.

MS. DANTOS: Judge, I'm making a Motion in Limine to keep the Transcript out.

THE COURT: Why? Isn't the Jury entitled to know all of this?

MS. DANTOS: No.

THE COURT: What did he do?

MS. DANTOS: No, they're not entitled to [37] know all that.

THE COURT: Well, you have some Law on that, not just Maria Dantos law, Law. Do you have any Law? I'm not quarreling with you. I don't agree with you. It seems to me – his responsibility is to show aggravating circumstances whatever they may be in accordance with whatever they are.

MS. DANTOS: And this aggravating circumstance –

THE COURT: And you have to show mitigating circumstances.

MS. DANTOS: Right and this aggravating circumstance that he's trying to show is that the Defendant has a significant history of prior convictions involving violence period.

MR. MOYER: Or threat of violence.

MS. DANTOS: Not that they're similar, not that – not that the facts are similar.

THE COURT: But he's not putting that on.

MS. DANTOS: Your Honor, he's going to read the –

THE COURT: It's not for that purpose, are you?

MS. DANTOS: He's going to read the entire Transcript.

[38] MR. MOYER: It's for the purpose that there was violence or threat of violence in the use of those –

THE COURT: Okay. Here –

MS. DANTOS: We'll stipulate that that's a crime of violence.

MR. MOYER: You're not going to be able to stipulate away my case.

THE COURT: No, I agree, no, no. I think they're entitled to put on what they're entitled to put on, and I don't see anything wrong with it. These are aggrava – this is a hell of a part of the Trial, I'll be quite frank with you. Oops, off the record.

(Whereupon proceedings are off the record)

(Whereupon proceedings are back on the record)

THE COURT: And I think they're entitled to hear the aggravating circumstances that are available. And if, indeed, those were the part of the aggravating circumstances of the Burglary, fine, we'll permit it, all right.

MR. MOYER: Thank you.

THE COURT: All right.

MR. MOYER: If you want to look at this, be [39] my guest.

THE COURT: Now, is that it then? All right.

(Whereupon conference in Chambers concludes)

[40] COURT CRIER: All rise please, Court is again in session, you may be seated.

MS. DANTOS: Your Honor, can we approach side-bar before the Jury's brought in?

THE COURT: All right.

(Whereupon Counsel approach side-bar)

MS. DANTOS: Judge, –

MR. MOYER: May the record reflect that I've handed a copy of the Indictment to Ms. Dantos as well as a Transcript of the Testimony of Joe Macrenna, I think is the way it's pronounced.

MS. DANTOS: Judge, for the record, I have been given a copy of the Indictment. I'd like to point out that it says, that did unlawfully enter a building 222 East Hamilton Street –

MR. MOYER: Well, read the whole thing please. It says, a building or occupied structure –

MS. DANTOS: Correct.

MR. MOYER: – or simply secured or occupied portion thereof.

MS. DANTOS: 222 East Hamilton Street which is the building. It does not specifically delineate the apartment that this woman lived in. I've had a chance to

[41] look over the – briefly, this Transcript. I don't think that this is going to go to the Burglary to show that the Burglary was violent. All it's going to do is point up one prior conviction for a Rape, that's not – that's not enough for this aggravating factor and if it comes back that the Burglary is not involved in violence, it's too late. They've already heard all this about the Rape. It's extremely prejudicial, and I – I'm objecting to it, to the whole Transcript being read in and to this aggravating factor, even the Jury being allowed to consider this.

THE COURT: Very well, and that's been argued, the Court's ruled it, denied. All right.

MR. MOYER: Can I have it back now?

MS. DANTOS: Well, I would like a copy of this.

MR. MOYER: I don't think that's my duty to provide you with a copy. That's a public record, and you could have gotten that Transcript at any time prior to this Trial. I made one copy for myself, and I'd like to have it now.

MS. DANTOS: Well, Judge, then I'm going to need to get a copy of it. I'm going to need to get a copy of it.

THE COURT: Well, it's going to be is read into the record, right?

[42] MR. MOYER: Correct.

THE COURT: Why would you need a copy?

MS. DANTOS: Because I would like to – as it's being read, I may have some objections to it, and I would like to get a copy so I can follow along.

THE COURT: Who's going to do the reading? How many copies do you have?

MR. MOYER: I just have the one copy I made for myself. I told Counsel, before this trial ever started, that it was my intent to have this Transcript read into the record.

MS. DANTOS: Well, Judge, –

MR. MOYER: What they did after that, you know, I'm not aware of.

MS. DANTOS: Judge, I was not aware that he was going to read the entire Transcript from her testimony.

MR. MOYER: Well, –

MS. DANTOS: How did I know which part of the Transcript he's going to read.

MR. MOYER: I told either you or Fred Charles that I was intending to do that.

THE COURT: This is a copy of the original?

MR. MOYER: Correct.

THE COURT: Where is the original?

MR. MOYER: Doris Glaessman has the [43] original.

THE COURT: Who does?

MR. MOYER: Doris Glaessman.

THE COURT: Is she going to use that for reading?

MR. MOYER: Correct. You know, I have no objection to the Defendant – Defense Attorney having a copy, of course, I don't have an objection to that but, you know, I don't understand why they didn't get a, you know, why they didn't make plans for that themselves before.

MS. DANTOS: Well, Judge, this will take five minutes to get a copy of it.

THE COURT: Well, now, she – are you going to have somebody responding with questions, and her answer, is that how you're going to handle this?

MR. MOYER: No, just – I'm going to have – in fact, I'm going to have Kelly Waldron, from our Office, reading the Transcript as it – exactly the way it is. If there are –

THE COURT: This one right here?

MR. MOYER: No, the original, she's going to be reading from the original.

THE COURT: Why can't you let her have this?

MR. MOYER: Because then I don't have one. [44] I guess the only thing to do is to have a copy made now, and we'll wait or we can put on the rest of testimony until it's time for that in the meantime.

THE COURT: Do you have something that you can put on?

MR. MOYER: I'll put on Doris to testify it's – that they are convictions, first of all, I have to do that, and I have Detective Beltz to testify to the same –

THE COURT: Okay, all right. Send it down, have a copy made, all right.

MR. MOYER: Well, why don't we have a copy of the original done.

MS. DANTOS: Fine.

THE COURT: Who has the original?

MR. MOYER: Doris Glaessman.

THE COURT: Well, I'm not sure she wants to give that up. I – do you have the original transcript.

MS. DANTOS: Page 77 through 149 is what we need.

THE COURT: Do you have the Pages? Can you – can we have copies made of whatever pages they're asking for?

MS. GLAESSMAN: Sure.

THE COURT: Send it down and then we can [45] have Mr. Moyer can put you on as a witness and develop what he wishes with you by way of – all right.

MR. MOYER: Now, are you going to give preliminary instructions to the Jury when they're brought in, again?

THE COURT: Well, I may repeat something but that's –

MR. MOYER: Are we going to give openings?

THE COURT: Yeah, if you want to?

MR. MOYER: Yeah, I do.

THE COURT: I would assume.

MS. DANTOS: I would request to defer mine till tomorrow.

THE COURT: All right, very good. All right.

(Whereupon side-bar conference concludes)

THE COURT: Well, we can have the – we can dispose of the openings and while she's having that at the Copy Room, all right?

MR. MOYER: Well, can we have somebody go down with the Transcript so that she can be here to testify.

THE COURT: All right, you may bring the [46] Jury in please.

(Whereupon the Jury enters the Courtroom)

MR. MOYER: Judge, do you want – can we approach?

THE COURT: All right.

(Whereupon Counsel approach side-bar)

MR. MOYER: Did you want a copy?

THE COURT: No, I can count on you people for that. I don't think I need to, all right.

MR. MOYER: Okay, then I'll get one copy.

(Whereupon side-bar conference concludes)

THE COURT: Now, ladies and gentlemen, as I indicated when we recessed, we are about to commence the Hearing, to take additional evidence and argument and thereby, you shall decide whether or not the Defendant is to

be sentenced to life or death, rather life imprisonment or death. Suffice it to say, that the burden, of course, remains with the Commonwealth to prove this Defendant the aggravating circumstances necessary for you to make the [47] determination as they may request, and they must do so beyond a reasonable doubt and that has been defined for you, and you may so consider it as such, as it was defined to you by the Court in its Charge in the initial – in the underlying trial. As I indicated, the burden remains with the Commonwealth throughout the course of this Hearing. The Defendant, of course, has a burden of proving any mitigating circumstances but only by a Preponderance of the Evidence. This is a lessor [sic] burden of proof than beyond a reasonable doubt. A Preponderance of the Evidence exists where one side is more believable than the other. In affect, [sic] and it is sometimes illustrated by using the normal balancing trays that you sometimes see where they have two pans on either side, and they lie of equal level and on one side, you put all the evidence established by one side or the other and on the other side, you put at the other end. If the scale tips ever so slightly in favor of the mitigating circumstance, that the burden rests with the Defendant then, of course, they have met that burden. That is a basic difference between that and beyond a reasonable doubt. There is a difference, and you should consider it as such as you go through the testimony that will be presented here. We will permit, at this juncture, the Defendant – rather the Commonwealth to make an opening remark as well as the Defendant if they so wish. Are you [48] prepared to proceed then, Mr. Moyer?

MR. MOYER: Yes, your Honor.

THE COURT: Very well.

MR. MOYER: May it please the Court, Counsel, ladies and gentlemen of the Jury, good afternoon. By your verdict, you had decided and rightfully so, that the Defendant is Guilty of Murder in the First Degree for the killing of James Scanlon in this case. As I told you on Voir Dire, it will be you 12 people that will decide the Sentence in this case and as you're well aware, there are two choices; there is life imprisonment and there's the death penalty. And as I told you on Voir Dire, the Commonwealth is seeking the Death Penalty. Nothing has changed since Voir Dire. It seems like a long time ago in many respects but nothing has changed since then. The Commonwealth is still urging you that that is the appropriate sentence in this case and now, is the time for us to put on further evidence that the Death Penalty is warranted. As I told you on Voir Dire, I mentioned to you two aggravating circumstances. That is, that the death was by means of torture and also that the death was committed during a commission of another felony and those felonies were Burglary and Robbery which you have also found the Defendant guilty of. Now, I am permitted to tell you that there is a third aggravating factor that the Commonwealth [49] is relying on. I was not permitted to tell you about that earlier, but I am now and that third aggravating factor is that the Defendant has a significant history of felony convictions which involve the use or the threat of violence to another person. So, there are actually three aggravating factors that the Commonwealth will be arguing to you are permissible in this case. At least one of those, we have to prove beyond a reasonable doubt, and we have to prove that it outweighs any mitigating factors that the Defendant may put on. We only have to prove one of those aggravating factors, one out of those three. Now, the first two aggravating factors that I had talked to you about are pretty self-evident from the

evidence. You know, and you have so found that the Defendant, during the course of the Burglary and the Robbery, killed Jimmy Scanlon. You also heard some of the testimony concerning some of the wounds that were inflicted upon Jimmy Scanlon. Dr. Mihalakis will also testify early this afternoon, hopefully this afternoon. If not this afternoon, tomorrow concerning the injuries that were suffered by Mr. Scanlon. The final aggravating circumstance involves a significant history of felony convictions. And in this case, we will show you two felony convictions. We will show you that the Defendant has been previously convicted of Rape and another crime of Burglary, another Burglary, and we will submit to you that [50] that presents a significant history of felony convictions. You will also hear testimony that there was violence and the threat of violence that was inflicted by the Defendant during those – during the commission of those felonies. After the Commonwealth has put on all its evidence concerning the Death Penalty, the Defendant has an opportunity to give you evidence concerning mitigating factors. When all of that is done and all of the evidence is before you, his Honor, will, again, instruct you on the Law for this phase of the Trial. Until then, I just ask you to keep the same attentive – attentiveness that you have throughout this whole Trial, thank you very much.

THE COURT: Miss Dantos?

MS. DANTOS: Your Honor, I will defer my opening till the beginning of our case.

THE COURT: Very good. All right, you may call your first witness.

MR. MOYER: Commonwealth calls Doris Glaessman to the stand.

DORIS GLAESSMAN, WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MOYER:

Q. Could you state your name for the Jury please?

[51] A. Doris Glaessman.

Q. By whom are you employed?

A. I'm the Elected Clerk of Courts for the County of Lehigh.

Q. How long have you been so employed?

A. I've been the Clerk of Courts since 1982.

Q. Could you tell the ladies and gentlemen of the Jury what your duties are?

A. The Office contains and handles the criminal and civil filings and cases coming into the Court of Common Pleas for the County of Lehigh.

Q. As part of your duties as the Clerk of Courts, are you the official custodian of all criminal records?

A. That's correct.

Q. Could you explain to the Jury what criminal records are maintained?

A. The original Magisterial Complaint and Transcript, the Information, the Pleadings, the Motions, Petitions, and Dispositions.

Q. Pursuant to my request, did you bring with you criminal records relating to the case of Commonwealth of

Pennsylvania vs. Ronald Rompilla, specifically Case Numbers 1487 and 1488 of 1974?

A. That's correct.

Q. And did – are those the documents there?

[52] A. Yes.

Q. Are those the full and complete records of those cases?

A. These are full and complete files as well as the copy of the – a certified copy of the docket records.

Q. Is there also a Transcript of that Trial?

A. There is a Transcript, Stenographic Transcript, of the Trial.

Q. Now, is – do you have that with you or is that somewhere else?

A. Right.

Q. Is that the Stenographic Transcript of the Trial involving Case Numbers 1487 and 1488 of '74?

A. That's correct.

Q. Now, did you also bring with you the docket entries concerning that – those cases?

A. That's right.

Q. And have you – strike that. Do those docket entries bear a certificate?

A. Yes, they are certified by a Deputy in my Office.

Q. And what are they certified as being?

A. They are certified as being a true and correct copy of the original on file.

MR. MOYER: Can we have them marked as Commonwealth's Exhibits – should we start over at 1, [53] again, your Honor?

THE COURT: Very well. Are those two separate –

MR. MOYER: Yes.

Q. I'm going to show you what's been marked Commonwealth's Exhibits 1 and 2. Are they the certified true and correct copies of the original docket entries in those two cases, Case Numbers 1487 and 1488 of 1974?

A. Yes, they are.

Q. And are those actually correct copies of the originals?

A. They are duplicated xerox copies, correct.

Q. Now, directing your attention to the docket entries concerning Case Number 1487 of 1974, was the Defendant convicted of a crime in that case?

A. Yes, there is an entry to that extent.

Q. And what was the Defendant convicted of?

A. The Defendant was convicted or found guilty of Rape in Case Number 1487 of 1974.

Q. What is the date of that conviction?

A. The date of the conviction was December the 13th, 1974.

Q. And was that pursuant to a Jury Trial?

A. That's correct. It was a Jury Verdict.

Q. Was the Defendant sentenced in that case?

[54] A. Yes, the Defendant was sentenced.

Q. By whom was he sentenced?

A. The Court, in Sentencing, was the Honorable John E. Backenstoe.

Q. And what is the date of the Sentence?

A. Date of Sentence was February the 2nd, 1976.

Q. Now, directing your attention to Case Number 1488 of 1974, was the Defendant convicted of a crime in that case?

A. The Defendant was found guilty to Burglary and Theft charges.

Q. And what is the date of that conviction?

A. The Jury returned the verdict on December the 13th, 1974.

Q. Was the Defendant sentenced?

A. Defendant was sentenced on February the 2nd, 1976 by the Honorable John E. Backenstoe.

MR. MOYER: I would ask for the admission of Commonwealth's Exhibits Number 1 and 2.

THE COURT: Any objection?

MS. DANTOS: No objection.

THE COURT: Very well, they're admitted.

MR. MOYER: That's all.

THE COURT: Any questions?

MS. DANTOS: I don't have any cross.

[55] THE COURT: Very good. Thank you very much Miss Glaessman.

MR. MOYER: Can we keep the Notes of Testimony of the Trial, your Honor?

THE COURT: I think it would be appropriate. We better, because we may have need of it. You may call your next witness?

MR. MOYER: Commonwealth calls James Beltz to the stand.

JAMES BELTZ, WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MOYER:

Q. Could you tell the ladies and gentlemen of the Jury your name please?

A. James Beltz.

Q. Are you employed, sir?

A. I'm retired.

THE COURT: How do you spell that last name, excuse me?

THE WITNESS: B-E-L-T-Z.

THE COURT: Thank you.

Q. Prior to your retirement, by whom were you employed?

[56] A. Police Department, City of Allentown.

Q. In what capacity?

A. I was a Lieutenant when I retired and before that, I was a Detective.

Q. For how long were you a police officer?

A. 41 years.

Q. 41 years?

A. Yes.

Q. Are you familiar with the Case, Commonwealth of Pennsylvania vs. Ronald Rompilla, Case Numbers 1487 and 1488?

THE COURT: Of 1974.

Q. Of 1974?

A. Yes.

Q. And you – did you hear the testimony of Doris Glaessman?

A. Yes.

Q. Who testified to the conviction concerning Rape and Burglary?

A. Yes.

Q. Were you the Prosecutor in that case?

A. I was.

Q. And by Prosecutor, you mean the officer that filed the charges?

A. I did.

[57] Q. You investigated the case –

A. Yes.

Q. – and you filed the charges? Ms. Glaessman has indicated that the Defendant, in that case, was a man by the name of Ronald Rompilla, is that correct?

A. That's correct.

Q. The Ronald Rompilla that was Defendant in those Cases, is he located in this Courtroom?

A. He is.

Q. Could you point him out for the Jury?

A. In the blue shirt sitting across from Attorney Charles.

MR. MOYER: May the record reflect that the Witness has identified this Defendant, in this Case, Ronald Rompilla.

THE COURT: As the Case in 1487 and 1488 of 1974?

THE WITNESS: Yes.

THE COURT: Very well. Let the record so reflect.

MR. MOYER: That's all, you can cross.

MS. DANTOS: No questions.

THE COURT: No questions. Thank you very much, Mr. Beltz.

MR. MOYER: Your Honor, may we approach the [58] bench? May we approach, your Honor?

THE COURT: Yeah, sure.

(Whereupon Counsel approach side-bar)

MR. MOYER: It is, at this time, that I would like to have the Transcript of the Victim in the Rape Case read.

MS. DANTOS: Your Honor, at this point, procedurally, I believe I could object every question.

THE COURT: We know you're – very good.

MS. DANTOS: But if you are telling me that my objections are going to be sustained, I mean overruled, and that the whole Transcript is going to be allowed to be read in, I just want my objection for the record to everything in the Transcript, to every question and every answer.

THE COURT: So noted, and we make the same ruling that we made before, all right.

MR. MOYER: There are very well – if I may be heard on this. I don't think that's sufficient. I think that if there are individual questions that have to be objected to, I think she's going to have to do that at the time those questions are asked. There are certain things that are on si – that are at side-bar, obviously, I [59] don't think the Jury should hear or is entitled to hear but if there is any objectionable questions that she's objecting to, she's got to interpose that objection either now or at the time the question is being read.

MS. DANTOS: Your Honor, I object to every question in here. I object to everything in here.

THE COURT: She don't have to object every time.

MR. MOYER: I can – no, I can say – I understand she can have a general objection to the fact that the Transcript, itself is being –

MS. DANTOS: No.

MR. MOYER But I'm talking about the individual questions. If she's going to object to every one, then she's going to have to object on it. If she doesn't object to it, then it's waived.

MS. DANTOS: Well, your Honor, that's why I'm telling you that I object to every question in here.

THE COURT: He says, –

MR. MOYER: Because there may be some objection –

THE COURT: – they're unrightful and that's what he said. But the point I'm making is, it's going to be – play havoc with your case if constantly –

MS. DANTOS: That's right.

[60] MR. MOYER: But there may be some objections – some questions that are properly objected to and properly sustained. She's got to – she's got to, you know, pay attention then, that's her job.

MR. CHARLES: Do I get to put my two sense [sic] in?

THE COURT: Pardon?

MR. CHARLES: May I say something?

MR. MOYER: Well, you know, I don't like, you know, fighting two – two battles, this is being ridiculous.

THE COURT: That's true.

MR. CHARLES: You know what this procedure is.

MS. DANTOS: Well, your Honor, I mean, I spoke at the side-bars on the last two.

THE COURT: Well, we do what the Rules are and one handles. One way or the other, I don't care who.

MR. CHARLES: Your Honor, may I have a minute to speak with her before she –

THE COURT: All right.

MS. DANTOS: Judge, you know, if I don't –

THE COURT: You're objecting –

MS. DANTOS: – if I only object to certain questions, I've already objected to everything in the [61] Transcript. I don't want to waive any objections.

MR. MOYER: Well, that covers you.

MS. DANTOS: I don't want to waive –

MR. MOYER: That covers you.

MS. DANTOS: – any objections to any questions.

THE COURT: Well, put your objection as you wish, whatever way you want to handle it, it's up to. You're objecting to the entire Transcript.

MS. DANTOS: And every question in there.

THE COURT: And we are denying the objection at this juncture, all right.

MR. CHARLES: Did you want her to object to each one as it's asked?

THE COURT: I'm not saying anything. I'm not controlling anybody's case here just as I don't control his.

MR. CHARLES: Fine.

THE COURT: It's up to you. All right.

(Whereupon side-bar conference concludes)

MR. MOYER: Your Honor, at this time, I would request that the Testimony of, I believe, is Josephine Macrenna be read into the record and read to the [62] Jury which is from the original Notes of Testimony that have been delivered by Doris Glaessman.

THE COURT: I'm not quite sure – Josephine Macrenna, I'm not familiar with the name.

MR. MOYER: She is the victim in the Rape case.

THE COURT: In 1487 of 1974?

MR. MOYER: That's correct, 1487.

THE COURT: Very well, are you going to call someone then to –

MR. MOYER: Yes, I will call Kelly Waldron from the District Attorney's office to read from the original.

KELLY WALDRON, WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MOYER:

Q. Ms. Waldron, if you could direct your attention to page 77 of the Transcript.

THE COURT: Well, can we have her identify herself on the record first with a full name?

MR. MOYER: Yes, your Honor.

THE COURT: All right.

Q. Could you state your name for the Jury please?

[63] A. Kelly Banach Waldron.

Q. By whom are you employed?

A. Office of the District Attorney, Lehigh County.

Q. In what capacity?

A. Assistant District Attorney.

Q. And how long have you been an Assistant District Attorney?

A. Approximately, a year and a half.

MR. MOYER: Any questions?

MS. DANTOS: No.

THE COURT: All right.

Q. Could I direct your attention to Page 77 of the Transcript please?

A. Yes.

Q. Do you have that in front of you?

A. I do.

THE COURT: Now, for the record, this is a Transcript that she's – will be reading from that was identified by Miss Glaessman as the official custodian, is that correct?

MR. MOYER: Yes.

THE COURT: And this is in Case, 1487 of 1974?

MR. MOYER: That's correct.

THE COURT: All right.

[64] Q. And Ms. Waldron, if you could begin reading from – about 1/3 of the way down where it says Josephine Macrenna was called as a witness and then read every question and answer with – and proceed the question with the word question and proceed the answer with the word answer.

A. Fine.

(Whereupon Transcript is read into the record)

Question by Mr. Brenner:

QUESTION: Josephine, what is your full name?

MS. DANTOS: Objection, objection, your Honor, same reasons.

THE COURT: Overruled, very good.

ANSWER: Josephine Macrenna.

QUESTION: And what is your address, Josephine?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: 222 East Hamilton.

QUESTION: How old are you?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: I'm 54, going to be 54 in January.

QUESTION: 54 years old and are you the owner of Joe's [65] Place?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: Yes, I am.

QUESTION: Are you married?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: No, I'm not, I'm widowed.

QUESTION: And when did your husband die?

MS. DANTOS: Objection.

MR. MOYER: Your Honor, I would ask that this not continue, because it's going to distract from the Jury listening to the Transcript.

MS. DANTOS: Your Honor, we can approach the bench.

THE COURT: Well, I don't control their trial of the case. I agree with you, Mr. Moyer, but you indicated

that unless they do object, they waive the objection. That's the difficulty. This is exactly what I've despaired occurring, but we will rule on each one if that's necessary then, all right. Overruled.

ANSWER: June 12th, 1964.

QUESTION: 1963. And directing your attention to Wednesday evening, January 24th, would you tell the ladies and gentlemen of the Jury where you were at that particular [66] evening?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: Well, I had went up to the –

THEN BY THE COURT: Is it January 24th or July?

BY MR. BRENNER:

QUESTION: I'm sorry, July 24th?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: July 24th. I went up to a Bingo Game at East Side Youth Center.

QUESTION: And who was with you at the Bingo?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: My daughter, and we had ran into two friends, lady friends, of mine.

QUESTION: And who were they?

MS. DANTOS: Objection.

THE COURT: Overruled.

ANSWER: It was Esther Laubach and Lil, I don't know Lil's last name offhand.

QUESTION: Are Esther and Lil about your age?

MS. DANTOS: Objection.

THE COURT: I think we're [67] going to draw – withdraw. We're going to say that your general objection to all of the questions are preserved with respect to each and every question and that's what will the holding be. Otherwise, I agree, this gets a little –

MS. DANTOS: So, your Honor, no longer do I have to object to every question in here –

THE COURT: Not as far as I'm concerned.

MS. DANTOS: Thank you.

THE COURT: Very good. All right, let's let it flow, please.

ANSWER: No, they're in their 60's.

QUESTION: They're in their 60s?

ANSWER: Yes.

QUESTION: And what time was the Bingo Game over?

ANSWER: Approximately 10 after 11 or quarter after, somewhere in there.

QUESTION: And after the game was over, where did you go?

ANSWER: My daughter was also present, and she had dropped me off at the bar.

QUESTION: And what's your daughter's name?

ANSWER: Marianne Harkins.

QUESTION: Marianne Harkins. And what time did you [68] arrive at your establishment?

ANSWER: About 20 after 11.

QUESTION: And you say your daughter left you off and you and –

ANSWER: Yes, she had left me off in front of the place, and she had went home.

QUESTION: All right. Did you go into your place?

ANSWER: Yes, I did.

QUESTION: When you arrived there, were there other people in the place?

ANSWER: Yes.

QUESTION: What did you do?

ANSWER: I had sat down, and I told Jean to get me a drink of water.

QUESTION: And was anyone else with you at the time?

ANSWER: No, not at the time. I was up at the upper end by myself.

QUESTION: You say, the upper end, where do you mean by upper end?

ANSWER: At the east end of the bar.

QUESTION: On this side here (indicating)?

ANSWER: No, at the east end of the bar.

QUESTION: This side (indicating)?

ANSWER: No.

QUESTION: Here (indicating)?

[69] ANSWER: No, right there.

QUESTION: Right there (indicating)?

ANSWER: Yes, ah-huh.

QUESTION: And you were sitting here and how long did you sit there alone?

ANSWER: Oh, about 10 minutes I'd say.

QUESTION: And then what happened, Josephine?

ANSWER: And – well, Esther and Lil had come in. They surprised me by coming in after the Bingo Game which they hadn't said anything up at the Hall that they were coming down and when they came in, I had went over to where they had sat down and joined them in a drink.

QUESTION: And where had they sat down?

ANSWER: They sat down on the west door, on that side of the bar with the back to the west door.

QUESTION: Over here (indicating)?

ANSWER: No, th~~at's the~~ east door, there I mean (indicating). I'm sorry, the east door.

QUESTION: The east door over in this area here (indicating)?

ANSWER: Yes, that's where we had sat, right around the bend of the bar there.

QUESTION: If I – If I would put an X here, would that be the approximate location?

ANSWER: Yes, that's where we had sat.

[70] QUESTION: Were [sic] you and your lady friends sat that evening?

ANSWER: Yes, ah-huh.

QUESTION: And how long were you together there?

ANSWER: Oh, I'd say about 40 minutes.

QUESTION: Did you have a drink together?

ANSWER: Yes.

QUESTION: Did they have a drink also?

ANSWER: Yes.

QUESTION: And then, what did you do?

ANSWER: Well, Lil said she had wanted to go home, and they had broke about 25 after 12 – 25 after 12 that they had left and when they had left, I says, to Jean that I was going up. I had felt I could watch the rest of the TV Show up in my living room.

QUESTION: All right. And did you do that?

ANSWER: Yes, I did.

QUESTION: All right. Now, what time did you go upstairs?

ANSWER: Approximately 12:30.

QUESTION: And was there a sweeper kept in this kitchen (indicating)?

ANSWER: Well, the sweeper is in back of the door in the kitchen.

QUESTION: What, one of these swinging doors?

[71] ANSWER: Yeah, ah-huh.

QUESTION: And at the time that you went up where that – where was that sweeper?

ANSWER: I hadn't noticed it. I had seen that the sweeper was disturbed later.

QUESTION: When did you see the sweeper was disturbed?

ANSWER: When he had asked me to come back downstairs.

QUESTION: That's the Defendant?

ANSWER: When we went down for the money, yes.

QUESTION: Where did you see the sweeper at that time?

ANSWER: The sweeper was on the opposite side in the back of the door, the exact opposite door.

QUESTION: In other words, –

ANSWER: That he must –

MR. MOYER: Now, let me interrupt you there, Ms. Waldron, because that question is objected to, and I believe it was sustained by the Court. So if you could skip the objection and the sustained – the sustained by the Court and go to the next question.

BY MR. BRENNER:

QUESTION: Had the sweeper been moved?

ANSWER: Yes, when I seen it the next time, it was on the opposite side, in behind the opposite door.

QUESTION: All right. Now, when you went up, which [72] door did you go up?

ANSWER: Up the upstairs.

QUESTION: This door here (indicating)?

ANSWER: Yes, ah-huh.

QUESTION: And did you lock that door?

ANSWER: I always lock it.

QUESTION: Did you lock it that evening?

ANSWER: Yes, it's an old type of thing you just lock. It's an odd type of thing you just lock.

QUESTION: Now, this would be then when you went upstairs, July 25th, 1974?

ANSWER: Yes, the early morning.

QUESTION: All right. Now, when you went upstairs, where did you go?

ANSWER: I went into the front room, I had changed. I had taken my top dress off, and I had put a gown type of dress on.

QUESTION: And what did you do – and what did you then do, Josephine?

ANSWER: I went in the front room, and I had put the rest of the Dick Cavett Show on, the Guiness Book of Records.

QUESTION: Is this a living area?

ANSWER: Yes, it's my front room. That's an apartment above the Bar.

[73] QUESTION: Was there a couch there?

ANSWER: Yes, on the east wall.

QUESTION: And did you put the television on?

ANSWER: Yes, I did.

QUESTION: And what show did you put on?

ANSWER: I watched that Dick Cavett, the rest of it because we were watching it downstairs before I come up.

QUESTION: Was that the same show that was on downstairs before you came up?

ANSWER: Yes, ah-huh.

QUESTION: You put on upstairs. Was there a pillow on the couch?

ANSWER: Yes, I was resting on a pillow watching this.

QUESTION: Did you see the entire end of Dick Cavett?

ANSWER: Yes, I did.

QUESTION: And what time did the Dick Cavett Show end?

ANSWER: At 1:00 o'clock in the morning.

QUESTION: At 1:00, what happened then, Josephine?

ANSWER: I dozed off.

QUESTION: Right on the couch?

ANSWER: Yes, I had fallen asleep there.

QUESTION: Had you turn [sic] the television off?

ANSWER: No, I had fallen asleep with the TV on.

QUESTION: Were there lights on, also, at this time?

[74] ANSWER: No, just the hall light that leads up to the stairway. I had left that on.

QUESTION: You left that one on?

ANSWER: Yes, and I had also closed the door, because I had intention of going back down later.

QUESTION: What door did you close?

ANSWER: The top door, I put the double latch on it.

QUESTION: Was there a door at the top of the stairs?

ANSWER: Yes, ah-huh, that's the door that leads –

QUESTION: Leading into your –

ANSWER: Immediately into my apartment. You step into the hallway and then right across would be my front room.

QUESTION: How did you lock that door?

ANSWER: With the chain lock. You just push it shut and put the bolt on it.

QUESTION: All right. Now, would you tell the ladies and gentlemen of the Jury, I believe you said you watched the Dick Cavett show to its end at 1:00 o'clock?

ANSWER: Yes.

QUESTION: And then what happened?

ANSWER: Well, I don't know long I had slept – I don't know how long I had slept, but I had heard this noise, and it sounded like a screen could have fallen, and my storm windows don't fit exactly the way they should. [75] When they installed them, they weren't quite uniform, and I had sort of felt that the screen had fallen – one of the screens had fallen in. It sounded like it had fallen into the room, and I picked my head up to see what the noise was, and I seen a man walking towards me, and he says, "face down on the pillow, I have a gun on you."

QUESTION: Can you identify that man?

ANSWER: Yes, I could now.

QUESTION: Who came in. Would you point to him?

ANSWER: That gentleman there (indicating).

BY MR. BRENNER: Let the record show that the Witness pointed to the Defendant, Ronald Rompilla.

BY MR. BRENNER:

QUESTION: Now, exactly, what happened?

ANSWER: Well, I had wondered, you know, just – this was strange, and I said, "who are you and how did you get in?" And he says, –

QUESTION: Had you been sleeping?

ANSWER: Yes, well, that's what woke me up. I came out of my sleep, and I had my face down on the pillow. He had told me he had a gun on me, and I put my face dawn like he had ordered me to. Then he came over to me, and he sat on the very end of the couch, and he put his arm across my back and that's when he se – that's when he went, "do you [76] know," he says to me sitting there, he says, "I hear you have a lot of money, a lot, a lot of money." And I picked my head up to say, "you're wrong." When he had pushed it back into the pillow. Then with that, he had grabbed me by the back of the hair, and he had pulled by [sic] head up. He says, "where do you have it?" And I said, "the only money I have is downstairs in the register." And then he says to me, "what time does she close?" That's the first time I realized that there was someone downstairs, and I says, "2:00 o'clock," and he had looked at his wristwatch, and he had said, "it's 10 of 2 now." And with that, he made me get up, and he had went through the apartment opening drawers, and he had pulled everything out of the desk drawers – the drawers, my drawers in the back – in the bathroom. He just went through the apartment looking for this money. Then he went into the front room

and that's when he had called the bar to find out if she had left yet which Jean had answered.

QUESTION: How do you know he called the bar?

ANSWER: I was there. He had me go with him, and he had used the phone in the front room and then when Jean answered, he hung up.

QUESTION: Was there a telephone book there?

ANSWER: No.

QUESTION: How did he know the phone number?

[77] ANSWER: He had asked me what the number was.

QUESTION: He asked you. Was there two separate numbers, one for your living area and one for the bar down below?

ANSWER: Yes, my number's unlisted upstairs.

QUESTION: It's an unlisted number upstairs?

ANSWER: Yes.

QUESTION: Did he then dial the Bar number?

ANSWER: Yes, he had asked for the number, and he had dialed which I was hoping she wouldn't have been there, you know. So, with that he had asked –

QUESTION: Could you hear whether anybody did answer downstairs?

ANSWER: No, he had waited and then he hung up.

QUESTION: He hung up?

ANSWER: He hung up. So, evidently, she had answered.

QUESTION: And then what happened?

ANSWER: Then he had asked me if she comes up with the money. I says, "no, she lets it down at the foot of the stairs." And then he says, "which way does she go out?" I said, "she goes out the back door." So, he had made me go back to the room that overlooks the porch, and you could look out the porch window. You could see out the second floor window, and you could see someone leave.

[78] QUESTION: Where would that be located?

ANSWER: That would be right over that one section of the dining room.

QUESTION: Over here (indicating)?

ANSWER: No, that side there overlooking the porch, there (indicating).

QUESTION: This area here (indicating)?

ANSWER: Yeah.

QUESTION: All right. Then what happened?

ANSWER: Well, then she had left. She had left with two other customers.

QUESTION: How do you know that she had left?

ANSWER: Well, we had seen her go.

QUESTION: And where was he at this time?

ANSWER: He was standing with me along side of me looking out the window.

QUESTION: And were you able to look out the window?

ANSWER: Yes, I seen Jean leave with Marvin and Larry.

QUESTION: All right. Then what happened, Josephine?

ANSWER: Well, then when we had seen her leave, I had says to him, he could go down for the money which he did. Then, when I had gotten downstairs, I wanted to go in that dining room area where we had kept the night light on, but he had insisted on going on the other side, the other [79] double half of that section. It was darker there. So, I had taken the bills out, and he had grabbed the bills and put them in his pocket. Then he says to me, "back in the kitchen."

QUESTION: Do you know how much money he took?

ANSWER: Yes, well, there's $108.00 missing.

QUESTION: Was that your money?

ANSWER: Yes, that was the receipts on the night key.

QUESTION: On the night key?

ANSWER: Yes, ah-huh.

QUESTION: And you actually saw a role [sic] of bills there?

ANSWER: Yes.

ANSWER: And what did he do with the money?

BY THE COURT: Just a second. When you say, "night key," what do you mean?

BY THE WITNESS: Well, when we have – your Honor, when we set up the help.

BY THE COURT: You can talk to the Jury.

BY THE WITNESS: We give them so much money to work with for change and stuff and that was the receipts for the day with the monies that were in the bag and the money that Jean had rung up. Why, that's what was missing.

[80] BY MR. BRENNER:

QUESTION: How much was that?

ANSWER: $108.00 was missing altogether.

QUESTION: All right.

ANSWER: But –

QUESTION: Did you see him with the role [sic] of bills in his hand?

ANSWER: Yes, when I pulled it out of the money bag, he had reached for it, and he had torn the top bill which was a 20, that was torn in half.

QUESTION: And what did he do with that?

ANSWER: He put it in his pocket, and he says, I should go back into the kitchen.

QUESTION: Did you do that?

ANSWER: Yes, I went back to the kitchen with him.

QUESTION: And what did you observe when you got into the kitchen?

ANSWER: At the time, I just went in. He was interested in opening the two big drawers by the sink and the smaller drawer that was over in the other side next to the slicer. It's a work table with a drawer in, and he didn't ask me to open the first drawer as we came in. He overlooked that drawer, because he must have got the spatula from that one.

QUESTION: You talk about a spatula, did you see a [81] spatula?

ANSWER: Yes, when we came down the steps, I had seen that there was a spatula on the third step.

QUESTION: On the third step?

ANSWER: Yes.

QUESTION: And that would be inside?

ANSWER: Inside the stairway.

QUESTION: Inside this door here (indicating)?

ANSWER: Yes, ah-huh.

QUESTION: On the stairway?

ANSWER: Yes.

QUESTION: And was the spatula kept in the first drawer in the kitchen?

ANSWER: Yes, all my kitchen utensils are kept in that first drawer.

QUESTION: He didn't ask you to open that drawer?

ANSWER: No, he didn't ask me to open that drawer.

QUESTION: But he opened all the other drawers?

ANSWER: Yes, the other on the far side of the kitchen. I have two, big, deep drawers at the sink and one at the slicer inside of a working table.

QUESTION: And did you observe the sweeper in this room?

ANSWER: When I came back, I had wondered – you could see, you approach up towards the way you go out of [82] the kitchen. I seen that the door on the opposite side where I usually kept my slee – sweeper, was slightly ajar, and I had noticed that my sweeper was moved from the one corner to the opposite side in back of the other door which I never kept it there because there's more room on the other side of the door. You know, it's more or less of a corner where you could –

QUESTION: All right. The Defendant had the money now in his pocket. What happened then?

ANSWER: Well, he says to me, "back upstairs," and I says to him, I said, "you got the money, why don't you run, why don't you go?" And he says, "upstairs," and I had sort of felt that all he wanted to do is – maybe he missed some the first time, that he just wanted to look around the second time. So, I get up to the top of the stairway –

MR. MOYER: Let me interrupt you there, Ms. Waldron, because I believe there's an objection and there's a discussion off the record until Page 92, approximately, halfway through the page where it begins, by Mr. Brenner.

BY MR. BRENNER:

QUESTION: All right. Josephine, you were downstairs and then what did he say to you?

ANSWER: To go back upstairs.

QUESTION: And what did you say?

[83] ANSWER: I had said, "you had gotten the money, go." I had felt that that's all he came for.

QUESTION: And what did he say?

ANSWER: Back upstairs, I had to go back upstairs.

QUESTION: And what happened then, Josephine?

ANSWER: And I got on top of the steps, he says, "take that room there" and to the left of it was my bedroom, and I had went in, and he stood in back of me, and he says, "take off your gown," he says, "I'm going to wrap you up with it and put your pants in your mouth." So, I – well, I stood petrified, and I didn't do anything. Then he come in front of me. That's when I seen he had the knife, and he was exposed.

QUESTION: All right. Just take it easy Josephine. Was this room lit?

ANSWER: No, just from the hallway, the light from the hallway.

QUESTION: There was a light on in the hall?

ANSWER: Yes, because by that time, he had knocked the door off.

QUESTION: Where the stairs were going up, this was lit and this then shown into the room?

ANSWER: Yes, into the bedroom.

QUESTION: Where you were. And you stood there, and you had this gown on I take it?

[84] ANSWER: Yes, ah-huh.

QUESTION: And you said something about a knife. Did he have a knife?

ANSWER: When he came in front of me, I seen he was exposed. He had is [sic] penis out, and he was holding a knife.

QUESTION: In what hand, do you remember what hand?

ANSWER: In the right hand.

QUESTION: And what did you then do, Josephine?

ANSWER: Well, when he said, "take your gown off," I took it off.

QUESTION: What were you wearing at that time?

ANSWER: I was wearing a green type of gown, sleeveless.

QUESTION: Did you have anything underneath?

ANSWER: Yes, I had my bra and panties on. I don't like to completely undress, because I often figure that maybe they'll need me downstairs that I could – just a matter of – just taking the gown off and putting another dress on, and I'd be ready to go down.

QUESTION: All right. Now, what happened then, how close was he to you at this point?

ANSWER: In front of me, in front of me with a knife.

QUESTION: Did he have his clothes on at this time?

ANSWER: Yes, he was dressed.

[85] QUESTION: But his penis was out?

ANSWER: Yes.

QUESTION: Was it erect do you recall?

ANSWER: No, not at that time.

QUESTION: Not at that time?

ANSWER: No.

QUESTION: Now, what did he say to you?

ANSWER: Well, he had asked me to take the gown off which I did then he says, "take your bra off" which I did. Then he says, "take your pants off." Then I had begged him not to do it to me, you know, and when I wouldn't take the pants off, he took the knife, and he had cut me.

QUESTION: Where did he cut you Josephine?

ANSWER: On the left bust.

MR. MOYER: Okay. Now, there's a discussion off the record there which I believe continues for a number of pages until Page 97, and we'll pick up by Mr. Brenner for purposes of identification.

BY MR. BRENNER: For the purposes of identification, I would ask that this be marked as Commonwealth's Exhibit Number 1. For the record, Commonwealth's Exhibit Number 1 was marked for identification.

BY MR. BRENNER:

QUESTION: Josephine, before I show you the Commonwealth's [86] Exhibit Number 1, as you went down from your room to the Bar, before coming up again, did you examine your door to your living quarters?

ANSWER: Yes.

QUESTION: Could you observe it?

ANSWER: I had seen that the first time he went through, the li – I had seen that the first time he went through the living quarters.

QUESTION: And what did you observe?

ANSWER: It was busted.

QUESTION: It was broken in?

ANSWER: Yes.

QUESTION: What about the latch that was –

ANSWER: The jam was split right in half and broken open and the door was swung right open.

QUESTION: All right. And you observed that. Now, you went downstairs and what happened, happened as you testified to and then you came upstairs again?

ANSWER: Yes.

QUESTION: Then you were in the bedroom?

ANSWER: Yes.

QUESTION: Now, I believe you indicated to the Jury that at this point, when you still had your panties on, the Defendant took his knife and slashed you across the breast, is that correct?

[87] ANSWER: Yes.

QUESTION: I show you what's been marked for identification as Commonwealth's Exhibit Number 1, can you identify that please?

ANSWER: Yes, that's where I was cut.

QUESTION: Is that you in the picture?

ANSWER: The next day, yes.

QUESTION: And that would the [sic] be –

ANSWER: That would be the morning.

QUESTION: The 25th?

ANSWER: The 25th.

QUESTION: And where was that picture taken?

ANSWER: In my kitchen.

QUESTION: And who took the picture, a police photographer?

ANSWER: Yes.

QUESTION: And does this picture accurately portray and depict the wound that you received from the Defendant?

ANSWER: Yeah, he cut me down and then across.

QUESTION: And is that the same wound that you received from this knife from the Defendant?

ANSWER: Yes, it is.

QUESTION: And is that an accurate and clear depiction and representation of that wound?

ANSWER: Yes, it is.

[88] QUESTION: Now, after Mr. Rompilla slashed you with a knife, what happened next?

ANSWER: Well, I had taken my pants off. He said I should get in bed, and I guess I wasn't spread the right way for him, because he gave me –

QUESTION: Let me ask you this. Did he have his clothes on at this time?

ANSWER: Yes, he kept his clothes on.

QUESTION: But his penis – what – but was his penis again exposed?

ANSWER: Yes, it was.

QUESTION: All right. Now, what did you do?

ANSWER: I got into bed like he had told me to get into bed.

QUESTION: Where was the knife at this time?

ANSWER: It was in his right hand.

QUESTION: And then what did he do?

ANSWER: I guess I wasn't spread right, because he had taken the point, and he had stuck me in the leg with it with the point of the knife to spread open more.

QUESTION: And what did you do?

ANSWER: I did.

QUESTION: And then, Josephine, what happened?

ANSWER: Well, he had gotten on top of me and with the knife in his right hand, he looked down at my face, and [89] he says, "you make one noise, and I'll pin you to the bed" and then he proceeded to do the sex act.

QUESTION: Did you have sexual intercourse with him?

ANSWER: Yes.

QUESTION: Was there penetration?

ANSWER: Yes.

QUESTION: Was there a completion of the sexual act?

ANSWER: Yes.

QUESTION: Was there semen put in your vagina?

ANSWER: I couldn't say, just that I had laid there, and I know he had laid on me, took a rest, laid on me, took another rest. It was eternal. All I could hear is my heart beating in my ears.

QUESTION: And do you know how long this went on Josephine?

ANSWER: Well, I'd say approximately an hour, an hour and 20 minutes that he had me in bed.

QUESTION: And where was the knife during this time?

ANSWER: In his right hand right along side of him.

QUESTION: Could you smell any alcohol on his breath?

ANSWER: Well, not to a point that it was prominent.

QUESTION: And what happened then, Josephine, how many times did you have sexual intercourse with him?

ANSWER: Well, I don't know if you'd call it one long time or whether you'd count it in 2's or 3's. I'd say [90] about three times that he could have.

QUESTION: And on each of those occasions, was there penetration?

ANSWER: Yes.

QUESTION: With his penis?

ANSWER: Yes.

QUESTION: Into your vagina?

ANSWER: Yes.

QUESTION: And you say this went on for about an hour and –

ANSWER: An hour and 20 minutes.

QUESTION: What happened then?

ANSWER: Well, I felt I was gonna have a coronary. I could feel my heart beating in my ears, and I pushed at him to get off which he did. He got off, and he got to the side of the bed, and he stayed there, and he says, "now, you're going to suck me off."

QUESTION: And what happened?

ANSWER: Then with that, I just slid off the end of the bed, put my gown on. I started to walk out of the bedroom. I got to the second step when he caught up with

me, and he grabbed my arm, and I pulled it back. He says, "you move when I tell you to move."

QUESTION: Where was the knife at this time?

ANSWER: He had it in his hand.

[91] QUESTION: All right. What happened then, Josephine?

ANSWER: Then I looked at him. I said, "I'm going down for a drink whether you like it or not."

QUESTION: Had you had it at this point?

ANSWER: Yes, I just couldn't go no more. I felt he was going to kill me anyhow.

MR. MOYER: All right. Why don't we stop there because there's an objection to the next question which is sustained by the Court and pick up where it's by Mr. Brenner.

BY MR. BRENNER:

QUESTION: What happened then, Josephine?

ANSWER: Then I went down into the bar area, and I'm in there making a drink for myself when he had come into the bar area, and he gave me a push. He said, "I told you not to move unless I tell you to move." Then I looked at him, I said, "do you want a drink?" He said, "get me a gin and tonic," that's what he say he wanted and with that, I went over, and I sat in the dining area at a table, and he came into the dining area, sat opposite across from me. That's when I noticed he had picked up – picked the towel up. Inside the bar area, there's linens, that's when I noticed that he had a towel along with the knife when he

sat at the table with me. So, I looked over at him, and I started to talk to him. I said, "where did you hear about [92] me." He said, "from friends of yours," and I said, "where did you get the idea I had so much money?" And then he mentioned that he had heard about it from friends, I was a rich widow. So, then we got talking, and I asked him what he did? He told me he was a knitter. He worked for a knitting company here in town and about his – then he told me he had a family. He has no furniture, they're really bad off, there was no furniture, that there is nothing, they're going hungry. And then I told him, I says, to assure him, I says, "I'm not gonna call the law."

QUESTION: Why did you say that?

ANSWER: Well, I sort of felt that maybe he'd leave, and I had said to him that I was in business for 27 years, and I wouldn't want my friends to know that this had happened to me, and I had sort of thought maybe I could – well, maybe by chance, he'd leave me alone. Then he jumped up. He says, "back upstairs," and I says, "I'm going for another drink" and with that, I had finished the drink I had made previously, and I went back to the bar.

QUESTION: Did he, at any time, give you a name?

ANSWER: Yes, he had told me that I could call the police if I wanted to, that his name was Richard Rutman, and I should call the police," I said, "no." I said, "I'm not gonna call the police."

QUESTION: Now, you were sitting at this table?

[93] ANSWER: In the dining area.

QUESTION: About how long did you sit having a conversation with him?

ANSWER: Oh, I'd say maybe about half an – a half hour that we sat.

QUESTION: And were there lights on downstairs?

ANSWER: Yes, in the dining area. There's a light on in that section.

QUESTION: Is there any question in your mind that it was this Defendant, here, who committed this crime?

MR. MOYER: All right. There's an objection then, and I believe there's an objection that's overruled and if you could pick it up by Mr. Brenner.

BY MR. BRENNER:

QUESTION: Absolutely certain?

ANSWER: Absolutely sure.

QUESTION: And you were in his company actually about how long?

ANSWER: About a half hour I'd say.

QUESTION: Downstairs?

ANSWER: Yes.

QUESTION: And upstairs?

ANSWER: We talked. He said he has a brother that was a – worked in a paint mill, he worked in a paint [94] factory, and he told me a little about, I guess, his family. He said he lived up in the Acres at one time, up on the hill, that you could see from the bar area through the front window.

QUESTION: And you were in his company from the very beginning until the time he left about how long?

ANSWER: Well, I'd say about another 15 minutes, I'd say about 45 minutes.

QUESTION: And he had arrived up there at what, about 2:00 o'clock?

ANSWER: 10 of 2.

QUESTION: 10 of 2?

ANSWER: When he had told me the time himself.

QUESTION: And he left about what time?

ANSWER: About approaching 5:00 o'clock, I'd say about quarter of.

QUESTION: Quarter of 5?

ANSWER: Yes, somewhere in there.

QUESTION: All right. Did you have any other conversation with him before he left?

ANSWER: Well, yeah, I told him, you know, that I worked. I work hard, and I'm happy in what I do.

MR. MOYER: All right. Now, there's an objection there which is overruled by the Court and if you could pick up at the bottom of the page where it [95] says by the witness.

BY THE WITNESS: I had told him that I'm happy as far as working goes, and he had gotten up and then he had given me 32, $1.00 bills back and a torn 20, the 20 he had ripped, and I had told him that I'd like to get to bed, because it was a matter of getting up in the morning. My

day man was on vacation, and I had to open the bar at 8:00 o'clock in the morning and then he had decided to go.

BY MR. BRENNER:

QUESTION: All right. Now, did he say anything in reference to a radio?

ANSWER: Yeah, well, he had told me about – I had said I wasn't going to call the law, that I wouldn't want it to be known that this had happened to me, and he said that he has a citizens band, and he'll find out. If there was any call for 222 East Hamilton, he was coming back for me, and I was petrified. I said, "no, I won't call the law," I said, "you didn't hurt me, you know."

QUESTION: And you wanted him to leave?

ANSWER: I wanted him to leave, yes.

QUESTION: All right. Did he then leave?

ANSWER: Well, he asked to call a cab for him. I had lost my glasses somewhere upstairs, and I couldn't see. I can't see without the glasses, but he had dialed, [96] but he had me do the talking. He said he was going to 19th and Highland and that's the address I had given the cab company. And then with that, I had walked to the front of the bar, and I had thrown the front door open, and I had put a wedge in. But he made me sit inside at the bar, right there at the doorway as you come in and then he sat on the ledge on the pavement side of the bar and that's when I had a chance to really observe his clothes, and I took a real good look at this man.

QUESTION: And what type of clothes did he have on?

ANSWER: He had a white pair of trousers with the red and black type of a plaid but not a solid black plaid, and he had brown shoes with a sort of an alligator style tip front and the shoe had a heal [sic], and he had a navy blue over slip type of brush rayon shirt that [sic] no button down shirt, no sport shirt, it was just an over type shirt.

QUESTION: And did he then leave?

ANSWER: Well, he waited till the cab came and then he had left but before he left, he came over to me, and he kissed me on the cheek, and he said, "I'll see you tomorrow honey" and that's when he had gotten into the cab.

QUESTION: And what happened then?

ANSWER: Well, I went back into the bar, and I pulled the door shut and I sat there, and I just sat there terrified. I couldn't believe that this had happened to [97] me. So, I must have sat there from approximately 5:00 o'clock until 8:00 o'clock.

QUESTION: Just by yourself?

ANSWER: By myself.

QUESTION: And did Mr. Shreibech come in eventually?

ANSWER: Ronnie came in about 10:00 o'clock.

QUESTION: And who is Mr. Shreibech?

ANSWER: He's an Allentown Policeman that helps me at the Bar.

QUESTION: And did you then relate to him the incident?

ANSWER: Yeah, I waited till Ronnie came, because I didn't want him to hear about it for fear that he'd come back after me before they had a chance to pick him up. So, I told Ronnie to run in town for him.

QUESTION: And did you relate it to Mr. Shreibech?

ANSWER: Well, yes, I told him that I was robbed, and I was cut, and I was raped, and I had showed him. That's when he had – well, I had showed him what happened. Then he went in for help.

QUESTION: All right. Did the Prosecutor, Mr. Beltz, then subsequently arrive?

ANSWER: Yes, he had gotten there about –

QUESTION: And did he go through the premises?

ANSWER: Yes.

[98] QUESTION: And did he observe your room upstairs?

ANSWER: Yes, he did.

QUESTION: And what was the condition of the room at the time he was –

ANSWER: Everything was thrown around. He had pulled everything out.

QUESTION: I have just one other question. Did you at any time consent to the sexual relations with the Defendant?

ANSWER: No, I didn't.

BY MR. BRENNER: No further questions.

MR. MOYER: All right, you may end there. May we approach, your Honor?

(Whereupon reading of Transcript concludes)

(Whereupon Counsel approach side-bar)

MR. MOYER: That's the extent of the Transcript, of this Witness, but I would like the Transcript of the – another Witness read in just so the Jury understands that it was, in fact, a barroom that was the scene of this crime and that is the witness of the bartender, Jean Ervin, I think her name is.

[99] MS. DANTOS: Judge, I would object. This certainly – the evidence that he's saying that it was a barroom, that's come out through that direct testimony that was just read, it just came out.

THE COURT: Isn't it duplication?

MR. MOYER: Pardon me?

THE COURT: Isn't it duplication?

MR. MOYER: Well, I suppose it is.

THE COURT: Sustained.

MS. DANTOS: Okay. Your Honor, for the record, since the Transcript has now been read in and line with my other objections, I'm asking that the Jury be directed to return a verdict of life.

THE COURT: Denied.

MR. MOYER: I think Dr. Mihalakis is here. So, if we could take a break so that I can, you know, just tell him a few things. He's not going to be that long, but I will

need the diagrams of the body, again. They might be in the Jury Room.

THE COURT: I don't know where they are. I guess they're there.

MR. MOYER: Yeah, I think so.

THE COURT: All right.

(Whereupon side-bar conference concludes)

[100] THE COURT: All right, Mr. Schaeffer, we're going to take a – make it a 15 minute recess, all right.

COURT CRIER: All rise please, this Court will be in recess for 15 minutes.

(Whereupon Court is in recess)

COURT CRIER: All rise, please, this Court is again in session, you may be seated.

THE COURT: All right. You may bring the Jury in please.

(Whereupon the Jury enters the Courtroom)

THE COURT: All right, Mr. Moyer, you may call your next witness please.

MR. MOYER: Commonwealth recalls Dr. Mihalakis.

ISIDORE MIHALAKIS, WITNESS

DIRECT EXAMINATION

THE COURT: And Doctor, again, I guess I have to remind you, you are still under oath from the –

THE WITNESS: Yes, sir.

[101] THE COURT: Very good.

BY MR. MOYER:

Q. For purposes of this hearing, you're actually being recalled from your testimony you gave in the trial, all right?

A. Yes, sir.

Q. Dr. Mihalakis, can you tell the Jury the difference between a person being alive and a person being conscious?

A. Alive refers to the beating of the heart, the having of blood pressure, the having the breathing, the having vital signs, these are indicators of life, blood pressure, pulse, respiration. Now, being conscious is being able to appreciate your surroundings. I can see you, you see me. As someone touches me, I feel someone touch me. If someone speaks to me, I can hear them. In other words, my five senses told me what is happening in the surroundings.

Q. Now, I think you've told us before which wounds the decedent, James Scanlon was alive for. Could you go through that again for the Jury for this proceeding?

A. Mr. Scanlon was alive for essentially all the wounds primarily, because we found hemorrhage through a greater or lessor degree.

Q. And when you say "hemorrhage", you're talking about bleeding?

[102] A. Yeah, we – in other words, we found bleeding in the soft tissues adjacent to the wounds. So, in order to have hemorrhage, one has to have circulating blood. So, if a vessel is severed, cut, damaged, then it leaks out, it leaks blood from within the lumina of the vessel. This causes hemorrhage and this is an indication that the heart is beating and the vascular system is functioning. So, we know we have life. Says nothing about consciousness, merely, that there is life present.

Q. And I think you testified that for all the stab wounds, all the abrasions, all the lacerations, all the blunt force injuries, fracture of the nose, Jimmy Scanlon was, indeed, alive, is that correct?

A. That's correct.

Q. And it is only for the Second and Third Degree Burns that there – there's no evidence that he was alive, is that correct?

A. That's correct.

Q. And that is because there was no smoke found in the lungs?

A. No smoke was found in the lungs, no carbon monoxide, nothing to indicate that he was breathing in any way.

Q. Now, can you determine whether a decedent is conscious for certain wounds?

[103] A. Yes, you can.

Q. And could you tell the Jury how you can determine whether a decedent is conscious for certain wounds?

A. You can tell by the fact that they are defense wounds. Defending oneself is a conscious phenomenon where one will raise his hands. When one is unconscious, vision is impaired, feeling is impaired, the vital functions, some of the vital functions, the five senses, are impaired to – to a variable degree. You know, you have people coming out of the operating room, and they have a feeling of pain as they're coming out of the anesthesia So, there are degrees of unconsciousness but, by and large, if there is an indication of a deliberate act, such as defending oneself, this is an indication that the person is conscious and obviously, if he's conscious, he has to be alive.

Q. All right. And those would be the wounds that you've described around the hand area, is that correct?

A. That's correct. The –

Q. There are stab wounds on the hand, lacerations on the hand, and blunt force injuries on the hands?

A. That's correct.

Q. Now, other then defensive wounds is there any other way to determine whether or not wounds were inflicted while the decedent was conscious?

A. The only way you can tell if is you have eye [104] witnesses or something, you know, just by looking at a deceased individual other than those indicia that we spoke of, there really is no other way.

Q. Medically, there is no way of knowing that whether these wounds were inflicted while – any of these wounds were inflicted while the decedent was conscious, is that correct?

A. That's correct, with beyond reasonable doubt, no it cannot be.

Q. So, you're not saying that they were not – they were inflicted when he was conscious, and you're not saying they were inflicted when he wasn't conscious. You cannot tell one way or the other?

A. That's correct. We know at some point he had to have lost consciousness, he's found on the floor. We know that there's bruising of the back of the head which translates into bruising of the brain. That's commonly associated with loss of consciousness, we know that there is loss of blood.

Q. Can we assume, however, that at least one, at the very least, at least one of these wounds was the first wound other than the defensive wounds?

A. I – I believe you, yes you can infer that but at the same time, we don't [sic] whether the blunt force injury came first of the back of the head. So, –

[105] Q. Correct. Let's assume that that blunt force injury did come first, can we medically determine whether or not he was conscious for that? Isn't it true that to a reasonable degree of medical certainty, you can determine whether or not he was conscious for that?

A. Well, we have him conscious for the defensive wounds, okay, now, we'll just see the body with that [sic] any of the other wounds, okay. Certainly, the abrasions of the face, are non-lethal, and we have two options. If they are not lethal, okay, then either they were inflicted strictly for the sake of causing pain or he is alive. The alternative is, that someone just deliberately, as an unconscious individual wants to see if he's alive, and it's just your and

[sic] brandishes a broken bottle which is unlikely. So, either he's alive and feeling pain or it is a deliberate attempt to hurt the same, by the same token, the wounds of the back of the head. There are multiple stab wounds of the back of the head. You know, at some point, the assailant realizes that he is not getting through the skull with that knife because the knife is not getting stuck. So, yet we have multiple wounds of the back of the head. Either they are a deliberate – if the – they are subsequent to the wounds of the back, you know, he's either alive or – I'm sorry, if they're before the wounds of the back, he's alive or they're a deliberate [106] attempt to cause pain. You know, the options are very limited.

Q. Right. If – I think you testified at trial, that one of these stab [sic], and I believe it was this one here, was the stab wound that pierced Mr. Scanlon's heart and entered his ventricle, is that correct?

A. That's correct.

Q. Now, if we can assume that that was the last wound, assume that fact, can – do you have an opinion to a reasonable degree of medical certainty as to whether or not the wounds of the head, the stab wounds of the head, were either meant to inflict pain or whether they – the decedent was conscious for those wounds?

A. Well, if we eliminate the wounds of the back, there is nothing about the wounds of the back of the neck, the sides of the neck, and the head to cause immediate death. One may, indeed, have caused him to fall, primarily, because it cuts into the spinal – into the spinal cord itself, and it would not be unusual for this person to lose some sort of function, because it's pretty high up. So, we probably lose some arm and some leg function but the others,

there is nothing about them that would cause immediate lethality or immediate death.

Q. Is there anything about that – those wounds that would cause immediate unconsciousness?

[107] A. No, not necessarily immediate unconsciousness.

Q. So, is your testimony, Doctor, that the decedent could have been conscious for these 16 stab wounds in the neck and the back, it's a possibility, correct?

A. If he was not rendered unconscious by the wound to the back of the head, and we have a substantial wound to the back of the head with, obvious, bruising of the brain.

Q. Do you have an opinion as to whether or not that, in fact, caused unconsciousness?

A. One cannot be absolutely sure, but it is not unusual for a wound which causes bruising of the brain and hemorrhage in the coverings of the brain to cause unconsciousness. That would not be unusual at all.

Q. Then assuming that he was conscious for that wound, would that have inflicted pain?

A. Yes, indeed, until for this – during the momentary lapse from that wound until he lost consciousness, there would be pain.

Q. And assuming that the decedent was conscious for these 16 stab wounds to the back of the head and the neck, if the decedent was conscious, would that have caused pain?

A. It most certainly would have.

Q. What about the lacerations and the fracture on the front of the face if the decedent was conscious, would that have caused pain to Mr. Scanlon?

[108] A. Indeed it would have. No doubt about it. I mean, the nose is an extremely sensitive area.

Q. Could you tell the Jury what you mean by pain, medically, what is pain, what is that?

A. Medically, pain is the stimulation of a nerve ending which takes the impulses from the nerve ending to the brain that says something has stimulated me and there are pain sensitive nerve endings which the brain interprets as pain. In layman's term, pain is something that hurts.

Q. Now, assuming Doctor, that the blunt force injuries occurred first, in this case to Mr. Scanlon, then also assume that the 16 stab wounds of the neck and the head occurred next and that the Defendant, the perpetrator, the assailant, had to walk from an area of the bar into the kitchen to get a second knife, a butcher knife, which I think you examined, and would that knife cause these wounds in the middle of the back. Assuming those facts and evidence, do you have an opinion, to a reasonable degree of medical certainty, as to the length of time that would have taken to inflict those injuries?

A. It would take some period of time, no, several minutes primarily, because we have evidence for a struggle.

Q. What about the fact that there were two knives used and also various bottles used as instruments of infliction of pain?

[109] A. Well, in a – he's behind a bar and behind a bar, there are lots of stacks – stacked bottles. No, he obviously doesn't take very long to grab a bottle and hit. I would say, definitely, several minutes at the minimum. Now, it could have been longer, the answer is, yes but can I medically say that it has to be longer, there is nothing which I see that I can unequivocally say it has to be 15 minutes or it has to be 10 minutes.

Q. Doctor, do you have an opinion, again, to a reasonable degree of medical certainty, based on the factors that you have testified to, based on the multiplicity of wounds, based on the locations of the wounds, based on the fact that there was a – there was multiplicity of instruments, do you have an opinion, to a reasonable degree of medical certainty, as to whether or not the perpetrator, the Defendant, had a deliberate attempt to inflict pain to this decedent? Do you have that –

MS. DANTOS: I object.

Q. – you have that opinion, first of all?

MS. DANTOS: I object, your Honor.

THE COURT: As to the pain.

MR. MOYER: No, deliberate attempt to inflict pain.

MS. DANTOS: On the part of the Defendant.

[110] MR. MOYER: Based –

THE COURT: Overruled.

MR. MOYER: Thank you.

THE COURT: Overruled, we'll permit it.

Q. You may answer it. Do you have that opinion, first of all without saying what that opinion is?

A. Yes, I have a – yes I have an opinion.

Q. And what do you base that opinion on?

A. The – the multiplicity, the distribution, the repeatedness, in that one knows that he is in a non-lethal area in a sense that he has not caused lethal injury because the knife has not gone through. Therefore, to persist in stabbing an area in which one did not hope to have the knife penetrate and in which one already knows that the knife is br – has a broken tip in it.

Q. You're talking about the stab wounds in the head and the neck, now?

A. Yes. No, obviously, the person is deliberately trying to cause pain.

MR. MOYER: With the Court's indulgence. That's all, you may cross.

CROSS EXAMINATION

BY MS. DANTOS:

[111] Q. Good afternoon, Doctor.

A. Good afternoon.

Q. Dr. Mihalakis, Mr. Moyer asked you to assume a lot of things. Isn't it your testimony, though, that you cannot teil the order of the wounds, wasn't that your prior testimony?

A. That's – that's correct.

Q. So, you don't know to any degree of medical certainty which one of those wounds came first or which came last, correct?

A. That's true.

Q. Okay. And –

A. On a strict medical basis can I separate them, that's very, very true, Miss Dantos.

Q. Okay. So, and I believe it was also your testimony that other than the defense wounds, you can't say to a degree of medical certainty whether or not he was conscious for any of the other wounds other than the defensive wounds, correct?

A. Other than the defensive wounds, that's true except that we have to have some explanation for the others.

Q. Well, as far as your testimony that you – you can't determine to any medical degree that he was conscious during those other wounds, can you, as opposed to alive? I understand your distinction, but you can't say whether or [112] not he was conscious.

A. I have a problem with that, primarily because of these wounds. We have these scrapes and unfortunately, we have limited options as to where were they. These are non-lethal wounds made by a broken bottle. Now, either they are suffered when a person is conscious or if he's unconscious, somebody is deliberately trying to disfigure him. If we're willing to give those, in other words, we're willing to accept that those are the options, then I would agree with you.

Q. Okay. Well, let me ask you this. The blunt force injury to the back of the head. I believe you testified earlier that that was a tremendous force, sufficient to bruise the brain.

A. Yes.

Q. That injury in it [sic] of itself could render someone unconscious, couldn't it?

A. Yes, indeed, yes.

Q. Okay. And so that if that was, and I'm asking you to assume that that's the first injury, okay, if that was the first injury, the blunt force to the back of the head, then he would be rendered unconscious if that's possible, correct? It's possible that he could have been rendered unconscious from that point.

A. If that's the first injury after the hands you [113] mean?

Q. Correct.

A. Yes.

Q. Okay. Now, Mr. Moyer asked you to assume that this back injury occurred first, right?

MR. MOYER: Which one?

MS. DANTOS: The back injury that –

MR. MOYER: No.

MS. DANTOS: – punctured the ventricle.

A. I think he said last.

Q. Last, okay, I'm sorry. Now, the burning of the body that you testified to previously, that was postmortem, correct?

A. Yes.

Q. No way that was done when the victim was alive or conscious, correct?

A. Yes, I believe that's true.

Q. Okay. And isn't it also true that if – if it – that – take my possibility that the first blow was the blunt force injury after the defensive wounds, after this struggle that you testified to, okay, and he's rendered unconscious by the blunt force injury. You don't know to any degree of medical certainty who did all these wounds or how many people did them, do you?

MR. MOYER: Objection, that's been decided [114] by the Jury.

THE COURT: Would you repeat that question again please? You do not know what?

MS. DANTOS: How many people were involved.

MR. MOYER: Well, first of all, that's not an accurate recitation of the question. She said, first of all, you do not know who did it and that's what I objected to because the Jury has decided who did it.

MS. DANTOS: Okay, then I'll withdraw that part of the question.

THE COURT: All right, very good.

Q. Dr. Mihalakis, you cannot say, can you, how many people were involved in this can you?

A. I only see wounds, I do not see assailants.

Q. Okay. And you do not know any of the order of the wounds other than defensive wounds, correct?

A. That's correct with a reasonable medical certainty.

Q. Okay. So, it is possible, is it not, that other than the defensive and possibly other than the lacerations on the face, that James Scanlon was unconscious for all of the stab wounds?

A. It's possible, yes.

MS. DANTOS: Thank you.

REDIRECT EXAMINATION

[115] BY MR. MOYER:

Q. If the blunt force injury to the head was the first one, though, that would have caused pain wouldn't it?

A. Yes, I –

Q. No matter which one's the first one, the first one's going to cause pain, right?

A. Yes, indeed.

Q. And if you assume Miss Dantos's hypothetical that that was the first one, that would have caused pain?

A. Yes.

Q. Can you quantify the amount of pain that that would have caused?

A. I can quantify it but, you know, what is a lot. You know, quite a bit of pain, primarily, because we have splitting of the skin, we have crushing, and we have bruising. So, I guess one has to have his head split open, so to speak, to appreciate, but it does cause a considerable amount of pain.

Q. Miss Dantos also asked you about if more than one person was involved in this and this is something that was brought up at the trial concerning fragments of hair that were found and – excuse me – hair that was found in the decedent's hand. Was there hair found in the decedent's hands?

MS. DANTOS: I'll object, your Honor.

[116] MR. MOYER: They've raised it again.

MS. DANTOS: Your Honor, could we approach the bench?

THE COURT: Well, really, that's not the issue here is it?

MS. DANTOS: Right.

MR. MOYER: But she's raised it by –

THE COURT: That has been decided as you indicated at trial.

MR. MOYER: She raised it on cross examination by asking whether or not he could tell more than one person was involved.

MS. DANTOS: As to the injuries.

MR. MOYER: I have a right now to go into that on redirect.

MS. DANTOS: As to the injuries, your Honor, I did not get into the hair.

MR. MOYER: The issue's been raised, your Honor.

THE COURT: And still, may I ask – may I see Counsel up here a second?

(Whereupon Counsel approach side-bar)

THE COURT: On aggravating circumstances.

[117] MR. MOYER: That's right, but it's been raised now, and I just want to make sure that this Jury's aware, because I think they were misled, not intentionally, but they were misled as to findings of hair in the hand. The autopsy report says, that there were fragments of hair found in the hand.

MS. DANTOS: Well, you can't go back and clarify that now.

MR. MOYER: You've – but you've raised, my friend.

MS. DANTOS: I did not.

MR. MOYER: You've raised by saying –

MS. DANTOS: Judge, I –

MR. MOYER: Wait, can I finish?

MS. DANTOS: Sure.

MR. MOYER: You've raised it by saying, can you tell whether or not more than one person was involved in this. By that – raising that fact, that has put that seed in the Jury's mind, and I have the right to clear that up.

MS. DANTOS: Your Honor, no, as to the injuries, that's what I was getting at, as to the actual stab wounds. That fact about the hair, has nothing to do with the aggravating factors –

MR. MOYER: Then why did you ask the [118] question?

MS. DANTOS: We're talking about whether or not there was torture here not whether or not there was hairs.

MR. MOYER: Then why did you ask the question whether or not you could tell there's more than one person involved?

MS. DANTOS: To see if he knew. To see if he could tell.

MR. MOYER: And what's – what's the relevance of that?

MS. DANTOS: As –

MR. MOYER: 'Cause you – you're going to argue it that's why. Judge, they've raised –

MS. DANTOS: Judge, – –

MR. MOYER: – it again, they raised it in the case in chief –

MS. DANTOS: It's not appropriate.

MR. MOYER: – they raised it again, and I have the right to clear up the misunderstanding that I believe this Jury has about hairs found in the decedent's hands. By Mr. Charles – his actions, it looked as though there

were clumps of hair. The autopsy report, which they have a copy of, says, fragments of hair were found.

MS. DANTOS: And we read that to him when [119] he was on cross with Mr. Charles.

MR. MOYER: And the word fragments never came up.

MR. CHARLES: Do I get to say –

THE COURT: Was it a question that was asked.

MR. CHARLES: There was also things from Bennett. Bennett said, hairs were retrieved, not fragments, hairs, Judge.

MR. MOYER: But he's the one that did the retrieving.

MR. CHARLES: But hairs was what Bennett said.

MR. MOYER: Fine.

MR. CHARLES: We use Bennett's words.

MR. MOYER: Fine.

MR. CHARLES: It's not appropriate now.

MS. DANTOS: Judge, –

THE COURT: That shouldn't have been asked and that's the trouble.

MR. CHARLES: I think in the beginning –

MR. MOYER: She raised it.

MR. CHARLES: – in order – was the order of the blows, Judge.

THE COURT: That's the trouble.

[120] MR. CHARLES: Because you have them going to get a second knife, an order of blows. I think it was in response to then if one person went to get the knife –

MR. MOYER: Again, I have to argue against two – two different Counsel, and I object to that.

MS. DANTOS: He's the one that did the original cross.

MR. MOYER: Well, we're not on that now.

MR. CHARLES: It was in the order of the stab wounds, Judge. The testimony was, someone else went to get another knife.

THE COURT: Do you admit you asked the question?

MS. DANTOS: I asked, does he know how many people were involved in the stabbings? I didn't ask anything about the retrieving of the hair that was all covered –

MR. MOYER: That's raising the issue again.

MS. DANTOS: No it's not, not [sic] it's not raising the issue.

MR. MOYER: It's raising a red herring to this Jury –

MS. DANTOS: We're talking about the stabbings.

MR. MOYER: – once again as it was before.

[121] MS. DANTOS: It's not red herring. It's to find out if he can tell or not.

MR. MOYER: And what's the relevance of it then 'cause you're going to argue that's possible that there's another person involved just to cause reasonable doubt.

MS. DANTOS: Well, –

MR. CHARLES: Your Honor, it was a question as to the order of the knife, going to the kitchen to get a second knife.

MR. MOYER: I have to object to Mr. Charles participating in this argument.

MS. DANTOS: Your Honor, –

THE COURT: All right.

MS. DANTOS: – my objection is to going back into the hair now to clarify, as Mr. Moyer said, the only purpose to clarify something that happened on the other phase of the trial, and I think that's improper.

MR. MOYER: But she's raised it again. If she hadn't raised it, I wouldn't have had the right to do it, I admit.

MS. DANTOS: Well, your Honor, I object.

MR. MOYER: But now that it's raised, I think I have the right to go into it. She's opened the door.

[122] THE COURT: It seems to me we're having problems with it, I guess we wouldn't be here, but it was asked.

MS. DANTOS: It –

THE COURT: All right. Overruled, we'll permit it.

(Whereupon side-bar conference concludes)

BY MR. MOYER:

Q. I think you testified at the trial that you found hair in the decedent's hand, is that correct?

A. Yes, Mr. Moyer.

Q. Could you further describe the hair that you found?

A. There were fragments of hair in the left and right hand which were recovered and surrendered to Sergeant Kolowitz.

Q. And when you say, "fragments" do you have any idea how many hairs you had, you found?

A. No, I really don't. They were surrendered directly to the police. I'm sure they're available.

Q. But the word that you put in your autopsy report was fragments, is that correct?

A. That's correct.

MR. MOYER: That's all.

[123] RECROSS EXAMINATION

BY MS. DANTOS:

Q. Doctor, you were asked earlier in the trial to look at the report regarding that, weren't you, regarding the fragments of the hair that were found?

A. That's correct.

Q. Okay. And you cannot say, – this autopsy was performed back in January, right?

A. Yes.

Q. So, you can't say now, you don't remember how many hairs you found in each hand, do ya?

A. No, I've already said that to Mr. Moyer, that I can – I do not recall.

Q. Okay.

A. I'm sure they're recoverable.

MS. DANTOS: Okay, thanks.

THE COURT: All right. Is that it with this Witness? Any reason why we can't excuse this Witness?

MR. MOYER: Excuse me your Honor. That's all.

THE COURT: All right. Any reason we can't excuse this Witness?

MR. DANTOS: No, your Honor.

THE COURT: Very good. Doctor, thank you [124] very much.

THE WITNESS: Thank you, your Honor.

THE COURT: Do you have another witness, Mr. Moyer?

MR. MOYER: No, your Honor. I would ask that the evidence that was introduced at the trial in chief be incorporated into this hearing so that the Jury can also review that evidence for purposes of the sentence in this case.

THE COURT: Are you tal – I'm not quite sure what you mean by that. You mean all of the evidence, all of the physical evidence?

MR. MOYER: Let me approach, your Honor.

THE COURT: All right.

(Whereupon Counsel approach side-bar)

MS. DANTOS: From the trial?

MR. MOYER: Yeah.

MS. DANTOS: Yeah.

THE COURT: You're talking about what the testi –

MR. MOYER: All testimony and all Exhibits as well.

THE COURT: So, they can be argued then.

[125] MR. MOYER: Sure.

MS. DANTOS: And, your Honor, I have no objection but with that same objection that we had as to Commonwealth Exhibit 5 on the photo of the body. You're not moving for the Transcript, correct? That's not in, is it?

MR. MOYER: No.

MS. DANTOS: You're talking about the trial.

MR. MOYER: No, –

MS. DANTOS: Okay.

MR. MOYER: – I'm not going to ask that the Transcript itself be admitted into evidence.

MS. DANTOS: Okay, then I have no objection.

THE COURT: No objection then, all right, they'll be admitted.

(Whereupon side-bar conference concludes)

THE COURT: Mr. Moyer then, if I understand you correctly, you rest?

MR. MOYER: Commonwealth rests.

THE COURT: All right. And as I indicated, we will adjourn then till tomorrow morning at 9:30 and [126] Counsel for Defendant will be prepared, at that point, to proceed, very good.

MS. DANTOS: Ready, your Honor.

THE COURT: All right. All right, now, before you go, though, ladies and gentlemen – yeah, would you please take that down, thank you. All right, very good. Now, ladies and gentlemen, as I indicated earlier, since both parties have agreed to the fact that we need not sequester you for this evening, you will be permitted to return home, to return tomorrow morning at 9:30 to the same room, the Jury Room, over here. And now, it becomes extremely incumbent upon you, because I did see a

reporter, at least one reporter, here from the Morning Call, and I am assured there will be something in the paper as to the verdict and maybe a possible total rehash of this whole case. Again, you are instructed that you are to ignore and have – do not read or look at anything that might appear in the newspaper. Even though you have reached a verdict with respect to the trial in chief, if you'll notice, one of the motions that was last made by Counsel was the evidence that was submitted in that trial for the purpose of reviewing – by way of argument by Counsel as to this being an aggravating circumstance and again, we do not want you tainted by anything that might appear in the newspaper with regard to the reporter's memories as to what was [127] said. It will be your memories of what was said that is important. You should not discuss, again, the case or anything about what is before the Court with anyone. Again, for the same reason, it is your ultimate decision in this case that will control as to what finding will be made and as to the burdens of each party with respect to this Sentencing Hearing that we're endeavoring to complete here now. So, again, I can't emphasize to strongly the importance that all of you refrain from any review of anything that might appear in the newspaper or anything that might appear on the television or radio for that matter. I think that covers everything. Is there anything else that I may have missed?

MR. MOYER: No, your Honor.

MS. DANTOS: No, your Honor.

THE COURT: All right. All right, then we will adjourn then until tomorrow morning at 9:30.

MR. CHARLES: Your Honor, we need to see you if we could on another matter.

THE COURT: A what?

MR. CHARLES: We need to see you after the Jury leaves on another matter.

THE COURT: All right, then we'll excuse the Jury and then we'll adjourn.

COURT CRIER: All rise please, Court will [128] be adjourned until tomorrow morning at 9:30, 9:30 tomorrow.

(Whereupon Jury leaves the Courtroom)

COURT CRIER: All rise please, Court is again in session, you may be seated.

THE COURT: All right, now, –

MR. CHARLES: Your Honor, there is another matter I would like to address to the Court.

THE COURT: Very well.

MR. CHARLES: Okay. Maybe Attorney Dantos can advise – at this point in time, since it's – we're on our side of the case, the Defense, plans to call various witnesses in mitigation to argue for a Sentence of Life Imprisonment. Since Attorney Dantos has that information, is running that side of the case, I'll let her advise us as to who the witnesses are.

MS. DANTOS: Your Honor, I – we had planned to call Nick Rompilla, Darlene Rompilla, Aaron Rompilla, and Ron's sister, Sandy.

THE COURT: These are all family members?

MS. DANTOS: Correct.

MR. CHARLES: Well, – we've been advised by the Defendant, prior, that he did not want us to call any of those witnesses. It was our intention to call them, [129] and it is still our intention, if you agree, I want to clear up, because I don't want to get into a situation where we're told not to and then we have to then turn around, and it's so important to call them now 'cause – because of where the case is.

THE COURT: And prepare for tomorrow.

MR. CHARLES: Yes.

THE COURT: There's no question, that's why we postponed it a little more.

MR. CHARLES: So, I wanted – I wanted you to have an opportunity to be heard on that issue for the record.

THE COURT: All right. Well, let me ask you this, Mr. Rompilla. Is that accurate what they've just outlined, that you've instructed them not to put or call any of the family members to put on any evidence?

MR. ROMPILLA: I did, but I changed my mind. I agree with them.

THE COURT: You're willing to do it?

MR. ROMPILLA: Yeah.

THE COURT: Very good. I must say, Mr. Rompilla, in all fairness, we were quite concerned, because it's very serious that what you're facing here and mitigating circumstances under the circumstances may very well change the whole result. Very good, then we have your [130] word then that you – they should go ahead?

MR. ROMPILLA: Fine.

THE COURT: I think it was a wise choice, I'll be quite frank with you. I would have strongly recommend [sic] it. Counsel has really done a superb job, Mr. Rompilla, in my opinion. Now, I realize the result may not have been what you wanted, but I think they did a superb job on your behalf. I guess sometimes, and I'm sorry to say, some people measure these things totally by results and that's not true in the Law. I guess we'd like – we'd all like what we want, but it doesn't turn out that way. I think they must be measured by how well a job they did as a Lawyer, and I must say, in all fairness, I don't think you could have gotten a better job with anyone. Well, all right, well I'm glad that decision has been made then.

MR. CHARLES: Thank you, your Honor.

THE COURT: All right, very good. All right, Mr. Schaeffer, we will adjourn until tomorrow morning.

COURT CRIER: Court will be adjourned until tomorrow morning at 9:30.

(Whereupon testimony concludes for the day)

CERTIFICATION

I.

I hereby certify that the proceedings are contained fully and accurately in the recordings taken by me in the hearing of the above case and that this is a correct transcript of the same.

DATE: November 1, 1989

/s/ [Illegible]
COURT MONITOR

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	NO. 682/1988
vs	)	Jury Trial November 2, 1988
RONALD ROMPILLA	)	

VOLUME VII NOTES OF TESTIMONY HEARD BEFORE THE HONORABLE DAVID E. MELLENBERG, J.

APPEARANCES:

For the Commonwealth: MICHAEL MOYER, ESQUIRE
District Attorney's Office
Lehigh County Courthouse
P.O. Box 1548
455 Hamilton Street
Allentown, PA 18105

For the Defendant: FREDERICK CHARLES, ESQUIRE
MARIA DANTOS, ESQUIRE
Public Defender's Office
Lehigh County Courthouse
P.O. Box 1548
455 Hamilton Street
Allentown, PA 18105

Court Monitor: Lori A. Reichl

[2] INDEX

WITNESSES:	PAGE
DARLENE ROMPILLA	
Direct Examination by Ms. Dantos	4
Cross Examination by Mr. Moyer	8
NICHOLAS ROMPILLA	
Direct Examination by Ms. Dantos	9
Cross Examination by Mr. Moyer	12
Redirect Examination by Ms. Dantos	14
ROBERT ROMPILLA	
Direct Examination by Ms. Dantos	15
Cross Examination by Mr. Moyer	20
Redirect Examination by Ms. Dantos	24
SANDY WHITBY	
Direct Examination by Ms. Dantos	25
AARON ROMPILLA	
Direct Examination by Ms. Dantos	28

[3] (Court called to Order)

THE COURT: Will someone please inform the District Attorney that 9:30 means 9:30. We don't mean 9:35, we mean 9:30. Is he anywhere – oh, here he comes. Mr. Moyer, please 9:30 means 9:30, all right. Oh, do you have, by any chance, the proposed Verdict Slip?

MR. MOYER: Yes, I do.

THE COURT: I think this is the one Counsel has agreed to, you've reviewed it?

MS. DANTOS: Yes, Your Honor.

THE COURT: All right, thank you. All right, you may bring the Jury in please.

(Whereupon the Jury enters the Courtroom)

THE COURT: Good morning. all right, now, Miss Dantos.

MISS DANTOS: Your Honor, Counsel, members of the Jury. I was introduced to you a long time ago. My name is Maria Dantos. I sat through the Trial the same as you did, and I heard the same things that you heard, and you heard some horrible things come out, some horrible facts that you found Mr. Rompilla guilty of First Degree Murder. Now, is his Sentencing Hearing, this is it. This [4] is as real as it gets. This is life or death. I'm going to ask you to do what you promised me you'd do and keep an open mind during his. You told me that you could consider life, and I'm asking you to do that. I'm going to present some witnesses to you, and I want you to listen to them, their [sic] his family, and I know that we all felt it when we saw the Scanlons' crying during the Trial. And this is Ron's hearing right now, and I know I felt it, too when the Verdict came back, and I saw Ron's family crying. So, please, keep a open mind and listen to what they have to say about him. Let them show you a little bit about him, thanks.

THE COURT: You may call your first witness.

MS. DANTOS: Your Honor, I call Darlene Rompilla.

DARLENE ROMPILLA, WITNESS, SWORN

DIRECT EXAMINATION

BY MISS DANTOS:

Q. Darlene, for the record, would you state your full name, please?

A. Darlene Rompilla.

Q. Darlene, how old are you?

[5] A. 38.

Q. And can you tell me what your relationship is to Ron?

A. I'm Ron's sister-in-law.

Q. What do you do for a living, Darlene?

A. (Crying).

Q. Can I get you some water?

A. I work at the Morning Call.

Q. Darlene, how long have you known Ron?

A. 19 years.

Q. And he was living with you, wasn't he?

A. Yes.

Q. How long was he living with you?

A. 3½ months.

Q. And do you have children at home?

A. Yes, I do.

Q. And how is his relationship with your family?

A. When Ron – when Ron was going up for Parole, my kids were very afraid, they didn't know him, and they didn't want him in their home. And the day he came home, my daughter came home from school and went right to her room. She wouldn't even look at him but within two or three days, they – they started opening up to him, and they became very attached to him. He was very good in our home.

[6] Q. Did he help you out?

A. Yes, he did. He did cleaning, dusting –

Q. How did he help you?

A. – vacuuming, did some wash, everything but cooking.

Q. Stayed around the home?

A. Yeah.

Q. What do you think of him as a person? What do you think of Ron as a person?

A. As a family member, he was a good family member.

Q. Does he feel strongly about family?

A. Yes, yes. He respected our family very well.

Q. When he was in prison before, did you have contact with him?

A. Yes.

Q. Did you go to visit him?

A. Yes, we did.

Q. As often as you could?

A. Yes.

Q. And did he write to you?

A. Yes, there were lots of letters.

Q. And what kind of things did you talk about?

A. Family, his son, his wife, his brothers and sisters.

Q. How has his relationship with his son been?

[7] A. Good.

Q. Good. Darlene, how do you feel about – how do you feel about the Scanlon family?

A. (Crying) I feel very bad for them.

Q. Did you know Jim Scanlon?

A. Yes, I did.

Q. And how did you know him?

A. From going into the Cozy Corner on occasions.

Q. And you feel for the Scanlon family?

A. Very much, very much.

Q. And how do you feel about the fact that Ron has been convicted of murdering Mr. Scanlon?

A. I don't believe Ron actually did it but something we're going to have to deal with now.

Q. Darlene, how has this whole thing from the arrest through the Trial, how has all of this affected your family?

A. It's been hard. We go to bed crying, we wake up crying, it's been very hard on my children.

Q. Darlene how do you feel about the possibility that Ron may be electrocuted?

A. (Crying), we want Ron alive even if it's in jail, we want him alive.

Q. Even if it's for the rest of his life?

A. Yes.

[8] Q. This is the last chance that you'll have to talk to the people that are going to sentence him. Is there anything else that you want them to know?

A. I don't think I can.

MS. DANTOS: Thanks, Darlene.

THE COURT: Mr. Moyer.

CROSS EXAMINATION

BY MR. MOYER:

Q. Mrs. Rompilla, you've known Ron for 19 years, is that correct?

A. Yes, sir.

Q. And for that 19 year period, he's lived with you for only 3½ months, is that right?

A. Yes, sir.

Q. You said something about Parole. When he was left out on Parole, is that correct?

A. Yes, sir.

Q. The children were afraid of him at first?

A. My children didn't know him.

Q. And they were –

A. All they know is what they heard from other people.

Q. Right. And at first, they were afraid of him, correct.

[9] A. Yes, before they knew him.

Q. Right.

A. Before he came into our home.

Q. Right. When was this?

A. September of 1987?

MR. MOYER: No other questions.

THE COURT: Thank you very much, Mrs. Rompilla.

MISS DANTOS: Nick Rompilla.

NICHOLAS ROMPILLA, WITNESS, SWORN

DIRECT EXAMINATION

BY MISS DANTOS:

Q. Nick, for the record, could you give them your full name, please?

A. My name is Nicholas Rompilla, Junior.

Q. Nick, how old are you?

A. 46.

Q. And you are Ron's brother?

A. His brother, yes.

Q. What do you do for a living, Nick?

A. I'm interior, exterior painter.

Q. I'm sorry?

A. Interior, exterior painter, I have my own business.

[10] Q. Have your own business and did Ron work with you?

A. Yeah, he worked for me for about 3½ months.

Q. You're Ron's brother?

A. Right.

Q. Did you guys grow up together?

A. Yes, we did.

Q. How would you classify your relationship with him? What would you say about your relationship with Ron?

A. As long as I know him, it's good. We never had a problem, you know.

Q. Do you feel close to him?

A. Very much so, yes, I do.

Q. Do you – did the two of you talk about things?

A. Yes, we talked.

Q. And when he was in prison, did you visit him?

A. Yes, every chance I could possibly get, yes, I did.

Q. What kind of things did he talk about?

A. Well, sometimes when he thought about when he was going to get out, what he wanted to do, talked about family, how everything is.

Q. What were some of the things he wanted to do?

A. Try to get his life together. Maybe get back to – back with his wife and back with his kid, but I don't think he really had a chance, you know, 'cause I asked for Halfway House for six months, and they said they couldn't [11] give it to him, because it was crowded with alcoholics and that there and addicts, it was full.

Q. So, you took him into your home?

A. So, I took him in my home, yes.

Q. And did you help him with trying to get his relationship with his son together and –

A. Well, we talked about it, you know, but it – I guess it was actually up to his wife, you know.

Q. Was – is this hard for Ron?

A. Yes, it is – it's hard. I think he couldn't adjust too well to it at the present time.

Q. He had a hard time adjusting?

A. Yes, he did, yes.

Q. Now, when he was living with you, he was working with you, did he help you out around the house, did he help you with other things?

A. Yes, he did. If I didn't do it, he'd do it, you know, that's the way it goes.

Q. Okay. Brothers?

A. Right.

Q. Now, Nick, I know that you knew Jim Scarlon, right?

A. About 10, 11 years, yes.

Q. And how do you feel for the Scanlon family?

A. I feel pretty bad. My heart goes out to them. I mean, I cried, my wife cried, we cried for Jimmy then when [12] it was all over, I cried for my brother. I was very hurt, you know, I still feel sorry for him, there's not much I can say or bring him back.

Q. Nick, how do you feel about the possibility that this Jury might impose a penalty of death of electrocution?

A. Well, I – I don't know, I don't think my brother did it. I think there's too many consistent – inconsistencies of that there, and I feel he's told me the truth. I don't think he'd lie to me.

Q. You believe him?

A. I believe him very much.

Q. You understand the Jury's convicted him?

A. Yes, I am, yes.

Q. Is there anything else that you want to tell the Jury, the people that are going to sentence him?

A. Only thing I can say is, just have mercy on him, that's all. I – I don't know, that all I can say.

MS. DANTOS: Thanks, Nick.

CROSS EXAMINATION

BY MR. MOYER:

Q. Mr. Rompilla, you said that the Defendant worked for you for 3½ months, is that correct?

A. Yes, right.

[13] Q. When was that?

A. Well, the second day he got out of Huntington.

Q. Pardon me?

A. The second day he got out of Huntington.

Q. When was that?

A. Last year, September.

Q. September of 1987?

A. '87, yes.

Q. And he worked until he was arrested on these charges, is that correct?

A. He was still working for me at that time, yes.

Q. That was in January of this year?

A. Right.

Q. And you've indicated you don't feel that your brother is guilty of these offenses, is that correct?

A. I feel that he didn't murder Mr. Scanlon.

Q. Well, –

A. I feel that he was there, but I feel that he didn't kill him, that's all.

Q. That you feel what?

A. I said, I feel that he was there, but I don't think he murdered Mr. Scanlon.

Q. Well, do you realize that this Jury has already decided that question, and they –

A. Yeah, I understand that, yes.

[14] Q. – have decided that he did, in fact, murder Jimmy Scanlon. Are you aware of that fact?

A. I'm aware of that fact, yes.

Q. Do you feel that he wasn't guilty of the rape that took place in 1974 at Joe's Place, the rape of Joe Macrenna? Do you think he was guilty of that?

A. I don't know.

Q. You don't know. How about the Burglary?

A. I don't know.

Q. How about the Theft?

A. I don't know, I wasn't there.

Q. But you don't think he's guilty of this?

A. No.

MR. MOYER: No other questions.

MISS DANTOS: One more.

REDIRECT EXAMINATION

BY MISS DANTOS:

Q. Nick, aside from your feelings about this case, all right, and whether you believe or not believe, what are you asking of this Jury?

A. Well, I'm asking for them to – I don't – one life is done with. I don't see why another life is going to take Mr. Scanlon's place, you know, I don't see any sense [15] to it.

MISS DANTOS: Okay, thanks, Nick.

THE COURT: All right, thank you very much, Mr. Rompilla.

THE WITNESS: Thank you.

MISS DANTOS: Robert Rompilla.

ROBERT ROMPILLA, WITNESS, SWORN

DIRECT EXAMINATION

BY MISS DANTOS:

Q. Bobby, for the record, could you give your full name, please?

A. Robert Rompilla.

Q. Bobby, are you Ron's brother?

A. Yes, I am.

Q. How old are you?

A. 31

Q. What do you do for a living?

A. Production worker.

Q. Bobby, we're here because the Jury has convicted Ron of First Degree Murder. How do you feel about his being convicted?

A. I feel there wasn't strong enough evidence for him to be convicted.

[16] Q. You believe in him?

A. Sure do, 100%.

Q. Okay. What kind of a relationship would you say you had with him, with Ron?

A. Excellent relationship for the time that he was out with me, he was excellent.

Q. You got close in those months?

A. Very close.

Q. And was there a period of time when you were in the Service?

A. Yes, there was.

Q. Okay. And when was that?

A. 1976 to 1979.

Q. Okay. So, for those three years, you didn't see Ron, right?

A. No, just by writing letters.

Q. I'm sorry?

A. Just by letters.

Q. By letters.

A. Right.

Q. Okay. And while he was in prison on his other charges, did you see him?

A. Yes, I did.

Q. Okay, you visited him?

A. Yes, I did.

[17] Q. And he wrote to you?

A. Sure did.

Q. What kind of things does Ron talk about with you?

A. Every day, outside world, how's everybody doing, the family, how I'm doing, and his wife and kid and –

Q. Concerned for his family?

A. Very much so.

Q. And his son?

A. Very much so.

Q. Bobby, how is this whole thing affected your family?

A. We all still got doubts, because I don't think there was strong enough evidence. You know what I mean, the place puts him there but as far as going –

MR. MOYER: Objection, not being responsive to the question.

A. Like I said, it's -- I'm saying what I feel, whatever he says, it's me. I don't think there's strong enough evidence for him –

MR. MOYER: Objection, not responsive to the question.

A. – it puts him there but as far as him doing it, I don't think he did it to this day –

MR. MOYER: Objection, not responsive to the question –

[18] A. – and I'd swear on that.

THE COURT: All right.

MR. MOYER: – I ask that it be stricken from the record.

THE COURT: Now wait, what was the question again?

MISS DANTOS: How it has affected him.

MR. MOYER: No, the question was, how did it affect the family.

THE COURT: All right, let's – I'll have to sustain the objection under the circumstances. Please, just answer the question, how it affected you?

THE WITNESS: Hurt bad, you know what I mean, well, what can I say.

Q. You're hurt?

A. Very much so. Especially, if I don't feel like he did it and not enough come out, what – how am I supposed to feel, you know what I mean?

Q. Okay.

A. Hey, nobody seen him, no eye witness, so, how can you – you know what I mean, I just don't see it.

Q. Okay, Bobby, but now, the Jury has convicted him, okay. I know you understand that, I know you do. Did you know the Scanlons'?

A. No, I didn't.

[19] Q. How do you feel about their pain?

A. No comment.

Q. Bobby, how do you feel about the possibility that this Jury could order that Ron be electrocuted?

A. I can't see them doing it, myself. I mean, I couldn't – I couldn't see them doing it for the fact, nobody seen him, there's – it's just – it's impossible, I just can't see it.

Q. You're having a hard time dealing with it?

A. Very much so. Like I said, it's – it's an opinion what they gave, which is a strong opinion, they convicted him. It just puts him there, it don't have him doing the thing, you know what I mean, there's not eye witness, there's nothing. The finger on the middle of the blade, what did he do, go like this? You know what I mean, what – you know what I mean, it just couldn't get it in there. There's no ha – there's nothing there that pertained for him to do it. Like I said, I don't have to – they got to make the decision, not me.

Q. Right. Okay, is there anything else that you want them to know about Ron?

A. That the 3½ months I knew him, he came out, and we went out and stuff like that, you're trying to say – probably trying to say, how can get close to him? I was very close to him. He confide in me, he loved my family, [20] you know, holidays were around, Thanksgiving, Christmas, he was there for all that. After all them years he wasn't there, he enjoyed it, he loved it, you know what I mean, I guess, he just didn't have a chance, I guess, like I said, they didn't give him no rehabilitation which was wrong, you know what I mean? That's like putting a little child on 7th Street and say, walk across the street. What's he going to do, he's going to get hit, you know what I mean? It just don't make no sense to me why they just didn't help him a little more when he came out.

MISS DANTOS: Okay, thanks Bob.

CROSS EXAMINATION

BY MR. MOYER:

Q. Mr. Rompilla, you weren't here through – throughout the whole Trial, were you?

A. One day.

Q. Pardon me.

A. One day.

Q. You were here one day. How do you know what the evidence –

A. Doesn't mean I didn't hear about it from my family –

Q. Excuse me. Let me ans –

[21] A. – 'cause I couldn't get off of work.

Q. Let me ask the question. How do you have any idea what the evidence is in this case? You were here for one day?

A. From my sister-in-law's calling me, everyone – they heard it, they were here every day.

Q. From other people?

A. By word of mouth is good by me if it's my family.

Q. From other people. You have no idea, of your own knowledge, –

A. From my family, they're not other people, –

Q. Excuse me.

A. – they're my family.

Q. You have no idea, of your own knowledge, what evidence this jury heard and what evidence they based their decision on, do you?

A. Yes, I do, I was here at closing arguments –

Q. Other than from other people telling you –

A. – when you brought it all out. So, there was –

MR. MOYER: Judge, could you please instruct the Witness to let me –

THE COURT: Mr. Rompilla, –

MR. MOYER: – answer my question?

THE COURT: – let him finish the question, then you may answer, all right, please.

[22] Q. You have no idea, from your own knowledge, other than for one day in this Courtroom, what the evidence is in this case, do you?

A. Correct.

Q. Now, you said, well, there was no eye witness, how can they convict him without an eye witness, right? Isn't that what you said?

A. Correct and there wasn't enough –

Q. Well, this Jury has already convicted your brother of First Degree Murder, that's a fact.

A. Does that mean it's right? Does that mean it's right?

Q. That's a fact.

A. That's not mean it right.

Q. It's a fact, though.

A. Facts ain't right all the time.

Q. This one is.

A. Why?

Q. Now, –

A. Because you say so?

Q. – you were asked by Ms. Dantos how you felt about the Scanlons', and your answer was what? No comment?

A. I don't know them. I don't know them so, therefore, I have no comment on it.

Q. No comment?

[23] A. Right.

Q. You also said that they didn't rehabilitate Ron Rompilla. Who's they?

A. The County, the system, or whoever.

Q. The system?

A. You know what I mean? Yeah.

Q. It's the system's fault, right?

A. I ain't saying it's the system's fault, but they didn't give the man a chance.

Q. It's our fault that Ron Rompilla killed Jimmy Scanlon –

A. I didn't say it's your fault.

Q. – is that what you're saying?

A. You just put guys out on the street and order – just go ahead and walk on some things. You don't do that stuff.

Q. Why can't he rehabilitate himself?

A. Why can't – why can't he get help like all the rest of the people get help?

Q. Why is it always the system's fault –

MS. DANTOS: Your Honor, I'm –

Q. – that Ron Rompilla killed Jimmy Scanlon?

MISS DANTOS: – going to object to his arguing.

A. It ain't the system's fault, I didn't say it was [24] the system's fault, but you didn't give the man a chance, that's what it is.

MR. MOYER: No other questions.

THE COURT: He's answered the question, all right.

REDIRECT EXAMINATION

BY MISS DANTOS:

Q. Bobby, just let me ask you something. Mr. Moyer's making a big deal out of it that you weren't here.

MR. MOYER: Objection.

Q. Bobby, –

THE COURT: All right, let's rephrase the question, please.

MISS DANTOS: All right, I'll withdraw that part of it.

THE COURT: All right.

Q. Bobby, you believe what you believe because Ron's your brother, right?

A. Correct.

Q. And because he told you something?

A. Correct.

Q. Okay. And you love him?

A. Correct.

[25] Q. And you believe him?

A. Correct.

Q. And it doesn't matter that this jury has convicted him of First Degree Murder, you still love him?

A. Yes, I do.

MISS DANTOS: Thanks.

THE COURT: Anything further, Mr. Moyer?

MR. MOYER: No other questions.

THE COURT: Very good, thank you very much, Mr. Rompilla.

MISS DANTOS: I call Sandy Whitby.

SANDY WHITBY, WITNESS, SWORN

DIRECT EXAMINATION

BY MISS DANTOS:

Q. Sandy, for the record, what's your full name?

A. Sandra Whitby.

Q. Sandy, how old are you?

A. 41.

Q. And what relation are to you to Ron?

A. His sister.

Q. Did you grow up with him?

A. Yes.

Q. How do you feel about Ron?

[26] A. I love him (crying) very much.

Q. Does he talk to you?

A. Yes.

Q. When he was in prison, did you visit him?

A. Yes and wrote to him.

Q. Okay, and he wrote to you?

A. Um-hum.

Q. What kind of things are important to Ron?

A. Family, his son, his wife, things my children were doing, my brothers.

Q. He asked a lot about the family?

A. Always.

Q. What kind of person do you think Ron is?

A. A good person, I've never seen the bad side of my brother, never. Every time I've been around him, he was nice and when he was on Parole, he came to my home for dinner, we showed films of my deceased mother and –

Q. When did you mother die?

A. In '81.

Q. In '81?

A. Um-hum.

Q. I'm sorry, you were showing films of your mother?

A. Yes, and he was interested in them, and he just loves us like we love him.

Q. How do you feel about what the Scanlon family's [27] been going through?

A. Oh, I feel bad for them (crying). I work at the hospital center and when I go by the Chapel, I pray for them (crying). I don't even know them, but I prayed for them and then when I heard that he was buried, I said my last prayer and now, I pray for my brother.

Q. And what do you pray for Ron?

A. That he can live, because we're not God, and we can't take people's lives (crying).

Q. Sandy, how do you feel about the possibility that this Jury may order him to be electrocuted?

A. I don't want it. I love my brother. Taking one life is never going to replace another life.

Q. And if he does get life, will you visit him?

A. Yes, I would, and I would continue to write and keep in contact with him.

Q. And stand by him?

A. Yes, I would all the way.

Q. And continue to love him?

A. Yes, and he's told me he didn't do this, and I believe him, I really do.

Q. Sandy, this is the Jury that's going to sentence Ron, is there anything else you want to tell them?

A. Just that I love him very much, and I truly believe he didn't do it. That's all.

[28] Q. And even though they've convicted him of First Degree Murder, what are you now asking them to do?

A. To let him live. He's a good person there is – he is.

MISS DANTOS: You can cross.

MR. MOYER: No questions.

THE COURT: Very good. Thank you very much ma'am.

MISS DANTOS: Call Aaron Rompilla.

AARON ROMPILLA, WITNESS, SWORN
DIRECT EXAMINATION

BY MISS DANTOS:

Q. Aaron, will you tell the Court your full name, please?

A. Aaron Rompilla.

Q. Aaron, how old are you?

A. 14.

Q. And what relationship are you to Ron?

A. He's my father.

Q. He's your father. Aaron, after your father was released from prison, did you start to have some regular visits with him?

A. Yes.

[29] Q. Did you enjoy that?

A. Yes.

Q. Were you getting to know him?

A. Yes.

Q. How do you feel about your father?

A. I love him.

Q. When he was in prison, did you visit him in the prison?

A. I don't remember, it was –

Q. You were young. If he was sent to prison, would you visit him then?

A. Yes.

Q. Do you feel as though you've gotten closer to him?

A. Yes.

Q. When you and your dad talk, what kind of things did you talk about?

A. Well, mostly things that I did, you know, that he – when he wasn't around and how I grew up and how I wanted to get back together.

Q. How he wanted to get back together?

A. Yeah.

Q. Family?

A. Yeah.

Q. Did you talk about your school?

A. Yeah.

[30] Q. And did you tell him what you're interested in?

A. Yeah.

Q. And how did he seem about that?

A. He seems happy for me and –

Q. Proud of you?

A. Yeah.

Q. How do you feel about the fact that your father's been convicted of murder?

A. (Crying) I don't think he did it.

Q. Do you believe him?

A. Yes.

Q. Aaron, how do you feel about the possibility of him dying in the electric chair?

A. I don't think it's right.

Q. Is there anything that you want to tell the Jury?

A. (Crying).

Q. Is there anything else?

A. (Crying), (nods negative).

MISS DANTOS: That's all I have.

MR. MOYER: I have no questions.

THE COURT: Very good. Thank you very much, Aaron, you may stand down.

MS. HAAS: They said they need a break. They said they can't take no more of this right now.

THE COURT: Okay. May I see Counsel up [31] here a second? We're going to take a recess. You can excuse the Jury, all right.

(Whereupon the Jury leaves the Courtroom)

(Whereupon Counsel approach side-bar)

THE COURT: They wanted a break.

MISS DANTOS: Me to.

THE COURT: Okay. How many more witnesses?

MISS DANTOS: I'm done, that's it.

THE COURT: Pardon?

MISS DANTOS: That's it, that's it.

THE COURT: Oh, is that it?

MISS DANTOS: That's it.

MR. CHARLES: What's the matter, Judge, what was that –

MISS DANTOS: They wanted a break.

THE COURT: They wanted a break. Let me ask you something. You didn't go over your sentencing sheet.

MR. MOYER: Verdict Slip.

MISS DANTOS: Verdict Slip.

THE COURT: Verdict Slip. Now, I guess it's a sentencing sheet, because I want to make sure –

[32] MISS DANTOS: Um-hum.

THE COURT: He outlines, what he's proposed and approved, fine. But nothing in here as to what you want.

MR. MOYER: No, that's the factor though. That's the exact verbatim factor from the 9711.

MR. CHARLES: Judge, in other words, everything in mitigation all falls under that category. It's not one factor –

MR. MOYER: It's a catch all.

MR. CHARLES: – versus three. Everything else is all within that –

MISS DANTOS: I think we might have some –

THE COURT: Well, –

MR. CHARLES: Yeah, we're going to have – Judge, before we finish –

THE COURT: I just want to make sure, that was my point. I don't want –

MR. CHARLES: Judge, we have to –

MISS DANTOS: Judge, we have some points for charge.

MR. CHARLES: We have points for charge.

MR. MOYER: That was taken right from 9711.

MR. CHARLES: Judge, we have Points for Charge, also, if we can have a couple of minutes to get [33] them.

MISS DANTOS: Yeah, I need a break before we close anyway.

THE COURT: Are you saying that's taken from where?

MR. MOYER: Taken right from the mitigating – it's the last one, any other evidence.

THE COURT: Oh, okay, so –

MR. MOYER: See, none of the other –

THE COURT: Well, my point –

MR. MOYER: None of the other seven are applicable.

THE COURT: Well, that was what I was asking. Are any of the others applicable as far as you're concerned. Well, that's what I was wondering, all right.

MR. CHARLES: But each – each one of the factors can be one mitigating factor catch all, it could be family, there one relationship, another mitigating factor could be age, that's one point.

THE COURT: All I'm interested in is whether or not this meets with your approval?

MR. CHARLES: It's all under within the catch –

MR. MOYER: Age of the Defendant?

MR. CHARLES: If he was like 18 or 19, [34] something like that, I'm saying in general.

THE COURT: Because this is summarizing one aspect of it, that's all.

MR. MOYER: But that's not.

MISS DANTOS: Yeah, we have additional Points for Charge –

MR. MOYER: Well, wait, he's not even listening.

MISS DANTOS: – that I would like to present to you.

THE COURT: Okay.

MISS DANTOS: Okay, and I think that will clear up our part of it.

THE COURT: Okay, all right.

MISS DANTOS: Judge, –

MR. CHARLES: Can we have –

MISS DANTOS: – since we're going to go be closing next, I'd like a little extra time.

MR. MOYER: Well, we're going to go over the points that you want to –

MISS DANTOS: Yeah, –

MR. MOYER: – Points for Charge.

MISS DANTOS: – I want to go get them.

MR. CHARLES: Yeah, we want to go down and get them.

[35] MR. MOYER: Oh, okay.

THE COURT: All right, well then –

MR. MOYER: I thought you meant they were at your desk.

THE COURT: All right, then we'll recess and go in and do that, all right?

MR. CHARLES: Thank you.

MISS DANTOS: Okay.

THE COURT: If you want to go to the girl's room, fine, you have five minutes to get in there, all right.

MR. CHARLES: Can we have 10 minutes Judge, just to go down and get them. I mean, you'll be ready to close at, quarter after, twenty after. We got to just do down –

THE COURT: Well, what are your Points for Charge, are they lengthy?

MISS DANTOS: I'm going to be quick. No.

MR. CHARLES: No.

THE COURT: Do you have Points for Charge?

MR. MOYER: No.

MISS DANTOS: And my argument is not going to be long.

MR. MOYER: The only thing that I want the Court to do, and I assume you're going to do this, is, [36] define torture.

THE COURT: Yeah, yeah.

MR. MOYER: I think the Purcell Case defines that.

THE COURT: All right.

MR. MOYER: Also, I think that under Mills versus Maryland, you have to instruct the Jury that they don't have to be unanimous on the actual individual mitigating factors. They each – each indi – each Juror can have their own mitigating factor but the Jury as a whole has to be unanimous as far as mitigating factors. In other

words, six Jurors could have a mitigating factor, the fact that he's got a son, okay. Six Jurors could have a mitigating factor of something else. They don't have to be unanimous.

THE COURT: Yeah.

MR. MOYER: Now, in those specific mitigating factors, and I think under Mills versus Maryland that you have to – in fact, I have an instruction that, if your Honor please, I can give you that I think is appropriate.

THE COURT: All right. You get it to me, we'll go over that and with their Points for Charge.

MR. CHARLES: Can we come back at 10:30? Would that be too much to ask?

[37] THE COURT: Oh, yeah, because I want to get this over with. Really, I don't know why you need so much time.

MR. MOYER: Yeah, I mean, what's the hold up.

THE COURT: What do you need it for, because I want to get the Points for Charge out. Let's get – give you 10 minutes, quarter after, be in Chambers with your Points for Charge and then we'll go over them, very good.

(Whereupon side-bar conference concludes)

(Whereupon Court is in recess)

COURT CRIER: All rise please, Court is again in session, you may be seated.

THE COURT: All right, you may bring the Jury in, please.

(Whereupon the Jury enters the Courtroom)

THE COURT: Very well, all right, Miss Dantos.

MISS DANTOS: Your Honor, Mr. Moyer, [38] members of the Jury, this is my last opportunity to talk to you, and I'm going to beg you for mercy. This is something that is an awesome responsibility, awesome, for all of us. For you and for me. I put myself into a near panic to try and think of what would be the right words to say to you. What can I say that touch a part of your heart? And worse than that, what if you've already closed your minds to whatever I have to say? I hope you haven't, because you told me you wouldn't. I want you to keep an open mind. What are the right words to say when you're trying to save someone's life? You, as a Jury, you convicted him of First Degree Murder. You convicted him, in your minds, beyond a reasonable doubt, but you must have some doubt. There has got to be some doubt there with no eye witness, with circumstantial evidence, and you saw what that circumstantial evidence showed you. It didn't only point to Ron Rompilla, did it? It pointed somewhere else. So, I know that you have to have some doubt as to what actually happened that night. We may never know what actually happened that night. For months and months and months, I've been worried about this, the possibility that it could become real and the possibility has become a reality here. Life or death, doesn't get any more real than that, and I've been struggling with it. It is a tough case, it's complicated, a lot going on, there's a lot of emotion. [39] Please bear with me, okay, I'm going to try and get through it. I needed some help with this, I needed some help to deal with this and the gravity of the decision that we're all involved in. So, I went to talk to someone, and I talked to the man that married me and my husband, our priest, and I asked him to help me get through it. How can I find some

peace with this? And he told me two simple words, to pray for. We pray for justice and mercy. That's it, justice and mercy. You rendered what you thought was just. I'm begging you to show him mercy. You've seen us, Fred and I, fight for him for two weeks. Fighting, fighting, fighting, everything they brought in we fought, because we believed in it. Not just because we were putting on a show, we believed in it. You found him guilty, that's your verdict. I still say there's room for mercy. What can be pure, what can be cleaner than to have justice and mercy. Don't you want to be sure before you condemn that man to die because don't fool yourselves. A death sentence is death. Death is final, irreversible. No more questions after that. No more questions, you're the sentencing, you're the sentencers. You're going to determine the sentence. You may not be the one that pulls the switch, and you may not have to be there when the electricity wrenches his body apart. You may not have to be there, but you killed him nonetheless by your verdict, [40] by your order of electrocution, and I'm begging you not to do that. I'm begging you to show him mercy. He's better than the person that you found him to be. Show him what compassion is. Show him some mercy. You saw what the Commonwealth wants you to believe of Ron Rompilla. He's an animal. I wanted to show you his family so that you could see that he's more than this act that you have found him to have committed. He's more than that. He's got love, he's got love of his family. He's got his 14 year old son that loves him. God knows what could happen if he's allowed to live. Maybe his son can learn from his mistakes. Maybe he can grow from him, maybe he can get to know his father. I'm not asking you to not punish him. I'm begging you for mercy. Your punishment, you will be punishing him if you give him life. Life is life. He will spend the rest of his life behind bars.

He will not get out. Life is life. I'm not asking you to just let him walk away. I'm just asking you to spare his life, to be better than what you found him to be. I saw you all struggling with this. I saw it Monday night at 10:00 o'clock when we let you go for the evening. You looked tired, you looked nervous, and you looked like you've been struggling. I know that. Well, I'm struggling too, we're all struggling with it. But if you're struggling with it, the fact that you had some doubt, should also stay in your mind, now. If there was [41] any doubt, and I submit to you that there has to be some doubt. There has to be. You don't know what happened. You'll never know exactly what happened. There's got to be some doubt here. What if he dies, and they find out whose hairs those were, what then? It's too late. You heard some horrible things about his priors, about the rape. Horrible things. You heard that he was convicted of rape, and you heard that he was sentenced by the Court to what they thought was just, and he served his sentence, and you are not sentencing him here today, because he committed a rape or, because he was found to have committed a rape. That's not what we're here for. Commonwealth wants you to kill him, because he took another life. They want you to kill, because he killed. That's what your verdict showed, that's what you found. I want you to know that one single mitigating factor can outweigh every aggravating factor. It just takes one, just one. You're to consider what I presented to you, his family, his son. Consider it, they can give you nine aggravating factors and one can outweigh it, one. Justice and mercy, that's what I'm asking for, mercy. The one aggra – the one mitigating factor that I want to talk about now is the right to life. He is a human being. He is not an animal, he's a human being because people that care for him, that love him. We all felt sad and pain when I saw Mrs. Scanlon cry.

This killing of Ron [42] Rompilla will not bring him back, will not, cannot, nothing can, it's done. Now, give him a punishment for that. Right to life. Legislature says you can do it. We're in the Courtroom, have to follow the laws of the Court, Law of the Land. There are higher laws, higher laws that rule us and what do they tell us? They tell us to be compassionate and to show mercy. Excuse me. Members of the Jury, I'm asking you to not subject Ron to the same horrible fate that Mr. Scanlon was subjected to. I'm begging you for that and please, don't let him die. I tell you this from the bottom of my heart, if you order death, it will take a part of your life away. Don't stain your hands and your souls with this man's blood, don't do it, please. If you can't, if you have no mercy in you, if you can't put aside what you heard and what the Commonwealth told you, and you can't listen to the please [sic] from his family, crying out to you to save his life. Not to let him go but to put him jail for the rest of his life. That's what they're asking you. But if you can't find that mercy in your heart, and you come back here, and you look him in the eye, and you tell him that you have ordered his electrocution. You tell him that but what if you're wrong? What if you're wrong? Can you live with that? This is a decision that I hope none of us ever has to be involved in again, but we are. Mark my words, this will affect all of us for the rest of [43] our lives, for the rest of our lives. Don't take a chance that you're going to make a mistake that you can't live with. Don't stain yourself with his blood. I have one quote to tell you "Blessed are the merciful, where they shall obtain mercy." Some point in life, I think we all need some mercy. I'm begging you for it now. I'm begging you for it. This is hard. Earth to death can be final, final. As they count down the days when he's on Death Row, when he's on Death Row, and, therefore, counting down the days and

the hours and the minutes. All I can tell you is, don't do it. Don't do it, please. Don't stain your hands, don't stain your soul of his blood. Don't stain it with an electrocution, a horrible death. Don't stain yourselves of that. I'm telling you, it counts down by days, minutes, seconds, put him in the chair, and you don't have to be there when the bolts of electricity will wrench his body apart. Spare him. Spare him so that he can live for better than what you found him to be. That's all I'm asking you for, is justice and mercy, justice and mercy. You've rendered what you felt was a just verdict. I have no quarrel with you, that was your job, you came back with a verdict but none of you can tell me that you have no doubts and if you have a doubt, then you better think very, very, very, carefully about what you're going to do here. He's a human being. You found that he has killed another. [44] Does that justify taking his life when you've seen what he has, his family, when you've seen them? When you heard them say, no matter what the verdict, I love him. I love him. He's my brother, he's my father, I'll visit him. Put him jail, I'll visit him, I'm there, I'll stand behind him. Yeah, sure, Bobby was upset, because he believes him. He believes him, that's his brother. He's not faulting anyone. He's saying, I can't believe you did this, because he's my brother. Because no matter what he did, not matter what you found, they love him, they love him. His son has just gotten to know him. That's no one's fault. I'm not blaming it on anyone, but I'm asking you to consider it. Consider the fact that this boy, who had to come in here today, because he wanted to, because he wanted to, to have a say in whether or not you kill his father. That's why he came in and that's all he can tell you. I don't know if I missed anything, I don't know. Just tell you this, it's in your hearts to show mercy, and you all told us that you would consider it, that you would

consider a life sentence with that First Degree. Please, don't block your minds out on that. Consider it. It's a heavy, heavy responsibility. I didn't give it to you, the law did. They say you have to decide life or death. I say, decide for life, decide for life. Spare his life. His punishment is going to be behind bars for the [45] rest of his life, it's punishment. Don't take a chance that you may be making a wrong decision that you can't live with. Please, spare his life, thanks.

THE COURT: Mr. Moyer.

MR. MOYER: May it please the Court, Counsel, ladies and gentlemen of the Jury. This is the last time I'm going to speak with you in this case. Again, I want to thank you for the attention that you've shown in this case. It's been obvious from day one, it was obvious from the deliberation, it was obvious in the verdict. I thank you again for the attention that you're going to be giving for this phase of the case. Obviously, this case is not over. This is a very important part of this case. You learned some things you didn't know before, some things that we weren't permitted to tell you in the Trial but now you know those things. I realize that deciding a man's fate is not an easy job to do. It's not easy for me to argue for the death penalty, but I'm not arguing it out of vengeance or malice, I'm arguing it because the facts warrant it in this case. It is the proper thing to do. Each one of you told me on Voir Dire that if the facts warrant it, you could vote to impose the penalty of death. Each one of you individually told me that. And each one of you were picked on this Jury, because you could consider the death penalty, you could vote to impose the death [46] penalty if it was appropriate. Ladies and gentlemen, the death penalty is appropriate in this case. It's not appropriate, because I say

it's appropriate, it's not appropriate because anybody else says it's appropriate. It's appropriate because the facts of the case say it is and the Law, which you took an oath to uphold, says that if the facts warrant it, you can impose it. Each one of you told me you could. The Legislature of Pennsylvania set forth factors, aggravating factors. We can present to you, the Jury, in determining whether or not the death penalty is appropriate. Three of them, we are presenting today, you know what they are. First of all, the factor that the murder was committed during a commission of another felony, that's pretty obvious. By your verdict, you had determined that the Defendant is guilty of this murder. That phase of the case is taken – has been taken care of. The Defendant committed that murder, you have found that beyond a reasonable doubt and that is what the law replies. You've also found that that murder – during that murder, there were two other felonies that were committed. There was the Burglary and the Robbery, and it's very crystal clear from the evidence that those – that that murder was committed during that Burglary and that Robbery. So, just on that factor alone, if you found that that factor exists beyond a reasonable doubt and that it outweighs any mitigating [47] circumstances, on that factor alone, you can sentence this Defendant the death penalty. But the Commonwealth has more and the Commonwealth has shown more. We have the factor of torture. Maria Dantos gave you a very inspired, a very emotional speech and that is her job, there's nothing wrong with that. And what the main touchstone of that speech was mercy, and it's true. The law recognizes that the Jury can impose mercy but ask yourselves this, ladies and gentlemen of Jury. Did Ronald Rompilla show any mercy to Jimmy Scanlon, any mercy whatsoever? I submit to you, he did not. He did not show one bit of mercy on January

14th, 1988. The Judge will instruct you that the term torture, as defined in this case, means the intent to inflict pain, suffering, or pain and suffering. The intent to inflict. You've got to focus in on what that man did to Jimmy Scanlon and what his intent was. Whether it was more than just to kill him. Was it to inflict pain, to make him suffer? You've heard the testimony concerning this injuries. Jimmy Scanlon died a very violent, savaged, brutal death. Defensive wounds probably took place first, stabs, bruises, lacerations on the hands. You then have lacerations of the face. They practically cover Jimmy Scanlon's face. They are on the left cheek, the chin, the right cheek, the forehead. Dr. Mihalakis told you that it is very likely and to a reason medi – excuse me, to a [48] reasonable degree of medical certainty, that those injuries came first. I submit to you, ladies and gentlemen of the Jury, Jimmy Scanlon knew he was going to die that morning. He knew that he was up against a very strong individual, very violent individual, and he knew he was going to die, and he was in incredible pain just from those injuries alone. The defensive wounds on the hands and the lacerations from the bottles. Glass cutting his face. Those injuries, in it of itself, caused tremendous pain and suffering. The Defendant wasn't – he wasn't satisfied with that. At some point, he fractures his nose, fractures Jimmy Scanlon's nose. He smashes a bottle over his – the back of his head, splitting open the scalp. You heard the testimony from Dr. Mihalakis. Then I submit to you, the Defendant grabbed the knife, you saw the knife, it was taken back into the Jury Room with you, and began stabbing Jimmy Scanlon. Stabbed him once, twice, three times. At some point, the tip of the blade breaks off. He still doesn't stop. He still continues to stab after the tip of the blade has broken off. Continually stabbing the back of the skull, the neck, 16

times, ladies and gentlemen,–16 times he stabs him. Some of those 16 stab wounds are with the blade broken off. Eventually, that blade breaks. Defendant still not satisfied. He gets another knife, he gets the butcher knife. Walks into the kitchen to get the [49] butcher knife and stabs Jimmy Scanlon three more times. Did he show Jimmy Scanlon any mercy, any mercy whatsoever? I submit to you, he didn't. There was some testimony from Dr. Mihalakis as to whether or not Jimmy Scanlon was conscious for any of these wounds. I only hope that Jimmy Scanlon wasn't conscious. I hope that he didn't know all the pain that it was the intent to inflict in this case. I pray that Jimmy Scanlon did not feel those 16 stab wounds to the back of his skull and the neck. I pray that he didn't feel these three stab wounds in the middle of the back. Ladies and gentlemen of the Jury, Dr. Mihalakis couldn't tell you whether he was alive or whether he was conscious at those – at that point. He could tell you he was alive, he couldn't tell you whether he was conscious. I submit to you that at some point, some of these wounds, Jimmy Scanlon was conscious, and he felt the pain. He felt that tremendous pain that comes with having your head split open, with having your nose fractured, and it's true that those burns, Jimmy Scanlon wasn't alive. You know what, he didn't know that. He didn't know whether he was alive or not. He didn't know whether he was conscious or not. It was his intent to cause substantial pain and suffering and that's the legal definition of torture. That wasn't just a killing, that was overkill. No one deserves to die, ladies and gentlemen, especially, like that. Not – not that [50] way. That's not mercy, and I'm only asking you to show the same mercy to him that he showed to Jimmy Scanlon because the statement's true, it's going to put him to death if you find the death penalty is appropriate, but they're not

going to do it this way. They're not going to do it with 16 stab wounds to the head, fractured nose, piercing the left ventricle with a butcher knife. Commonwealth has more. Commonwealth submits to you that the Defendant has a significant history of felony convictions involving violence to the per – to the person or the threat of violence to the person. You heard the testimony, that in 1974, the Defendant was convicted of the crime of Rape and Burglary, and you heard some of the testimony of that case, and I don't think you can really grasp the feeling of a victim testifying from the mere printed word. I think you got a little bit of the feeling. Joe Macrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point. She was a pretty plucky woman in a lot of respects and fortunately, that crime didn't result in any further damage to her than what you heard. But isn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. [51] Isn't it frightening the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. But there is one difference, one major difference, Joe Macrenna lived through her experience. Jimmy Scanlon didn't. And you know, I've been involved in this case for about eight months, 8, 9 months. I keep wondering, why did the Defendant wait till Jimmy Scanlon left the Bar? He knew he was closing up. Why didn't he just wait until he had left to break in and steal the money, no problem, nobody gets hurt? You have to ask yourselves, why didn't he wait for Jimmy Scanlon to leave? Was it his

intent to kill right from the start? Was it his intent to do serious bodily injury right from the start? Because if he had waited maybe a half hour, an hour later, Jimmy Scanlon would have been gone. This wouldn't be a homicide case. Jimmy Scanlon would still be living. I think the Defendant learned a lesson from Joe Macrenna in that case, that Rape case. That lesson was, don't leave any witnesses. Don't leave anybody behind that can testify against you. Don't leave any eye witnesses that he's banking on, we don't have and so, that you can't convict him. Unfortunately, you rejected that, and I'm asking you to reject it as far as [52] the penalty phase goes as well because that's what he's banking on. That you cannot return a death sentence because there's no eye witnesses. Well, he's the one that made sure there were no eye witnesses, ladies and gentlemen. He's the one that savagely, brutally, killed Jimmy Scanlon, to make sure there's no eye witnesses. You know, in our system of justice, there's a lot of emphasis on the rights of Defendants and that's the way it should be, I'm not suggesting otherwise. Fortunately, we live in a great country as we do. We don't live in the Soviet Union or Iran or Libya. We get trials, we get rights and that's great, that's wonderful and a defendant should have those rights. What about the rights of the victims? You know, unfortunately, Mrs. Scanlon is not permitted to come up onto the stand to tell you how she feels about losing her husband. Tim Scanlon can't tell you how he feels about losing his father. There's no question that Mr. Rompilla, the Defendant's family is upset, and they feel sympathy for the Scanlons'. I'm not questioning that. We've only heard from the family's feelings, we haven't heard from the Scanlons', and we're not permitted to put on evidence about how they feel about losing their father, about losing their husband. Jimmy Scanlon had no

trial, ladies and gentlemen. Jimmy Scanlon didn't have people defending him. Jimmy Scanlon couldn't have his sisters, his brother, [53] his sister-in-law, get up on the stand and tell you what a wonderful person he is. He doesn't have that right. Jimmy Scanlon didn't have the right to have Tim get up there and tell you how much he misses his father. The only thing Tim Scanlon had was the right to tell you the way he found his father the morning of January 14th, 1988, lying in a pool of blood, alcohol covered, savagely, brutally, beaten and killed. That's all Tim Scanlon could do. He can't tell you how much he misses his father. And the reason for that, ladies and gentlemen, because this Defendant, he was the Judge, he was the Jury, and he was the Executioner. Now, there's an image of justice a part of law I'm familiar with. It's a Statue of a woman, she's got a blind pulled on, she's got the scales of justice. She's weighing the evidence. That's the personification of our system of justice. There's one other thing a lot of people forget about. In the other hand, there's a sword and on certain cases, the sword has to be used. You don't want to, you don't like to but some cases you do. Ladies and gentlemen, if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for, thank you.

THE COURT: Very good. Ladies and gentlemen, before you retire to the Jury Room to make your final deliberation in this matter, the Court will present a [54] Charge to you with respect to your duties in this matter. It will not be very long and as I indicated, very shortly, you're going to be excused to decide whether or not the Defendant is to be sentenced to death or life imprisonment. The

sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the Jury unanimously finds at least one aggravating circumstance and no mitigating circumstance or if the Jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprison – imprisonment in all other cases. The Crimes Code defines aggravating and mitigating circumstances and for the purpose of this case, the Commonwealth advances and only the following matters may be considered by you, if proven, can constitute aggravating circumstances. One, that the Defendant committed a killing while in the perpetration of a felony. In this regard, of course, you're going to have to go to the evidence that was presented in the case in chief. In making that determination, however, you should consider that committing a killing, while in the perpetration of a felony, requires a person to commit the killing while performing or attempting to carry out the felony. A person cannot be perpetrating or attempting to [55] carry out a felony unless, at the time of the killing, he has formed the intent to commit a felony. And a killing cannot be in the course of perpetrating or attempting to perpetrate a felony if the accused forms the intent to commit the feloy only after the killing. The second aggravated circumstance advanced by the Commonwealth was that the a – the offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily [heinous], atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and

suffering in addition to the intent to kill. There must be an indication that the killing is not – the killer is not satisfied with the killing alone. And the third aggravating circumstance appointed to, by the Commonwealth, is that the – Defendant has a significance [sic] history of felony convictions involving the use or threat of violence to the person. And in this regard, a significant history of prior criminal convictions involving the use or threat of violence to the person means one – more than one prior conviction. In other words, at least two prior convictions before that can become an aggravating circumstance. For the purposes of this case, the following [56] matters, if proven, can constitute mitigating circumstances. Any mitigating matter concerning the character or record of the Defendant or the circumstances of his offense. The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. Reasonable doubt, in this context, is the same as that was – that which was charged to you in the case in chief but let me repeat. A Reasonable Doubt is such a doubt as would cause a reasonably careful and sensible person to hesitate before acting upon a matter of the highest importance to himself or herself. To be reasonable, a doubt must be one which fairly strikes a conscientious mind and clouds the judgment. It is not such a doubt that is fancied or imagined. It is not such a doubt as one might conjure up out of nowhere simply to avoid the consequences of returning an unpleasant decision or verdict. As the term itself implies, it is a doubt which is reasonable and which fairly arises from the evidence or the lack of evidence. If you have any such doubt as to any material part of the Commonwealth's position with regard to aggravating circumstances, it is your duty, as a Jury, to resolve that doubt in favor of finding against such an aggravating circumstance. The Defendant, however, has

the burden of proving mitigating circumstances but only by a preponderance of the evidence. This is a lesser burden of [57] proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other side. To put it in another way, and I think I did this, and I adduced to this method before, think, if you will, of an ordinary balancing scale with a pan on each side. Onto one side of the scale, you should place all the evidence favorable to the Defendant's position with regard to a mitigating circumstance and onto the other side of the scale, place all the evidence favorable to not finding such a mitigating circumstance and if after considering the comparable weight of the evidence in this regard, you feel that the scales tip ever so slightly or to the slightest degree in favor of the Defendant's position of a mitigating circumstance, you should then, of course, find such a mitigating circumstance. However, if the scales do remain the same and do not tip in his favor or for that matter, should tip against finding such a mitigating circumstance, then, of course, you should not find such a mitigating circumstance. As you know, we have been talking throughout the course of this – these charges. The requirement of unanimity that all of you must agree to a finding. This is true, and it will be true with the ultimate decision that you must reach, in this regard, with respect to the sentence. However, in viewing the mitigating circumstances and the burden that the Commonweal – that the Defendant [58] has by a preponderance of the evidence, you need not make such a finding by unanimi – unanimous thought in deciding if any particular mitigating circumstance has been proven. If one or more of you find one or more mitigating factors have been proven to your satisfaction by a preponderance of the evidence, you may individually consider such factor or factors in reaching a

unanimous verdict. By that I mean, if three of you should find a mitigating factor, so be it. It is a mitigating factor and if three others should find another mitigating factor, to which the original three didn't agree to, but nevertheless, those three find another mitigating factor, and you go on down the line with respect to each mitigating factor. It does not require all of you to agree as to each mitigating factor. However, when you ultimately decide the matter as to whether or not the aggravating circumstances outweigh the mitigating circumstances or the reverse, if the mitigating circumstances outweigh the aggravating circumstances, then, of course, it will require unanimity of thought. You may then consider the different positions which each of you may have taken with regard to the mitigating circumstance. You should keep in mind, again, that the burden of proving the aggravating circumstances remains with the Commonwealth, and it must do so beyond a reasonable doubt and, again, it never shifts in that regard. All the evidence from both [59] sides including the evidence you heard earlier during the trial in chief as to aggravating or mitigating circumstances are important and proper for you to consider. Your decision should not be out of any feelings of vengeance or prejudice towards this Defendant. And, again, if you recall, the Defendant did not take the stand in this Sentencing Hearing, you must dra – not draw any adverse inference from the fact that he did not take the stand. The same principals [sic] of law apply with regard to that aspect that we outlined to you with regard to the Defendant's requirement to take the stand. The mere fact that he did not take the stand, you cannot draw any adverse inference from that fact alone or from that fact at all. Ladies and gentlemen of the Jury, the verdict is for you to decide. You should remember and consider all the evidence giving it the weight to which it is

entitled. You should remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment of death or life imprisonment. Remember, again, that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and everyone of you. Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance or if you unanimously find one or more [60] aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment. Going out with you, will be a Verdict Slip upon which you will record your verdict and findings. The Verdict Slip, of course, is composed of, in four pages, yes, and is self-explanatory. You are requested to read through the entire Verdict Slip before beginning the deliberation. This is outlined on the Verdict Slip. It also outlines the fact that aggravating and mitigating circumstances presented to the Jury the following aggravating circumstances are submitted to the Jury and must be proved by the Commonwealth beyond a reasonable doubt as the Court has already charged. The three positions of the Commonwealth are outlined. The Defendant committed the killing while in the perpetration of a felony. Two, the offense was committed by means of torture. And three, the Defendant has a significant history of felony convictions involving the use or threat of violence to the person. The following mitigating circumstances is submitted to the Jury and must be proved by the Defendant by a Preponderance of the Evidence. Any other evidence of mitigating – of mitigation concerning the character and record of the Defendant and the circumstances of his offense. We ask that you do not complete the Sentencing Verdict Slip until

your [61] deliberations are concluded and the Verdict Slip, of course, is to be used only for one purpose and that is to record your sentencing verdict and the findings upon which it is based. After you have given sufficient deliberation, and you cannot unanimously reach a sentencing verdict, do not complete or sign this slip but return to the Court and report this fact to the Court. The Court will then decide and determine if further deliberations are required. If the Court should reach to the conclusion that they are not required and would serve no useful purpose, the Court would then sentence the Defendant to life imprisonment. If you have reached a unanimous verdict, you should complete the next Roman Numeral 2, and the sentence reads, "We, the Jury, unanimously sentence the Defendant to" and there's two choices you have. One, is death, the other is life imprisonment. You should check if whatever your unanimous verdict would be, your decision. If you find that death and recommend or rather find a death sentence would be appropriate, you go onto the next page, and it reads – tells you to do this, there's no problems with this, you'll have no difficulty following it. The findings in which the sentence of death is based are and then here you have one, at least one aggravating circumstance and no mitigating circumstance. And then we ask that you and direct that you do, if you find such an aggravating circumstance, the [62] aggravating circumstance or stances – circumstances unanimously found are, outline then whatever they may be. Two, one or more aggravating circumstance which outweighs any mitigating circumstance. And, again, if you so – should so find that one, the aggravating circumstances that you unanimously find, you should outline them whatever they may be. And also, the mitigating circumstances that you considered under those circumstances. And finally, if you find that life sentence is

appropriate sentence, and it is your unanimous decision in that regard, if you would then, fill out Paragraph C in which you then find there are no aggravating circumstance exists and the mitigating circumstances are outweighed by the aggravating cir – are not ag – outweighed. In other words, if the mitigating circumstances that you find are not outweighed by the aggravating circumstance and then we ask that you list, if you would, the mitigating circumstances that you find as well as the aggravating circumstance. Hopefully, in completing this Verdict Slip, it will be made easier for you as to what your responsibilities are. And as I said, and I referred to it, and it's outlined in the Verdict Slip, if after conscientious and thorough deliberation, you aren't able to agree on your findings and verdict, you should report back to the Court with this fact. You need not complete out – complete this form.

[63] JUROR: Can you repeat that, your Honor?

THE COURT: I said if after conscientious and thorough deliberations you are unable to agree on your findings and verdict, in other words, you just can't unanimously agree as to whether it should be death or life, you should not again, fill out this Verdict Slip. You should come back and report that fact to the Court. And, again, if the Court should, and I indicated before, reaches the opinion that further deliberations would not result in a unanimous agreement on the sentence, it will be the Court's responsibility then and duty to sentence the Defendant to life imprisonment. All right?

JUROR: (Nods affirmative).

THE COURT: Now, one in conclusion, the Defendant has submitted to the Court Points for Charge and as I indicated initially, the points if read and if they

accurately outline the Law, we will read them to you, and you should consider them as such in your deliberations here on – in the Sentencing Hearing. Binding instructions, the one is denied. Points for Charge; 1, 2, 3 are all – were all adequately covered by the Court. 4, 5, 6, as well as 7 were all covered and 8, the Court will read and affirms. There has been evidence presented related to the following mitigating circumstances: The Defendant, in this case, wants you to review these matters with respect to your [64] duties as to the mitigating circumstances that will be before you for your consideration. A. The time it took to deliberate, by you, the Jury, on the question of guilt or innocence. B is denied. C. The fact that the Defendant has a family and specifically, the relationship of the Defendant to; 1, his son, Aaron Rompilla. 2, his sister, Sandra Whitby. 3, his brother, Nicholas Rompilla. 4, his sister-in-law, Darlene Rompilla and 5, his brother, Robert Rompilla. And 9, although, the Court, I think referred to it in its basic Charge, we will approve and repeat. You should not consider retribution or revenge in your determination of sentencing. Ladies and gentlemen, the Law is quite clear, it is for you to make the decision as to the sentence that is to be imposed under these circumstances. That decision, of course, is of great concern to both the Commonwealth as well as the Defendant. The Court, therefore, instructs that you, of course, and I'm sure you will, give appropriate consideration to all that has been presented to you for your consideration in this regard and hopefully, then, after an appropriate discussion amongst you, you will reach an appropriate decision in this regard. All right, is there anything further?

MR. CHARLES: May we approach, please?

THE COURT: All right.

[65] (Whereupon Counsel approach side-bar)

MR. CHARLES: Judge, on that Verdict Slip, I'll likely consider on the – where is the Verdict – okay. I think that they should be told that – they should be told that the fact that there's only one that – Number 8, is there, that that one – there's three set out on the aggravating and one on the mitigating but that that one that they find can outweigh the other three.

THE COURT: Oh, all right.

MR. CHARLES: Okay. Now, you've gone through what the mitigating ones are as far as the relationship with the family and specified them, and it might be easier with your example on the unanimity, if, you know, you were to show – pick, like, one –

MR. MOYER: I object to that. I think it's clear on –

MR. CHARLES: I think that would confuse me.

MR. MOYER: – the unanimity. I object to specifying any particular mitigating factors at this point.

MR. CHARLES: I'm not saying specifying, Judge. I'm saying if you took – three can take Number 1 and three can take Number 2 and three can take Number 3 and even though all of them don't agree on the three, there's [66] three factors.

MR. MOYER: He said that, that's exactly what he said.

MR. CHARLES: I know but that was be –

MR. MOYER: Well, if he said it –

MR. CHARLES: He said it in a – let me finish. He said it before he went through the specific instances. I don't think it was as clear. Also, they should know that the one – the one catch all mitigating factor can outweigh the other three aggravating just because it's three and one. One can outweigh the three.

MR. MOYER: I have no objection to you saying that the mere number, in it [sic] of itself, doesn't – it's got to be – I have not objection to that.

MR. CHARLES: I mean that's – it confused me in the beginning.

MR. MOYER: I don't think that's objective, it was very clear.

MR. CHARLES: I think – I don't think so. I just – what's it going to hurt to go over it?

MR. MOYER: Well, then why not just do the whole charge over again.

MR. CHARLES: No, you don't have to do the whole Charge over again. What's it going to do –

MR. MOYER: Because you're drawing undue [67] retention –

MR. CHARLES: – that area –

MR. MOYER: – to the mitigating circumstances.

MR. CHARLES: I am not. That is something that's a confusing slip, Judge. I believe that slip is confusing. I just want that brought out.

THE COURT: Well, we can straighten that out that you've asked about it, but you're asking to emphasize something.

MR. CHARLES: No, I'm not asking you to emphasize anything. Just the fact that the one – the fact that there's one delegated mitigating factor and three delegated aggravating factors, doesn't mean three outweighs one, one can outweigh the three in total. I don't think that was covered on the slip.

MR. MOYER: That I don't have any objection to, I said that, but I object to is the thing about the unanimity. That was clear, I don't think the Jury's going to – they're an intelligent Jury.

MR. CHARLES: I know it's an intelligent Jury, but I don't think it was clear, Judge, I don't.

(Whereupon side-bar conference concludes)

[68] THE COURT: Now, ladies and gentlemen, the Court's been requested to make a point with respect to this Verdict Slip that will be going out with you. It should be noted, of course, as I indicated, the Commonwealth points to three specific aggravating circumstances which it is required by a – to meet the burden of proven beyond a reasonable doubt as to all three and the mitigating circumstances refer to is only one, and it is an all encompassing one, though, any other evidence of mitigation concerning the character and record of the Defendant and the circumstances of his offense. It should be kept in mind that like, and I think I can compare it to what was said in the Charge in case in chief with respect to witnesses. The mere fact that only one is asserted, it should be viewed in the context of all that was presented even though it may

represent only one and that one could very well outweigh all that the Commonwealth has established to your satisfaction whatever it may be, and you should not, therefore, say well, there were three here but only one here. It depends on the weight that you place upon that one, whatever it may be and again, as I said, the comparison would be to witnesses. You often times say, that you can't compare and weigh everything by the number of witnesses by one side or the other. The reason for that is because, obviously, that one witness, the testimony of [69] that one witness weigh – far outweigh that of 10 or 20 witnesses. If you, as a Jury, should so conclude and the same thing can be said with respect to the position here as to mitigating circumstances. I think that sufficiently covers it then, all right.

FOREMAN: One thing, you Honor, if I have any – if we have any questions on clarification, I still have the right to address it.

THE COURT: You may come back into Court any time, but we ask that you put it in writing whatever it is, okay?

FOREMAN: Right.

THE COURT: And then we'll address any question that you might have. Very good, all right. It is almost time, I think they probably already scheduled lunch. So, I think under the circumstances, you'll be taken over for lunch first, all right. All right, Mr. Schaeffer. Oh, wait a minute now, they better be sworn as, again, as to this – this is a special hearing on – you better swear in the Tipstaffs with respect to – same as you did with respect to the verdict because this is another aspect, it only has to do with the Sentencing Hearing.

(Whereupon Tipstaffs are sworn)

[70] THE COURT: All right, Mr. Schaeffer, we will adjourn then until 1:30.

COURT CRIER: All rise please, this Court will adjourn until 1:30 this afternoon.

(Whereupon Court is adjourned until 1:30)

COURT CRIER: All rise please, this Court is again in session, you may be seated.

MR. CHARLES: Michael, can we approach? Can we approach, Judge?

(Whereupon Counsel approach side-bar)

MR. CHARLES: Just –

THE COURT: Is it on?

MR. CHARLES: Is it on?

COURT MONITOR: Yeah.

THE COURT: It's on.

MR. MOYER: Are we on?

THE COURT: It's on.

MR. CHARLES: Is there any way that we can have you – to you answer that, advise them as the Charges just to pay attention to the Charges. In other words, they may not know that he faces possibility of consecutive [71] sentences either.

THE COURT: Well, maybe they don't know.

MR. MOYER: No, I object to that.

THE COURT: That's not before me, that's the answer.

MR. CHARLES: You know what, I think it's a misconception the Jury's had.

THE COURT: It may be, but I – that's their question, and I have to answer the question.

MR. MOYER: Fred, there's no evidence in this case or in the Sentencing Hearing that he was technically on Parole. I mean, there's no direct evidence on that.

MR. CHARLES: I'm not talking about that, but I think people think –

MR. MOYER: Consecutive sentence of what?

MR. CHARLES: He has a Burglary and the Robbery.

MISS DANTOS: The Burglary and the Robbery.

MR. MOYER: But they don't have to be consecutive.

MR. CHARLES: They don't have to, but they can be, it's a possibility. But I'm saying –

MR. MOYER: No, I object.

MR. CHARLES: Judge, the –

[72] THE COURT: I'm not going to, I'm sorry.

MR. CHARLES: – problem, is the misconce – okay. Because of the misconceptions, a lot of people think that if you go get a life sentence, you're out in five (5) years or three (3) years.

MR. MOYER: I don't think too many people think that.

MR. CHARLES: Well, –

THE COURT: I can't stop that.

MISS DANTOS: They – they have –

THE COURT: That's not before me. It's not before me, it wasn't brought up, you're right. They would have to confine themselves to what was brought out –

MR. CHARLES: Okay.

THE COURT: – in the Sentence Hearing from the Charge.

MR. CHARLES: Okay.

MISS DANTOS: That's it.

THE COURT: That's all.

MR. CHARLES: But I mean if it – it may get to another question at that point we may have to do with it then.

MR. MOYER: Well, then we'll have to deal with it.

THE COURT: And I'll deal with it, all [73] right.

(Whereupon side-bar conference concludes)

THE COURT: You may bring the Jury in please.

(Whereupon the Jury enters the Courtroom)

THE COURT: Let the record reflect, the Jury have a question of the Court that the Jury was brought in

at 2:15 p.m. That present were the Defendant, his Counsel, as well as the Assistant District Attorney. Now, ladies and gentlemen, I understand, my Tipstaff has handed a note and a question that was posed, I assume, you want answered and this is what it says. "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" Is that your question?

FOREMAN: Correct.

THE COURT: I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. [74] I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

FOREMAN: None right now.

THE COURT: Very good. The Jury's excused to return to continue with the deliberation.

MR. CHARLES: Your Honor, may we approach, please? May we approach?

(Whereupon Counsel approach side-bar)

MR. CHARLES: Are you going to outline the only alternative is life imprisonment at that? Are you going –

MR. MOYER: They know what they –

THE COURT: Yeah, come on. Fred, please, they're not –

MR. CHARLES: No, but I'm telling you, –

MR. MOYER: My god, Fred.

MR. CHARLES: – this – that kind of a question, that kind of a question, I think –

THE COURT: That's all they have.

MR. CHARLES: Oh, okay.

THE COURT: Now, do you know something else that they have an alternative on, I'd like to hear it, but [75] I don't know what it would be?

MISS DANTOS: No.

MR. CHARLES: Okay, you're right. Okay.

THE COURT: Okay.

(Whereupon side-bar conference concludes)

THE COURT: All right, you're excused, thank you very much.

(Whereupon the Jury leaves the Courtroom)

THE COURT: All right, let the record reflect that at 2:17, the Jury was excused to continue with their deliberation. All right, we will adjourn then, Mr. Schaeffer, until further notice.

COURT CRIER: All rise please –

MR. MOYER: Judge, are you going to inform the Sheriffs of –

THE COURT: Oh, yes, Mr. Barrett, could I see you a second up here. I expressed concern to Counsel that, you know, there may be a series of these questions. Do

they have to take him back to the prison? I think that they shouldn't. Can't they keep him downstairs until 5:00 o'clock?

[76] MR. BARRETT: Until 5:00 o'clock, okay.

THE COURT: Okay, do that. I think it would – because it – it takes quite awhile till they bring him over and everything. All right. All right, Mr. Schaeffer, we will adjourn then until further notice.

COURT CRIER: Court will be adjourned until further notice.

(Whereupon Court is adjourned until further notice)

COURT CRIER: All rise please, this Court is again in session, you may be seated.

THE COURT: All right, let the record reflect, the Court is bringing the Jury in to ask a question as to preparing for dinner depending how they respond to the question. You may bring the Jury in please and at the time, at 5:20, the present were the Defendant, his Counsel, as well as the Prosecutor and the Assistant District Attorney.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, as you know as is our procedure with respect to dinner, we have to make preparations for that, and it being about [77] 5:30. The only concern I have is, and I would like to pose to you whether or not you anticipate reaching a verdict, if at all, I'm not interested in how or why where you are with this. But by 6:00 o'clock, so that if not, we then can prepare for dinner?

FOREMAN: No.

THE COURT: You won't, all right. That's all I needed. Thank you very much. You may take the Jury back please.

(Whereupon the Jury leaves the Courtroom)

THE COURT: All right, then, we will adjourn until further notice.

MR. CHARLES: Your Honor, I would like to put something on the record please. May we approach?

THE COURT: Yeah, put it on the record right where you are. Why come up here? They're not here.

MR. CHARLES: Your Honor, I prefer to put it on the record at side-bar, please.

THE COURT: At side-bar, all right.

MISS HAAS: Excuse me, Judge, can you wait a couple minutes. They want to write a question down for you.

THE COURT: Oh.

[78] MISS HAAS: Okay.

THE COURT: All right. Meanwhile –

(Whereupon Counsel approach side-bar)

MR. CHARLES: Meanwhile, it's 5:20, the Jury looks to me haggard, and I'm requesting that you direct the sentence of life that you take it our of their hands at this point?

THE COURT: Too premature at this juncture, denied.

MR. CHARLES: Secondly, if they're going to be allowed to roam the halls, then I would ask your Honor to clear the halls of everybody else including –

THE COURT: I didn't know they were.

MR. CHARLES: They were out in the hallway.

MISS DANTOS: Yeah, they were.

MR. CHARLES: Outside, and I – and since –

THE COURT: Well, then it should be cleared. I didn't know that –

MR. CHARLES: Yeah, I don't care if they do that I don't want them to know that I'm trying to preclude that so, that they're angry at me, but I think that the victim's family is on one end of the 5th floor, and I [79] believe 7 or 8 Jurors are out pacing at the other end of the 5th floor.

THE COURT: Well, okay, you're right. I don't – I didn't know they were going out there but no way should anybody be near them, but I'm not quite sure just, because they're up here and not down here. It's –

MISS DANTOS: No, it's just not a good appearance.

THE COURT: Well, I agree.

MR. CHARLES: But what I don't understand, your Honor, is –

THE COURT: Have you ever been in one of those jury rooms?

MR. CHARLES: What I observed at 5:15 –

MISS DANTOS: Yeah.

MR. CHARLES: – was like 6 Jurors just on the – out looking out the window, walking up in the hall, and I guess the rest in the Jury Room. I don't know what kind of a deliberation that could be, but it appears 6 or 7 are looking out the window and talking in the hallway while the other ones are in the Jury Room. I don't know – well, I don't know what kind of deliberation that is if they're just –

THE COURT: Well, then let's find out from Mrs. Haas.

[80] MISS DANTOS: Let's get the question.

THE COURT: Mrs. Haas? Question was posed, the Jury is out in the hall. Now, there's concern for that reason. I understand people are out in the hall when they shouldn't be. How much of that goes on out there? The reason I say that is just how much deliberation can be going on.

MR. MOYER: I don't think the Jury should be in the hall regardless.

THE COURT: Right, I agree.

MISS HAAS: They asked me for a break because it's so stuffy. They say, could they just stretch their legs for a couple minutes.

THE COURT: Oh, that's all then.

MISS HAAS: And that's all they did.

MR. MOYER: Who decided that?

THE COURT: Pardon?

MR. MOYER: Who made the decision to allow them into the hall?

THE COURT: Who made that decision to go out in the hall? Originally, it was in the Jury Room.

MISS HAAS: Originally, they were in here, and they said it's just as stuffy in here. We checked the hallway, we checked Judge Backenstoe, everything was empty. I told them they may only walk out there as far as [81] the coat rack and back and there was nobody in sight but Charlie and I.

THE COURT: No one else.

MISS HAAS: Nobody else.

THE COURT: Well, I understand there were other people down here. Nobody else was –

MISS HAAS: If they were, I was up here. I was concerned with up here. I was watching them. There was a lady up here when I went out with nobody else but me, and I said to her, she has to go down to the other end of the hall, and I never saw her after that.

THE COURT: All right. Well, I think –

MISS HAAS: Well, when they went out, there was nobody in the hall but me.

THE COURT: All right.

MR. MOYER: Judge, I think from now, any more deviations from the Jury being in the Jury Room should be cleared with Counsel first.

THE COURT: Well, not Counsel, Court.

MISS HAAS: Judge –

MISS DANTOS: Judge, there's the question.

THE COURT: Counsel won't control this. Now, henceforth, we do not want the Jury taken from the Jury Room. Oh, here's the question, "is it necessary to reach a decision today?" Is it nec – no. I have to say [82] no, it's not necessary. All right, bring them back in.

MISS DANTOS: What if they can't make a decision?

THE COURT: All right, you may be seated.

(Whereupon side-bar conference concludes)

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, a note has been handed to me that you have a question, and I'll read it. "Is it necessary to reach a decision today?" Is that the question?

FOREMAN: Yes, there's – that was the original intent of us being called together the first time. It was just like an oversight, your Honor. That's what we wanted to know.

THE COURT: Well, the answer to the question is no. The question, we'll have to face it later in the Trial as to how long we go but at the moment, the answer is no, all right?

FOREMAN: Okay, fine.

THE COURT: Very good. All right.

FOREMAN: One more question, your Honor. Then the options will be up to us to decide if we ever come [83] to a point we can't reach a decision, and we can call that?

THE COURT: Well, eventually, if that be the case, and you all should agree and, of course, as we indicated in the Charge to you, when you reach that point, then you're instructed to come into Court and so inform the Court, all right. All right, thank you very much.

(Whereupon the Jury leaves the Courtroom)

THE COURT: Mr. Schae –

MR. CHARLES: Your Honor, I renew my Motion, your Honor.

THE COURT: Pardon?

MR. CHARLES: I renew my Motion again after seeing them and hearing the question, I renew my Motion.

THE COURT: All right, again, denied. Now, Mrs. Haas, for the record, when the Jury was in the hall, under your control, I assume, some other – a Sheriff was with you?

MISS HAAS: No.

THE COURT: No Sheriff. Was anyone with you?

MISS HAAS: Just Charlie.

THE COURT: All right. You and he were sworn to keep –

[84] MISS HAAS: Right.

THE COURT: – the Jury together. Did anyone talk to the Jury or have access to the Jury except you two?

MISS HAAS: No, there was nobody around.

THE COURT: All right. Let the record reflect that the Court finds that there was no tampering or in any way interfering with this Jury by anyone and that in each instance when the Jury is moved anywhere, they're constantly, when they go over to the Hotel to eat or otherwise, same situation occurs. It's just a question of keeping them separate from other people. So, the Court finds that there was no – nothing in error or wrong with what has happened. It's only out of consideration to the Jury, them being cramped up –

MISS HAAS: Right.

THE COURT: – for five, six hours in one little room. All right. But I think the better part about it would be that henceforth, we do not do it anymore, all right.

MISS HAAS: There was – there was a cleaning man out here, and I said to him, do you want to go through, I'll go with you to go through, and he said no, he said, I won't bother.

THE COURT: As long as no one talked to [85] them.

MISS HAAS: Nobody talked to them.

THE COURT: All right, that's the important thing.

MISS HAAS: And they were only out there for about five minutes, maybe 10 minutes at the most.

THE COURT: All right. All right, we will adjourn then, and I would like to see Mrs. Haas, we're going to have to decide where we're going to – about feeding the Jury, all right.

COURT CRIER: All rise please, this Court will be adjourned until further notice.

(Whereupon Court is adjourned until further notice)

COURT CRIER: All rise please, this Court is again in session, you may be seated.

MR. CHARLES: Your Honor, may I approach the bench, your Honor.

THE COURT: Please.

(Whereupon Counsel approach side-bar)

MR. CHARLES: Your Honor, it is now 9:00 o'clock p.m. The Jury was sent out a little bit before [86] 12. I realize they've had supper.

THE COURT: No, it was 12:00 o'clock.

MR. MOYER: And lunch.

MR. CHARLES: At 12 and lunch.

THE COURT: Exactly.

MR. CHARLES: Okay. It's now 9:00 o'clock. I understand the conditions in that room where they're deliberating are extremely warm. It's – I believe getting to the point where this verdict is going to be one from

oppression more so than anything else, and I move that you direct a verdict for a life sentence at this point.

MR. MOYER: Well, I'm opposed. The Jury has not complained about the Jury Deliberating Room. They've been – they've had lunch, they were taken out for dinner across the street to the Hamilton Plaza. I mean –

THE COURT: Okay.

MR. CHARLES: Let me add one other thing. Even at one point, they complained that the room was so warm that they had to have a break from it. It's now 9:00 o'clock. I'd also let the record reflect that it's taken less time – it took less time for the Jury to go through 46 Exhibits, 25 to 24, 24 Witness's testimony and to deliberate on a verdict in this case. It took less time for that to take all the Commonwealth's evidence, all the cross examination, the Charge, everything into affect and [87] come to a verdict and this time here, that they're taking on this issue is longer than they took on the guilt determining phase.

MR. MOYER: Well, it's a more serious issue. So, it's to be expected.

MR. CHARLES: Well, your Honor, I think anything passed now, you're going to have a verdict that is produced by oppression.

THE COURT: Now, I think you're being very close, but I think we're a little premature at this juncture. We're going to deny the Motion.

MR. CHARLES: Okay.

THE COURT: Now, as you know, I guess I did tell you, they're requesting Exhibits 1 and 2 from the Sentencing Hearing. I think we've agreed it was not admitted and, therefore, we can't accede to their wishes, right?

MR. CHARLES: Yes.

MR. MOYER: Are you going to inquire as to whether or not there's been any movement to determine whether or not to send them home, I said sequester them or – I mean while they're out now, I think we might as well ask them those questions.

THE COURT: All right, I will, I'll explore. Then maybe you can renew – let's see what they [88] say.

MR. MOYER: Do you have an objection to that.

MR. CHARLES: To what?

MR. MOYER: Asking those kind of questions.

MR. CHARLES: Those kind of questions, no. I mean, I object to them being sequestered, obviously, I object to –

THE COURT: No, no, the question's with – oh, no, I agree.

MR. MOYER: But you object to them being sequestered, and you also object to them being sent home, is that correct?

MR. CHARLES: I object to them being allowed to deliberate any further. That's what I object to.

MR. MOYER: And you also object to them being –

MR. CHARLES: I want him to direct a verdict of life right now.

MR. MOYER: Right, I understand that. And in addition –

MR. CHARLES: No, let's see where they're at. I want to hear what the answer is too, then I'll come back and renew my Motion.

[89] THE COURT: But, at this point, do you have any objection to the question then?

MR. CHARLES: No, Judge, if you're going to try and find out where we're at.

THE COURT: All right, I think we're in the right track then.

(Whereupon side-bar conference concludes)

THE COURT: All right, you may bring the Jury in. Let the record reflect at 9:00 o'clock, the Jury had a request and that the Jury was permitted to enter the Courtroom. At the time, the Defendant was present, with Co-Counsel, as well as, the Prosecutor and the Assistant District Attorney.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, a note was passed to the Court through its Staff, and it reads, "we request Exhibits 1 and 2 from the Sentencing Hearing?" Be quite frank with you, it taxed my memory as to what it was and after discussing with Counsel, apparently, reference was made to the fact that they were docket entries that Miss Glaessman – Mrs. Glaessman had

[90] testified to with respect to the pr – two prior convictions of the Defendant. Is that what you wanted?

FOREMAN: And basically, that was just dockets as far [sic] her testimony, nothing more. The evidence itself is just two documents of her testimony?

MR. MOYER: Judge, may we approach?

THE COURT: Yeah. Did I understand you correctly, you want to see the dockets or her tes – you want to hear her testimony, is that what you said?

FOREMAN: The Exhibits that were entered –

THE COURT: Right, they were not entered, that's the trouble.

FOREMAN: Okay, they were not entered.

THE COURT: That is one of the difficulties here.

FOREMAN: That's for clarification, we weren't sure, 1 and 2 were not entered as –

THE COURT: They were not entered as of record. They were not offered, and they were not received. But you said something about a testimony?

FOREMAN: No, I just was giving you for what you were saying –

THE COURT: Oh, all right. Well, then let me say this to you, for the obvious reason since they were not entered or received, we can't show them to you, all [91] right.

FOREMAN: See, we were actually debating as to if they were entered or received as what's ever required of this.

THE COURT: They were not, they were not.

FOREMAN: Please bear with us. This is hard on all of us. This –

THE COURT: Oh, no, I understand. It's a very –

FOREMAN: We made a question that seemed very trivial to you people but to me, they're not trivial.

THE COURT: Oh, no, it's not trivial. No, it's not trivial, no, we understand that, and I – I don't know where you got the idea that we considering [sic] it as such.

FOREMAN: No, I just –

THE COURT: No, no.

FOREMAN: – I'm just making an observation, myself.

THE COURT: While you're out here, and you have now been and have had this case since 12:00 o'clock although, several hours were with lunch and dinner. At this point, at 9:00 o'clock this evening, could you state whether you have and can anticipate possibly reaching a unanimous verdict.

FOREMAN: For this evening? No, I think [92] we're going to request that we have a recess until tomorrow. We're almost – I shouldn't say anything more than that. It's just – we're not deadlocked or any of that. It's just –

THE COURT: Well, let me ask you this. Have you discussed this, is this your opinion or when I say that now, I'm talking – is this something that you discussed as a Jury?

FOREMAN: Right.

THE COURT: All right. Well, –

MR. MOYER: Judge, may we approach the bench?

THE COURT: Well, at this juncture, we'll excuse the Jury then. If that's the only question you have, the only request I can't accede to your request, all right.

MR. MOYER: Judge, before the Jury is excused, may we approach the bench?

THE COURT: All right.

(Whereupon Counsel approach side-bar)

MR. MOYER: I just want a clarification, because I wasn't – I wasn't clear on it myself and that is concerning testimony. Do they want testimony concerning [93] the Rape case read again or not? Because they said something about testimony and then docket entries, and I don't think they're clear. I just think that we should make sure whether they're clear or not.

MISS DANTOS: He said –

THE COURT: I asked him whether they wanted something read, and I got the impression they didn't want it.

MISS DANTOS: What he said was, he was just trying to explain, is what was in the docket what she testified to.

MR. MOYER: She, I'm not sure what she is.

MISS DANTOS: Glaessman, because the Judge said Glaessman.

MR. MOYER: She – but she could also mean Joe Macrenna, you know, Kelly Waldron, Doris Glaessman. I don't know, I just would ask that it be made clear as to whether or not they need testimony read back from the –

THE COURT: Well, I thought I asked that, but I will again.

(Conversation between Judge and Foreman)

THE COURT: Now, your request is quite clear, you wanted Exhibits 1 and 2, and I indicated we [94] can't give that to you. Is there something else? Did you want something read back, her testimony, when I say that, Doris Glaessman's testimony or what was it that you were interested in?

FOREMAN: Well, basically, what brought all of this about is, I don't know if it's either relevant to the – someone questioned if we could possibly find out what the sentence was of the first –

THE COURT: Oh.

FOREMAN: – the length of the sentence.

(Whereupon that conversation concludes)

MR. MOYER: I told you, told you that's what they wanted to know.

THE COURT: That I can't give you nor could we give you nor was it indicated either.

FOREMAN: Right, that's the question.

MR. CHARLES: Judge, another question. He has it in front.

JUROR NUMBER 3: No, it's – we want to know if it was – the sentence was – if he got released on behavioral. –

FOREMAN: It was commuted in any way, the original sentence.

[95] THE COURT: Well, that we can't give you.

MR. MOYER: You can't tell them.

THE COURT: All right?

FOREMAN: Fine and as far as being recessed, is there any possibility of that?

THE COURT: Well, we'll discuss that. Meanwhile go back and begin to deliberate again, then we'll take that matter up, and we'll see where we go with it.

FOREMAN: Thank you.

THE COURT: All right.

(Whereupon the Jury leaves the Courtroom)

MISS DANTOS: Is that all you wanted on the record, Mike?

MR. MOYER: Um-hum. Really interesting?

THE COURT: Pardon.

MR. MOYER: We can go off the record.

MR. CHARLES: No, I oppose.

(Whereupon proceedings are off the record)

THE COURT: You said go off.

MR. MOYER: I asked to go off.

THE COURT: I don't see why we should.

[96] MR. CHARLES: I renew my Motion for you to direct a sentence of life imprisonment right now. It's now 9:10, they're not going to come back with anything by 10:00 o'clock, your Honor. It's been – going to be 10 hours. I object to them being sequestered, I object to this going on into tomorrow, and I renew my Motion for a life sentence.

MR. MOYER: Judge, the Jury Foreman has indicated they are not deadlocked.

THE COURT: That's the trouble.

MR. MOYER: He made it crystal clear, they are not deadlocked. He has made it absolutely crystal clear, they are not deadlocked.

MR. CHARLES: Do you see the condition of that Jury?

MR. MOYER: I agree.

MR. CHARLES: They're sitting you with their heads barely above the chairs.

THE COURT: Well, that's –

MR. MOYER: It's a hard job.

THE COURT: And that's exactly why he want's to recess until tomorrow.

MR. MOYER: That's right, and I think that is a fair request, and I think that's a good request, and I think that's what we should do. We should re – we should bring them out and send them either to be sequestered or [97] send them home and have them resume deliberations tomorrow morning.

MR. CHARLES: That's objected to.

MR. MOYER: They are not deadlocked.

MR. CHARLES: That's – well, we can explore what that meant. I don't think that that – I mean, we can ask –

MR. MOYER: It's obvious what it means.

MR. CHARLES: It's not obvious to me what it meant.

MR. MOYER: Well, I think it's obvious to the Court.

MR. CHARLES: Well, I don't know what's obvious to the Court. Let the Court say what's obvious.

MR. MOYER: I think he already has.

MR. CHARLES: Judge –

THE COURT: I specifi – he made that clear when we met the last time.

MR. CHARLES: Judge, if it's 10:00 o'clock at night, they'll have been out 10 hours, okay.

MR. MOYER: No, that's not true.

MR. CHARLES: They'll have – it'll be 10 hours since they went out.

MR. MOYER: With lunch and dinner.

MR. CHARLES: With lunch break and a dinner [98] break. That is certainly more than enough time to deliberate this sentence, and I strenuously object to them being released for the night or sequestered and brought back tomorrow.

MR. MOYER: Judge, they – he's made it absolutely crystal clear they are not deadlocked. If we are close to a unanimous verdict, I ask you that we do it and if it's that close, and I suspect that it is, because he's saying they are not deadlocked, we can only go on what they've said, and he has said, they are not deadlocked. I would ask that the deliberations be broken off and the Jury be sequestered for the night and begin again tomorrow morning fresh.

MR. CHARLES: Your Honor, he said they're not deadlocked and there's no way we can do it tonight, any more tonight.

MR. MOYER: That's right, so we do it tomorrow.

MR. CHARLES: What's the term? You're splitting hairs over words, they're deadlocked, they're not coming to an agreement.

MR. MOYER: Well, then they were deadlocked a minute after they went into the Jury Room for that matter if that's the way you want to define the term.

MR. CHARLES: They are not – it's 10 hours [99] later. They are – they do not have a verdict –

MR. MOYER: How do we know that there hasn't been movement? How do we know there hasn't been movement to a unanimous verdict? We don't know that.

MR. CHARLES: Maybe there is a way that we can ask them before you make this decision, but I strenuously object to that.

MR. MOYER: Well, I strenuously object –

THE COURT: The only thing I could have said, I'll be quite frank with you, if they had indicated they were deadlocked.

MR. MOYER: Right.

THE COURT: Then I would have no problems with it, as far as I'm concerned, entertaining your Motion.

MR. CHARLES: Before you send them back –

THE COURT: But when they don't say that, that means, they're the ones that evaluate it.

MR. MOYER: Well, that's right.

MR. CHARLES: I mean, that's one person that's the Foreman –

MR. MOYER: That's the Foreman, though.

MR. CHARLES: But they had so many different questions.

THE COURT: No, no, I asked him that. Are you speaking for yourself or was this something you [100] discussed amongst the Jury? And he said, amongst the whole Jury.

MR. MOYER: Right.

THE COURT: That's what he said. Now, if it were him, if I had that sneaking suspicion, well, then I'd want to know, but they would have said something.

MR. CHARLES: Well, there's got to be – then there's got to be another way to find out where they're at

MR. MOYER: Find out? We found out. He has communicated –

MR. CHARLES: You don't know.

MR. MOYER: – on behalf of the Jury –

MR. CHARLES: I don't believe so.

MR. MOYER: – that they are not deadlocked.

MR. CHARLES: Judge, I don't know what that means. It's been 10 hours, and they're not close to a verdict.

MR. MOYER: We don't know that.

MR. CHARLES: Well, let's –

MR. MOYER: You don't know that, Fred.

MR. CHARLES: – let's ask. Are you close –

MR. MOYER: They have said –

[101] MR. CHARLES: I thought you said –

MR. MOYER: – they have said they are not deadlocked.

MR. CHARLES: – are you close to a verdict and they said no, not tonight.

MR. MOYER: And they have sa – and he said, we are not deadlocked.

THE COURT: Well, all right, I'll tell you what we're going to do.

MR. MOYER: There's a –

THE COURT: I said they will go until 10:00 o'clock and then I'll call them back in and then we will ask those questions and depending what their answer is, then we'll entertain your Motion.

MR. CHARLES: Thank you, Judge.

THE COURT: And I'm not saying which way we'll go. It's funny they don't come in, all right.

MR. CHARLES: Your Honor, again, you saw the condition of that Jury. My God, they're weak.

MR. MOYER: So, the Room is hot.

THE COURT: Well, all right, they're tired.

MR. MOYER: So, the Room is hot.

THE COURT: What they're saying is, they'd like to have a break.

MR. MOYER: That's why we out to break now [102] and have them come back tomorrow.

MR. CHARLES: It's going to become an oppressed verdict. That's why we want to declare this to be a directed verdict of life on his sentence.

THE COURT: Well, I understand. I don't – you know, I can understand your position. You have an obligation to your client, fine. Well, all right, that's what we'll

do. We'll recess until 10:00 o'clock and then we'll reconvene with the Jury and let's see where they are at that point. All right, Mr. Schaeffer.

(Whereupon side-bar conference concludes)

COURT CRIER: All rise please, this Court will be in recess until 10:00 o'clock.

(Whereupon the Court is in recess until 10:00)

THE COURT: All right, it is 10:00 o'clock, in fact, it's two minutes after 10 and under the circumstances and the Jury indicating at 9:00 o'clock that they were talking in terms of recessing for the evening. We will bring the Jury back into the Courtroom and explore with them as to where they are with respect to being deadlocked or not. You may bring the Jury in please, and [103] at this time, when the Jury was permitted to enter the Courtroom, the Defendant was present along with Counsel as well as the Prosecutor and the Assistant District Attorney.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, in view of our last discussion or our last get together at 9:00 o'clock, it has been a long and a trying day, and I'm sure it has been for you. At this moment, I would like to ask a question whether or not you, in your opinion, as to whether or not you are deadlocked or not deadlocked?

FOREMAN: No, we're not deadlocked.

THE COURT: You're not deadlocked?

FOREMAN: No.

THE COURT: Now, Mr. Humbold, you're the Foreman?

FOREMAN: Correct.

THE COURT: Again, I must ask the question, are you speaking for yourself or are you speaking for the entire Jury, have you discussed this point?

FOREMAN: I am the spokesman, I'll speak for the entire Jury.

THE COURT: Do you all agree with your Foreman?

[104] JURORS: Yes, your Honor.

THE COURT: All right, so then I take it, you would like to recess, at this juncture, and then reconvene tomorrow morning?

FOREMAN: Yes, if it pleases everyone else.

THE COURT: Very good. All right, now, then, I have to ask Counsel, do you have any objection to the Jury being released to go home with, of course, directions as to their conduct in the interim?

MR. CHARLES: No.

MR. MOYER: We are not opposed to that.

THE COURT: We are not, all right. All right, ladies and gentlemen, then what we're going to do is adjourn then until tomorrow morning – when would you like to come back, 9:00 o'clock or 9:30? I'll leave it up to you, you've been very –

FOREMAN: 9:30.

THE COURT: 9:30, all right. You all look very tired, very good. All right, we will adjourn then until

tomorrow morning at 9:30 and the Jury is excused to go home with the directions that, again, not to read anything that might appear in the newspaper or watch anything that might appear on television. I don't mean to insult your intelligence by constantly repeating it but sometimes we might forget, and you can well imagine, this [105] is a very serious moment and position that you're in. So, all right, now, with that instruction then, we will reconvene tomorrow morning at 9:30, very good.

COURT CRIER: All rise please, this Court will be adjourned until tomorrow morning at 9:30, 9:30 tomorrow morning.

(Whereupon testimony concludes for the day)

CERTIFICATION

I.

I hereby certify that the proceedings are contained fully and accurately in the recordings taken by me in the hearing of the above case and that this is a correct transcript of the same.

DATE: November 1, 1989

[Illegible]
COURT MONITOR

IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	NO. 682/1988
vs	)	Jury Trial
RONALD ROMPILLA	)	November 3, 1988

VOLUME VIII
VERDICT
HEARD BEFORE
THE HONORABLE DAVID E. MELLENBERG, J.

APPEARANCES:

For the Commonwealth: MICHAEL MOYER, ESQUIRE
District Attorney's Office
Lehigh County Courthouse
P.O. Box 1548
455 Hamilton Street
Allentown, PA 18105

For the Defendant: FREDERICK CHARLES, ESQUIRE
MARIA DANTOS, ESQUIRE
Public Defender's Office
Lehigh County Courthouse
P.O. Box 1548
455 Hamilton Street
Allentown, PA 18105

Court Monitor: Lori A. Reichl

[2] (Court called to Order)

THE COURT: All right. Let the record reflect that we tried to get a hold of Mr. Moyer for the purpose of

opening up this on the record that we've reconvened and the Jury is all here. I would like the Jury in please and at 9:48, the Jury entered with Counsel for the Defendant being present.

(Whereupon the Jury enters the Courtroom)

THE COURT: All right. Now, ladies and gentlemen, this is only for the formality of placing on the record that, indeed, since last night we adjourned, and you were permitted to go home, I would like the record to reflect that at 9:50, this morning, when the Court convened, the full Jury, empaneled Jury, was present, and we will now, then, excuse the Jury to continue with your deliberation, all right.

FOREMAN: Very good, thank you.

THE COURT: Very good.

(Whereupon the Jury leaves the Courtroom)

THE COURT: All right, Mr. Schaeffer, we [3] will then adjourn until further notice.

COURT CRIER: Court will be adjourned until further notice.

Whereupon Court is adjourned until further notice)

COURT CRIER: All rise please, Court is again in session, you may be seated.

THE COURT: May I see Counsel up here a second.

(Whereupon Counsel approach side-bar)

THE COURT: The Jury asked the question, "was the Defendant offered any type for rehabilitation either while in prison or after his release from prison?"

MR. CHARLES: Your Honor, –

THE COURT: And you all agree –

MR. MOYER: It's not in evidence. It's not in evidence. You can't answer that.

THE COURT: All right, I can't, I can't answer it.

MR. CHARLES: Your Honor, at this point, you've read that onto the record. It's 10:45, okay, they have had all night to rest. They've been back, they've [4] been deliberating for at least an hour. This question, I believe what this is starting to get to, I believe, that whoever the majority is, is starting to beat up on the minority and these kinds of questions continue to come. We have gone the full gambit from was he paroled, could he get a commuted sentence, did he get rehabilitation, the issue of aggravating factors versus mitigating factors and back mitigating versus aggravating, has long since gone, and I think what you have is that you have one person or maybe two that feel one way and the other 10 feel the other way, and they are starting to coerce this Jury into a verdict, and I move now, for your Honor to direct a verdict of life.

THE COURT: You may be very, very true in your observation, however, that one or two persons all they have to do is say in here, we're deadlocked, that we'll never go along with the others and then I'll be happy to entertain the Motion.

MR. CHARLES: But they don't get the chance to say it, Judge, because –

MR. MOYER: Now, that's –

THE COURT: But I don't agree with you.

MR. CHARLES: – the Foreman speaks.

MR. MOYER: Oh, wait, that's not true because yesterday, the Judge asked –

THE COURT: Oh, no, I've asked –

[5] MR. MOYER: – everyone –

MR. CHARLES: One time you did.

MR. MOYER: – are they – are you deadlocked and every single one of them said no, we're not.

MR. CHARLES: That's correct, that's correct.

THE COURT: That's what has me shocked.

MR. CHARLES: That's correct, that did happen last night, but your Honor, it's getting to the point –

THE COURT: Well, let me say this, –

MR. MOYER: They've only been in another hour – we've only been an hour this morning. That is nothing.

THE COURT: I think – let me say this. I think when we get to noon, I'll ask again.

MR. MOYER: Fine.

THE COURT: Okay and then – and if they say no, Fred, I'll be quite frank with you –

MR. CHARLES: Judge, at some point in time, with all due respect, you've got to find them deadlocked no matter what they say. You can't sit for five days and listen –

MR. MOYER: Why not?

THE COURT: Why not?

[6] MR. CHARLES: Because they're – I don't believe they're on the issue of what –

MR. MOYER: The Jury knows more about what's going on in that Jury Deliberation Room –

THE COURT: Yeah, they know what they're talking about, I don't know.

MR. MOYER: – than any of us do.

MR. CHARLES: Well, your Honor, –

THE COURT: All right.

MR. CHARLES: Okay.

THE COURT: Well, any way, let's dispose of this.

MR. CHARLES: My Motion's denied I –

THE COURT: I under – right, if that's what your Motion is, fine, that's denied.

(Whereupon side-bar conference concludes)

THE COURT: All right, bring in the Jury please.

(Whereupon the Jury enters the Courtroom)

THE COURT: All right, ladies and gentlemen, let the record reflect that the Jury was [7] reconvened in Court at 10:46 in response to a question they had and written and submitted to the Court. That present was the Defendant, his Counsel, as well as the Prosecutor and the Assistant District Attorney. Ladies and gentlemen, I understand the question that I have here that was handed to me reads, "Was the Defendant offered any type of rehabilitation either while in prison or after his release from prison?" Is that the question?

FOREMAN: Correct.

THE COURT: Well, I'm sorry to say, I can't answer that. I can only tell you that you're going to have to make your decision based upon the evidence that was presented and in accordance with the Law with respect to Sentencing Hearing. First of all, I couldn't even answer it if I wanted to or if I could, I don't know.

FOREMAN: Could I change the question to the point that is – isn't rehabilitation available in prison?

THE COURT: Well, again, I would like to even answer that, and I can't. You're going to have to rely upon your own knowledge of that aspect if, indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be quite frank with you, is not an issue before – before you with respect to the Law that it's a decision that you must make. I can [8] understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find. All right. Very well, then, the Jury's excused to return to deliberate, very good.

(Whereupon the Jury leaves the Courtroom)

THE COURT: All right, Mr. Schaeffer, we will adjourn then until further notice.

MR. CHARLES: Your Honor, I renew my Motion.

THE COURT: I understand, and we – it's denied. Now, let me say this, I think I would want you back here, say, – they have to order lunch – like I say, there's always a logistics problem here. Get Mrs. Haas. Mrs. Haas, when do – when's the latest you can order lunch for the Jury if, indeed, we reach that point, 11:30?

MRS. HAAS: She said about quarter after 11.

THE COURT: That early.

MRS. HAAS: Maybe it won't be a problem because most of them get the buffet. Maybe that'll help now.

[9] THE COURT: All right.

MRS. HAAS: See, the first couple days, they didn't give us the buffet and now they give it to us. So that goes quick, quicker, you know, there's nothing to make, because they just get the buffet.

THE COURT: All right. Then we'll reconvene at quarter of 12, all right. Very good.

COURT CRIER: Court will be in recess and will reconvene at quarter to 12.

(Whereupon Court is in recess)

COURT CRIER: Court is again in session, you may be seated.

THE COURT: All right. Let the record reflect, the Jury was permitted to enter the Courtroom at 10 to 12, that'll be 11:50. At present were the Defen – you may bring the Jury in please. Present, were the Defendant, her – his Counsel, as well as the Assistant District Attorney and the Prosecutor.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, I have no idea how long you've been deliberating, but I know [10] it's in excess of 10 hours. Let me ask you this, are you deadlocked at this juncture?

FOREMAN: No.

THE COURT: You're still not, all right. Do you all agree with that conclusion?

JURY: (Nods affirmative).

THE COURT: All right. What we'll do then, we'll have to order lunch, all right. We will – all right, Mr. Schaeffer, we'll adjourn then. Miss Haas, if you'll take whatever you do, all right.

FOREMAN: Your Honor, I don't know for sure, some of the people rather just have it sent in here than rather than just go waste all that time.

THE COURT: Oh, all right. Well, now, the big problem is, from where? From whence.

FOREMAN: I don't know if that's –

THE COURT: All right, whatever you're gonna – we'll talk it over then, if you have some suggestions, why maybe we can accommodate you, very good, all right.

COURT CRIER: All rise please, Court will be in recess until further notice.

(Whereupon the Court is in recess)

[11] (Whereupon Counsel approach side-bar)

THE COURT: Mr. Charles, what do you have?

MR. CHARLES: May it please the Court, from what I saw when you asked, are you deadlocked, and you said, does everybody agree with that? One of the Jurors shook her head no and went like this and just shook her head no, and she appeared to be crying from what I saw. The fifth Juror, shook her head in the negative when you said, does everybody agree, and she appeared to be crying, and I –

THE COURT: All right, maybe what we should do –

MR. CHARLES: Individually –

THE COURT: – next time, we'll take it individually.

MR. CHARLES: Can we have them come out now and have them polled, Judge?

MR. MOYER: Judge, no, the problem with that is that the Foreman was very emphatic about that, no. I mean, that was an emphatic no.

MR. CHARLES: Judge, –

MR. MOYER: And you asked the Jury, are we all in agreement and nobody spoke up at that point. We don't know what she's hiding her head about.

[12] THE COURT: No, she didn't say a word. I didn't see her shake her head.

MR. MOYER: I didn't either.

MR. CHARLES: I did. Your Honor, –

MR. MOYER: Let's assume – can I finish? Let's assume that she was shaking her head. We have no idea what she's shaking her head about –

MR. CHARLES: And I'd like to find out.

MR. MOYER: Maybe she – excuse me. Maybe we're – maybe she's shaking her head, because she's disgusted with another Juror. We don't know that.

THE COURT: Yeah.

MR. CHARLES: Let's find out, Judge. Judge, let me –

THE COURT: 'Cause it was very easy for her –

MR. CHARLES: Judge, –

THE COURT: – after I said that, all she had to say, now, wait a minute, I don't agree.

MR. MOYER: Exactly.

MR. CHARLES: I don't know if they know they can do that and here's my – I – listen, Judge –

MR. MOYER: He asked them three times –

MR. CHARLES: Can I finish?

MR. MOYER: – once this morning and twice [13] last night.

MR. CHARLES: Okay, can I finish?

THE COURT: All right.

MR. CHARLES: Can I get one through from the start to finish then?

THE COURT: All right.

MR. CHARLES: I'm saying this, I believe that there is a majority that is pushing, from the nature of the questions and is, I believe, trying to coerce a majority of maybe one, and I believe it may be that fifth Juror or maybe two into turning the verdict from life to death.

THE COURT: You may be right, I don't quarrel with you.

MR. CHARLES: Your Honor, –

THE COURT: I can't quarrel with you.

MR. CHARLES: – that person is crying, she looks like she's been beaten, almost – that she –

MR. MOYER: Beaten?

MR. CHARLES: I don't mean physically –

MR. MOYER: I object.

MR. CHARLES: – I mean, that's an analogy.

MR. MOYER: Yeah, okay, I object to that.

THE COURT: All right.

MR. CHARLES: She looks worn out, she was [14] teary eyed and when you said, is that right, we're not deadlocked, she shook her head no, and I saw it and all I'm saying is, I believe that –

THE COURT: Well, did everybody else see that?

MR. CHARLES: I know that we saw it at our table, and I think –

THE COURT: Well, you're the only one because I looked at her too, I'll be quite frank with you about that.

MR. CHARLES: Your Honor, I'm telling you this as an Officer of this Court, –

THE COURT: Well, –

MR. CHARLES: – and I believe that if – I would like an individual polling as to whether or not they are deadlocked. Not having the Foreman simply say it and everybody else just keep quiet or look the other way. I am also, again, asking for that, and I am renewing my Motion for you to direct this to be a life sentence. It is now lunch time of the second day and Judge, –

THE COURT: Well, when I hear from them they say they're deadlocked, then we'll entertain but right now, I can't.

MR. CHARLES: Please ask – please individually poll them, your Honor, and let them say yes [15] and no whether they think they can come to a verdict. I am asking for an individual polling. I believe they are working on one Juror, and they may get it done before even lunch is done. I'm asking, before they retire to lunch, that you poll the Jury individually and ask them if there is a

chance for them to come to a verdict or they feel they're deadlocked. An individual polling, your Honor, I am – I'm requesting the Court, I don't think that's too much to ask, please.

MR. MOYER: Judge, I don't think that's – that's part of the process to – his characterization of working over a Juror, we don't know what's going on in that Deliberation Room.

THE COURT: That's right.

MR. MOYER: If a person was being overworked, these are adults, they're intelligent people, they would speak up. You've, on three occasions, asked them if they were deadlocked and on three occasions, they have all indicated that they were not deadlocked. The Jury Foreman was very emphatic this – this morning, he was emphatic last night. I think under those circumstances, he's way out of line with his request. Maybe later on, this afternoon, we'll find out then.

THE COURT: All right.

MR. CHARLES: Could I respond to that, [16] please, Judge? The Jury Foreman not only gave the Jury a question but then he formulated the second question. The question is, did he have a chance to be rehabilitated or was he rehabilitated in prison or whatever that – or on the street. The answer's we can't answer. Well, then can we ask it this way. I mean, there was no deliberation for a second question. The next one is, well, was it offered to him. It's plain –

MR. MOYER: Well, what does that mean?

MR. CHARLES: – that that person is –

THE COURT: That doesn't mean anything. Well, maybe he's asking the question trying to get an answer for one of the other Jurors.

MR. CHARLES: Your Honor, I think it's clear to –

THE COURT: I don't agree with you.

MR. MOYER: We don't know, you're speculating.

MR. CHARLES: Now, what would it hurt to have individual polling.

THE COURT: I mean, you're reading things into this, Mr. Charles that are not there. Now, at this time, –

MR. CHARLES: What would it hurt to have –

THE COURT: – we're going to end it right [17] now.

MR. CHARLES: Okay.

THE COURT: Motion denied. Now, then, I don't deny we'll take it up this afternoon but right now, Motion denied.

MR. CHARLES: Could we consider it – when we take it up, having the individuals polled instead –

THE COURT: Well, I think maybe we're –

MR. CHARLES: – of having one spokesman –

THE COURT: – getting to that point now, that's true. All right.

MR. CHARLES: – speak for all of them.

THE COURT: We'll entertain that the next time and then make it a Motion then we'll entertain it, all right.

MR. CHARLES: And I'm just saying for the record, your Honor, I think it may be too late for a next time. Through the lunch hour, it may be too late. She appears to be –

MR. MOYER: Well, then you can have –

MR. CHARLES: – getting extremely weak and tired.

MR. MOYER: Then you can poll them when they come back with the verdict.

THE COURT: I wish I had your facility to [18] reading minds, Mr. Charles, but you read a lot of things that I don't see. All right. All right, Motion denied.

(Whereupon side-bar conference concludes)

THE COURT: Where can we –

MRS. HAAS: I'm going to try the Pizza Mart, right up the street.

THE COURT: Is that all they want?

MRS. HAAS: Yeah, he, at one point, had told me if I ever, you know, have a Jury that they would deliver pizza. So, I'm going to see if I can get them there, if not, I know Domino's will. But I don't know if they'll take –

THE COURT: But my point is, is that one person says they want a pizza or do they all agree on that?

MRS. HAAS: They all agreed, I asked.

THE COURT: What about something to drink?

MRS. HAAS: Well, I said I could do that upstairs. It would be easier for me to just to go up and get what they want upstairs.

THE COURT: They don't like going up there then. We're going to isolate them keep them apart.

MRS. HAAS: No, no, I will go get it for them.

[19] THE COURT: Oh, all right. Okay, well, let's try that.

MRS. HAAS: I'll do it myself.

THE COURT: Very good, all right. I think we're still adjourned.

COURT CRIER: Yes, Judge.

(Whereupon Court is adjourned)

COURT CRIER: Court is again in session, you may be seated.

THE COURT: Let the record reflect that the Court has been informed that the Jury has arrived at a verdict and at 1:40, you may bring the Jury in please. At 1:40 when the Jury was brought into the Courtroom that present were the Defendant, his Counsel, as well as the Prosecutor and the District Attorney.

(Whereupon the Jury enters the Courtroom)

THE COURT: Now, ladies and gentlemen, I understand that you have arrived at a verdict, is that correct?

FOREMAN: Correct.

THE COURT: All right, the clerk will [20] receive the verdict please.

FOREMAN: Your Honor, may I address the Court please, if possibly before the reading of this.

THE COURT: Do you want to make a statement you say?

FOREMAN: Yes, I believe – we, the Jury, have a request in the form of a question. That due to the magnitude of our decision one way or the other, life or death, we are asking if it's necessary Ron's son be present for the reading?

THE COURT: Ronald – the Defendant?

FOREMAN: His son.

THE COURT: Oh, his son.

FOREMAN: Right. Which ever way the decision is.

THE COURT: Well, it's a public meeting a public hearing, I don't see how I could –

FOREMAN: No, we're just thinking of Ron's son, himself. So, if someone could make a decision.

THE COURT: Well, I think, I assume they realize the gravity of what the decision would be and that, I assume, they look out for the best interest of this young man. I certainly – would certainly recommend that he not be present, but I couldn't order it. I don't think it would be appropriate for the Court under the circumstances [21] to order it.

FOREMAN: Thank you.

THE COURT: All right.

(Whereupon roll call of Jurors was taken)

THE COURT: All right. Now, the clerk will read the verdict, and it's got to be read in its entirety both as to Sentence as well as the – their findings and if the Jury should agree with what is repeated to you, then it shall be entered as a verdict of this Jury, all right.

CLERK: Commonwealth of Pennsylvania versus Ronald Rompilla, Case Number 682 of 1988. We, the Jury, unanimously sentence the Defendant to death. The findings on which the Sentence of Death are based on; one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstances unanimously found are: One, as submitted to Jury, two, as submitted to Jury, three, as submitted to Jury. The mitigating circumstances found by one or more of us are: One, the son of the Defendant being present and put on witness stand, two, possibly – possibility of no rehabilitation during incarceration and after release. So say you all?

Jury: I do.

THE COURT: All right, now before – before [22] you be seated please, I think I will have to – I ask one question, so that we have this correct because as submitted to Jury, I'm not quite sure what that means.

FOREMAN: In reference to what was said as to 1, 2, and 3 on the first page, your Honor, the aggravating circumstances.

THE COURT: Oh, I see. In other words, as submitted on the first page, the Defendant committed a killing while in the perpetration of a felony.

FOREMAN: Correct.

THE COURT: Two, the offense was committed by means of torture.

FOREMAN: Correct.

THE COURT: And three, the Defendant has a significant history of felony convictions involving the use or threat of violence to the person.

FOREMAN: Correct.

THE COURT: This is what the Jury meant by the answers to the Question Number 2 under B?

FOREMAN: Correct.

THE COURT: Which you have as outlined, as submitted to Jury?

FOREMAN: Correct.

THE COURT: All right, I think that's clear.

[23] MR. CHARLES: Your Honor, is there a finding that the aggravating factors outweigh the mitigating factors in that Slip.

THE COURT: Yeah, well, no, no, they say, one or more aggravating circumstances which outweigh any mitigating circumstances and then they unanimously found the three that were referred to. You're saying then, if I understand this correctly, so, that there's no question, that the aggravating circumstances as found, 1, 2, and 3 outweighed the mitigating circumstances that you found listed as 1 and 2?

FOREMAN: Correct.

THE COURT: Correct, all right.

MR. CHARLES: Your Honor, I'd like the Jury polled as to life or death.

THE COURT: Well, now, are you talking about, Mr. Charles, the question of the Sentence to be imposed?

MR. CHARLES: Yes.

THE COURT: Or what about the – do you want everything then, too –

MR. CHARLES: Yes.

THE COURT: – the aggravating circumstances –

MR. CHARLES: Yes.

[24] THE COURT: All right. The clerk will poll the Jury with respect –

MR. MOYER: Your Honor, may I be heard on that?

THE COURT: Pardon?

MR. MOYER: May I be heard on that?

THE COURT: All right. You may be seated, please.

(Whereupon Counsel approach side-bar)

MR. MOYER: I have no objection to them being polled as to life or death. I don't think they have to be – I don't think it's necessary, and I don't think it's proper that they be polled concerning the finding of the aggravating circumstances and the mitigating circumstances.

MR. CHARLES: I think it's proper and that's what I ask for.

THE COURT: How would it hurt?

MR. MOYER: Okay.

THE COURT: All right, understand.

(Whereupon side-bar conference concludes)

[25] THE COURT: All right. The clerk will poll the Jury. I think we'll start – we'll separate them. Separate the polling. I'm talking in terms of what you read. First of all, the Sentence.

(Whereupon the Jury is being polled)

THE COURT: Now, okay, read Question 2 and then – in place of the – where they have, as submitted by Jury, go to the beginning – where is it now, well, it were on here. Oh, that's it, all right. If you would read 2 and then instead of 1, 2, and 3, read in its place 1, 2, and 3 here. You're going to have to ask whether or not they agree with the aggravating circumstances as outlined, all right.

(Whereupon the Jury is being polled)

THE COURT: All right. Well, now go all over the others. He wanted it all. Mitigating circumstances same way but now, read as they have it there.

(Whereupon the Jury is being polled)

THE COURT: And one final one. Ask them if [26] they all agree that the aggravating circumstances weigh the mitigating circumstances and if they do, signify by saying yes.

(Whereupon the Jury is being polled)

THE COURT: All right. Anything further Mr. Charles?

MR. CHARLES: No.

MR. MOYER: Just that the Sentence be recorded, your Honor.

THE COURT: Very well. Since the Jury has agreed with the reading of the Verdict as submitted, it shall be recorded as the verdict of this Jury. Now, let me say this before you're excused, ladies and gentlemen, I understand, it was a very difficult task. I've often said that the most difficult roll [sic] of all is that of a Juror especially, under these circumstances. It's not a pleasant task. I think it goes without saying at least in this court's opinion, you all comported yourself extremely well. I think you afforded both sides the consideration in your utmost attention during the course of the trial. In any event, you go with the Court's thanks. Very good. Now, if you need anything by way of excuses, and I always find that an interesting statement but some employees, [27] require. If anything of that regard – oh, you have the vouchers? All right. My Tipstaff will see that you get vouchers then, all right. Very good, thank you very much. The Jury's excused.

(Whereupon the Jury is excused and leaves the Courtroom)

MR. CHARLES: May I approach side-bar, your Honor? Your Honor, approach side-bar for one moment?

THE COURT: Okay.

(Whereupon Counsel approach side-bar)

MR. CHARLES: I'm making a Motion that you set aside the Verdict or their Sentence, and you impose a sentence of life imprisonment.

THE COURT: You mean, I'm supposed to do that in my own Motion?

MR. CHARLES: I'm moving it, so –

THE COURT: I can't. I have to, according to the Law here, whenever the Jury shall agree upon a sentencing Verdict, it shall be received and recorded. The Court shall, thereafter, impose upon the Defendant the Sentence affixed by the Jury. Now, things will occur now, of course, it will be reviewed by the Commonweal – by the [28] Supreme Court, it's an automatic appeal, but your Motion, as such, I have to deny.

MR. CHARLES: Fine.

THE COURT: All right.

(Whereupon side-bar conference concludes)

THE COURT: All right. Could we have the Defendant up before the Court please? Mr. Rompilla, you heard the Sentence of the Jury that they determined in according to the Judicial Code, and I repeat, the direction received as ordered to the Court, whenever the Jury shall agree upon a Sentencing Verdict which was agreed to, it shall be received and recorded by the Court. The Court shall, thereafter, impose upon the Defendant the Sentence affixed by the Jury. In this regard, I will have to impose sentence in accordance with the Judicial Code. And now this third day of November, 1988, Sentence is, you pay the

costs of prosecution and that you be sen – that you are sentenced to death as found by the Jury this date and that you be sent to the Correctional Diagnostic Classification Center at Graterford, Pennsylvania, for this purpose. Mr. Rompilla, I can say this to you, there's an automatic review of this Sentence. It's – the Supreme Court of Pennsylvania and, again, the same Judicial Code requires [29] that the Supreme Court will, with its authority, correct any errors at Trial, shall either affirm or sen – or – either affirm the Sentence of Death or vacate the Sentence of Death and remand for the imposition of a life imprisonment sentence contrary, to the Sentence that I just indicated. The Supreme Court shall affirm the Sentence of Death unless, it determines: One, that the Sentence of Death was a product of a passion, prejudice or any other arbitrary factor. Two, that the evidence fails to support the finding of an aggravating circumstance specified in subsection D which are the ones that were outlined and went over in the polling of the Jury or that the Sentence of Death is excessive or disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the character and the record of the Defendant. In addition, the record of Death Sentence, of course, is to be sentenced – sent to the Governor of Pennsylvania, forthwith. In accordance with that direction, of course, we direct that the Court Stenographer make a transcript of the entire proceedings and such shall be forwarded to the Supreme Court of Pennsylvania for review. All right. I would like to say this, though, it was a very difficult trial and, again, as I say – I must say in all fairness, that Counsel has done a superb job. I was, indeed, impressed. Do you have anything at this point [30] you would like to say Mr. Rompilla?

MR. ROMPILLA: Nothing.

THE COURT: All right. Anything further?

MR. CHARLES: No.

MR. MOYER: No, your Honor.

THE COURT: Very well, all right, Mr. Schaeffer, we will adjourn.

COURT CRIER: All rise please, this Court will be adjourned until further notice.

(Whereupon Court is adjourned until further notice)

COURT CRIER: This Court is again in session, you may be seated.

THE COURT: Now, Mr. Rompilla, one thing we did forget when we went through the Sentencing Dialogue, and I guess colloquy as to what happens. As I indicated the Sentencing Verdict, of course, will be automatically reviewed by the Commonwealth – by the Supreme Court. In addition to which though, there might be Trial errors with respect to the Trial, itself. And in this regard, you have a right to file Motion for Arrest of Judgment with 10 days. The basis for a Motion of Arrest of Judgment would be for grounds of error appearing on the face of the record or the evidence was insufficient to sustain the charge or [31] that this Court did not have jurisdiction. If the Court should rule favorably on such a Motion, you would be discharged from the – and the case against dismissed. You also have the right to file a Motion for a New Trial within 10 days of this verdict. The basis for such a Motion would be Trial errors prejudicial to you or that the Verdict was against the weight of the evidence. If the Court should

rule favorably in such a Motion, a new trial would be granted. You are represented by an Attorney from the Public Defe – Attorneys, rather, from the Public Defender's Office, you are advised that if you so desire and can afford same, you may be represented by private counsel. If you cannot afford private counsel, you are hereby advised that your Court appointed Counsel will continue to serve and represent you free of charge with respect to the Motions I've already mentioned in all proceedings including, an appeal to a higher court. You are advised, further, that only the reasons or issues contained in the Motions may be raised on appeal to a higher Court. If you fail to file these Motions, you would forfeit your right to raise on appeal any issue which could have been presented to this Court in the Post-Trial Motions. You are hereby advised that if you do file either or both of the Motions I've just mentioned, and you later withdraw them, the legal affect [sic] would be that the Verdict [32] will stand, and you would be waiving your right to an appeal to a higher Court. In advising you of your rights, I want to make it clear the Court is neither urging nor discouraging the filing of such Motions. Nor is the Court indicating how it would rule on any such Motion. I'm merely, advising you of your legal rights, do you understand what I've just said?

MR. ROMPILLA: Yes, sir.

THE COURT: Do you have any questions with respect to what I've said? Is there anything you would like to say at this time?

MR. ROMPILLA: Yes, there is – they have me in observation down there, there's no need for it, your Honor. I'm a strong minded person, you know, except –

THE COURT: I must say, you comported yourself beautifully.

MR. ROMPILLA: And there's no need for that. I'd like for you to speak with the Warden. There's no need for observation.

MR. CHARLES: Your Honor, what he's saying is this, basically, they have taken him to BAU, to Behavioral Adjustment Unit. He has to be – it's a separate unit in the prison for observation, because they feel he's some kind of a threat there because whatever reason.

[33] THE COURT: Where was this? In local prison.

MR. CHARLES: In the prison and what we're trying to tell the Warden, the people there, is that he has been no problem for the three weeks during this Trial. I think, your Honor, has observed the fact, he has never had one problem. We even had the –

THE COURT: Well, I must say, he's comported himself very well throughout the course of the Trial.

MR. CHARLES: Through a very difficult three week period, and he's never been one problem for anybody. I think the Sheriffs will attest to that, also, and they are observing him and keeping him separated. His family wants to see him. I know this is a prison matter, but we may need the Trial Judge, who has observed this, and possibly, the Commonwealth Attorney –

THE COURT: Well, to the extent that I am able to, you understand. I don't control what happens down there. They have their rules and whatever they do. But to

the extent, I would have to be the first to concur with what your Lawyer said.

MR. CHARLES: Your Honor, –

THE COURT: You've been no – you've been very cooperative.

[34] MR. CHARLES: What I'm asking for is a telephone call, and I'm going to ask them, also, to call the Attorney for the Commonwealth. I think it goes without saying that it – if you're sentenced to death, that perhaps, may be a night when you should be not left alone or isolated from the people even within the prison. Your Honor, I think it's a very difficult time.

THE COURT: Well, yeah, I don't make that judgment call, you understand?

MR. CHARLES: Well, –

THE COURT: I think that's a penology decision that I'm – I'll be quite frank with you, I've never done this.

MR. ROMPILLA: Well, they said to call – a phone call from here, they'd be satisfied.

THE COURT: This is the first time I ever had to impose a sentence. I'll be happy to do that. If that's all it takes.

MR. MOYER: I have no objection to that.

THE COURT: All right.

MR. MOYER: I would concur that Mr. Rompilla has been a perfect gentlemen during this Trial, has been no problem whatsoever, and I – I also, would tell them I

have no problem with him being with other inmates. I don't see that being a problem at this point.

[35] THE COURT: Okay. Now, who do I call?

MR. CHARLES: I would – I would just call over to either the Warden or somebody over in –

MR. ROMPILLA: Captain Gremers.

MR. CHARLES: Ca –

THE COURT: Who?

MR. ROMPILLA: Captain Greenwich.

MISS DANTOS: Greenzweig.

MR. ROMPILLA: Whatever.

THE COURT: Greenblatt, is that his name?

MR. CHARLES: Greenzweig.

THE COURT: Greenblite.

MR. CHARLES: Greenzweig.

MISS DANTOS: Zweig.

THE COURT: Oh, Greenzweig, okay, all right. I'll be happy to do that. Anything else?

MR. CHARLES: No, your Honor, just that.

THE COURT: All right. Now, again, as I say, I've ordered that the trial transcript and the Sentencing Hearing matter be transcribed immediately so that this matter can proceed on your appeal. Now, I understand Counsel as already indicated to the Court, they have every intention to filing such Motions but –

MR. CHARLES: Filing an appeal.

THE COURT: All right. I'll be happy to.[36] I'll go over there and call immediately. If you want to go along with me, you may Mr. Charles, all right.

MR. CHARLES: Thank you, your Honor.

MR. ROMPILLA: Thank you.

THE COURT: All right.

(Whereupon Trial has concluded)

CERTIFICATION

I.

I hereby certify that the proceedings are contained fully and accurately in the recordings taken by me in the hearing of the above case and that this is a correct transcript of the same.

DATE: November 1, 1989

/s/ Lori A. Reichl
COURT MONITOR

---

653 A.2d 626

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Ronald ROMPILLA, Appellant.

Argued Oct. 20, 1994.
Decided Jan. 23, 1995.

Albert V.F. Nelthropp, for R. Rompilla.

Robert Steinnberg, Douglas G. Reichley, for Com.

Robert A. Graci, for Atty. General's Office.

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY, CASTILLE and MONTEMURO, JJ.

OPINION

NIX, Chief Justice.

This is an automatic appeal[1] from the imposition of a death sentence following a trial by jury in the Court of Common Pleas of Lehigh County. Appellant, Ronald Rompilla, was convicted of murder of the first degree,[2] burglary,[3] criminal trespass,[4] robbery,[5] two counts of theft,[6]

---

[1] 42 Pa.C.S. § 9711(h)(1).

[2] 18 Pa.C.S. § 2502(a).

[3] 18 Pa.C.S. § 3502(a).

[4] 18 Pa.C.S. § 3503(a)(1)(ii).

[5] 18 Pa.C.S. § 3701(a)(1)(i).

[6] 18 Pa.C.S. § 3921(a).

and two counts of receiving stolen property.[7] Pursuant to 42 Pa.C.S. § 9711(c)(1)(iv), the jury sentenced Appellant to death on November 1, 1988, after it found three aggravating circumstances which outweighed the one mitigating circumstance presented by Appellant.

Although Appellant has not specifically challenged the sufficiency of the evidence supporting his conviction, we will nevertheless undertake such a review in accordance with the standard set forth in *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 26-27 n. 3, 454 A.2d 937, 942 n. 3 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).[8] In reviewing the sufficiency of the

[7] 18 Pa.C.S. § 3925(a).

[8] Appellant has apparently had a contentious history with court-appointed counsel during his trial and appeal. Appellant's discontent with his attorneys has caused him to file a number of *pro se* motions and briefs in addition to those filed by court-appointed counsel. Present counsel has appended to the Brief for Appellant what is represented to be Appellant's own brief alleging other issues not included in counsel's brief. This appended brief authored by Appellant is addressed to the trial court and is intended to be a supplemental brief in support of Appellant's post-trial motions.

This Court recently addressed the issue of an appellant's right to file *pro se* supplemental briefs while that appellant is represented by counsel. In *Commonwealth v. Rogers,* 537 Pa. 581, 645 A.2d 223 (1994), we held that although an appellant has a clear right to terminate representation *prior* to the filing of an appeal, there is no concomitant right to file a separate *pro se* brief once appellate counsel has filed briefs. *Id.* at 583-84, 645 A.2d at 224. Thus, we refused to allow the appellant in *Rogers* to terminate appellate counsel and proceed *pro se* on amended and supplemented briefs once counsel had filed briefs. It was our belief that the appellant would "confuse and overburden the court by his own pro se filing of briefs at the same time his counsel is filing briefs on his behalf." *Id.* (quoting *Commonwealth v. Ellis,* 534 Pa. 176, 183-84, 626 A.2d 1137, 1141 (1993) (emphasis omitted)). A review of the issues raised in Appellant's *pro se* brief reveals that Appellant's claims are focused on the sufficiency of the evidence and trial counsels'

(Continued on following page)

evidence, we must view the evidence and all reasonable inferences derived therefrom in the light most favorable to the Commonwealth as verdict winner, to determine whether all the elements of the offense have been established beyond a reasonable doubt. *Commonwealth v. Carpenter,* 511 Pa. 429, 435, 515 A.2d 531, 533-34 (1986).

In the early morning hours of January 14, 1988, the victim, James Scanlon, was murdered in his bar, the Cozy Corner Cafe, located in Allentown, Pennsylvania. At approximately 6:30 a.m. on that same morning, the victim's son discovered the body of his father lying behind the bar in a pool of blood. The victim had been stabbed repeatedly and set on fire. The victim's wallet had been stolen and approximately $500 to $1,000 had been stolen from the bar.

The Commonwealth's case consisted almost entirely of circumstantial evidence as there were no eyewitnesses to this killing. Appellant was seen in the Cozy Corner Cafe on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.

When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he

ineffectiveness. As noted above, we are obligated to undertake an independent review of the sufficiency of the evidence supporting Appellant's conviction. We also hasten to point out that Appellant is free to raise the ineffectiveness of any of his prior counsel in a subsequent proceeding. Accordingly, we will not specifically address any of the issues raised in Appellant's *pro se* brief.

had been in the Cozy Corner Cafe on the night of the murder and left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only $2.00 to buy breakfast at a local diner. A cab driver testified that he picked up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of $9.10.

Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid $121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.

The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.

The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr. Scanlon's wallet was found by a groundskeeper in the bushes, six to eight feet outside the room that Appellant had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives that was used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told police concerning his activities on January 14 and 15, 1988, and the testimony of other witnesses.

When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence clearly supports

Appellant's conviction for first degree murder. Accordingly, we will now proceed to address Appellant's seven allegations of error relating to the trial underlying his conviction and sentence.

Appellant first contends that the trial court erred in allowing the Commonwealth to introduce a photograph of the victim in this case. The photograph in question, Commonwealth's Exhibit Number 5, shows the body of the victim lying face down behind the bar among a number of broken bottles. Appellant argues that the inflammatory nature of this photograph outweighs any evidentiary value that it may have had. The Commonwealth responds that the photograph is not inflammatory, and even if this Court were to find otherwise, its introduction was necessary to capture the disarray of the bar and to show the severity of the struggle between the victim and Appellant.

"We have consistently held that the question of admissibility of photographs in homicide cases is a matter within the discretion of the trial judge, and only an abuse of that discretion will constitute reversible error." *Commonwealth v. Duffey,* 519 Pa. 348, 359, 548 A.2d 1178, 1183 (1988) (citing *Commonwealth v. Petrakovich,* 459 Pa. 511, 329 A.2d 844 (1974); *Commonwealth v. Woods,* 454 Pa. 250, 311 A.2d 582 (1973)). In determining the admissibility of photographs of a corpse in a homicide trial, this Court utilizes a two-part analysis. *Commonwealth v. Chester,* 526 Pa. 578, 591, 587 A.2d 1367, 1373, *cert. denied,* 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

> First a court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is

> inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Id. 526 Pa. at 591-92, 587 A.2d at 1373-74 (citation omitted).

Based on our review of the photograph, we find that, although unpleasant, it does not rise to the level of what we consider to be inflammatory. The distance from the body and the angle from which the photograph was taken tend to diminish the inflammatory nature of the subject matter. Moreover, the number of broken bottles surrounding the victim makes it difficult, if not impossible, to discern whether the substance beside the victim is alcohol or blood.

In addition, we agree with the Commonwealth and the en banc trial court that even if we were to find the photograph inflammatory, it would still be admissible based on its evidentiary value. The photograph was introduced by the Commonwealth to demonstrate the state of disarray of the bar and the severity of the struggle between the victim and his attacker. Accordingly, we conclude that the trial judge did not abuse his discretion in admitting this photograph into evidence.

Appellant next argues that the trial court erred in answering the jury's question regarding accomplice liability. Shortly after deliberations began, the jury presented a note to the court in which it asked the following: "If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?" (N.T. 10/31/88, 166). In response, the trial judge

read 18 Pa.C.S. § 306(a), which defines the general rule for liability for conduct of another,[9] and briefly explained the concept of complicity to the jury. (N.T. 10/31/88, 167-68). The trial judge then cautioned the jury:

> I can only say this to you, that you should determine this case based on the Charge of the Court as it had given [sic] you originally. There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but it requires other proof or findings on your part that were not apart [sic] of this case nor were they made a part of this case. . . .

(N.T. 10/31/88, 168-69). Appellant argues that by being instructed on an accomplice theory and then being told to disregard it, the jury might have been confused and convicted Appellant as an accomplice.

Appellant's claim is analogous to an issue that this Court addressed in *Commonwealth v. Edwards,* 521 Pa. 134, 555 A.2d 818 (1989). In *Edwards,* the jury asked the trial judge whether it had the option to condition a verdict of life imprisonment on the defendant's ineligibility for parole. In his initial response to the jury, the trial judge deviated from the standard that we had previously prescribed when the jury asked such a question. We concluded that despite this error, the curative instruction and proper charge that were subsequently given were

---

[9] 18 Pa.C.S. § 306(a) provides that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."

sufficient to leave the jury's death sentence undisturbed. *Id.* at 158-59, 555 A.2d at 830-31. Likewise in the instant case, we are satisfied that any error which might have resulted from the trial judge's instruction on accomplice liability was cured by the subsequent admonition to the jury that it should not consider such a theory because there was no evidence presented during trial to support such a finding.

Additionally, we reject Appellant's argument that the trial court erred in failing to grant defense counsel's request that the culpability portion of section 306 be read to the jury. As noted above, the jury was specifically instructed that it was not to consider accomplice liability in its deliberations. Therefore, the denial of Appellant's request was well within the trial judge's discretion. *See Commonwealth v. Perkins,* 473 Pa. 116, 132, 373 A.2d 1076, 1084 (1977) ("when the court provides supplemental instructions at the jury's request, it may confine those instructions to the particular questions asked by the jury, even though requested by the defendant to give yet additional instructions").

Appellant next contends that trial counsel was ineffective for failing to file a request for a bill of particulars. By requesting a bill of particulars, Appellant argues that defense counsel could have limited the Commonwealth to the single theory that Appellant was the actor and not an accomplice. "A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid a surprise, or intelligently raise pleas of double jeopardy and the statute of limitations." *Commonwealth v. Chambers,* 528 Pa. 558, 580, 599 A.2d 630, 641 (1991), *cert. denied,* 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992). In the instant

case, the Commonwealth never asserted nor attempted to prove that Appellant's role in the murder and robbery was anything other than that of the actor. Thus, Appellant's argument is plainly without merit. Because counsel can never be considered ineffective for failing to raise a meritless claim, Appellant's claim of ineffectiveness must be rejected. *See Commonwealth v. Pettus,* 492 Pa. 558, 563, 424 A.2d 1332, 1335 (1981).

In a related argument, Appellant contends that the trial court erred in refusing his request to poll the jury in order to ascertain whether he was convicted as an accomplice or actor. The record indicates that the jury was polled as to their individual verdicts, but the trial judge refused to question each juror as to whether they found Appellant guilty as an actor or accomplice. (N.T. 11/1/88, 5-7). Appellant again relies on the erroneous premise that the jury failed to heed the trial court's warning that it was not to consider an accomplice theory of liability. Our review of the record satisfies us that the trial judge clearly and adequately explained to the jury that there was no evidence offered to prove that Appellant acted as an accomplice and that it should not inject such considerations into its deliberations.

> The purpose of the poll is to give any juror, who may possibly have been under pressure from other members of the jury to acquiesce in the verdict, an opportunity to speak out and declare to the court that the verdict as announced by the foreman was not voluntarily joined in by the answering juror.

Commonwealth ex rel. Ryan v. Banmiller, 400 Pa. 326, 328, 162 A.2d 354, 355, *cert. denied,* 364 U.S. 852, 81 S.Ct. 99, 5 L.Ed.2d 76 (1960). In the instant case, Appellant has

not alleged lack of unanimity of the verdict or that it was the product of undue pressure placed on one or more of the jurors. Accordingly, we conclude that the trial court did not err when it refused to poll the jurors on the theory upon which they convicted Appellant.

In his next allegation of error, Appellant asserts that the search warrant used to obtain evidence to link him to the crime was not supported by probable cause. The en banc Court of Common Pleas considered Appellant's challenge to the search warrant and found that

> [t]he affidavit in the present case, sworn to by a detective sergeant of the Allentown Police Department, contained sufficient averments supporting that there was a fair probability that evidence of a crime would be found in the defendant's room. The averments in the affidavit contained a general description and location of the crime and victim, as well as the fruits from what was properly believed to be a burglary and/or robbery, as well as the criminal homicide. The affidavit placed the defendant not only at the scene of the crime earlier that evening but also sets forth the fact that entry into the premises was gained by opening a window in the bathroom of the premises from the inside and that the defendant was seen going into the bathroom on a number of occasions that evening. Moreover, the detective sergeant observed a bloody footprint tread near the location of the victim's body, which pattern of tread was recognized to be similar to the one on the sneakers worn by the defendant when the police officer had interviewed him a short time prior to the execution of the affidavit. Lastly, the affidavit revealed that the defendant had checked into the room sought to be searched by using a fictitious name at a time when the defendant had told the police officer that he was at a different location. Lastly [sic], the affidavit set forth that, approximately two months' [sic] before the criminal homicide, the defendant had been hiding in the victim's bar after hours.

Commonwealth v. Rompilla, No. 682/1988, slip op. at 8-9 (C.P. Lehigh County March 12, 1993) (en banc).

In determining the validity of a search warrant, this Court has adopted the totality of the circumstances test articulated by the United States Supreme Court in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing] that probable cause existed."

Commonwealth v. Gray, 509 Pa. 476, 484, 503 A.2d 921, 925 (1985) (quoting *Illinois v. Gates,* 462 U.S. at 238-39, 103 S.Ct. at 2332, 76 L.Ed.2d at 548 (1983)) (citation omitted); *see also* Rule 2003(a) of the Pennsylvania Rules of Criminal Procedure ("[n]o search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside

the affidavits"). A finding of probability of criminal activity is sufficient to support the probable cause requirement of a search warrant; a *prima facie* showing of such activity is not required. *Commonwealth v. Baker,* 532 Pa. 121, 126-27, 615 A.2d 23, 25 (1992). After reviewing the affidavit underlying the warrant and giving due deference to the conclusions of the issuing magistrate, we find that probable cause existed to support the search warrant executed on Appellant's hotel room. *Commonwealth v. Council,* 491 Pa. 434, 444, 421 A.2d 623, 628 (1980). Accordingly, Appellant's argument must be rejected as meritless.[10]

Appellant argues lastly that the trial court erred in allowing a transcript of a rape victim's testimony to be read to the jury during the sentencing phase. Appellant claims that the Commonwealth was appealing to the passions of the jury and could have utilized a different method to describe what had happened. The Commonwealth responds that it was necessary to prove that Appellant had a history of convictions for felonies involving violence and that reading the transcript of the victim's testimony was the most efficient way to present the facts of one of the prior convictions.

[10] When police entered Appellant's hotel room armed with the aforementioned search warrant, they were accompanied by a parole officer who held a parole detainer. This detainer was based on the fact that Appellant was observed drinking alcohol in violation of one of his conditions of parole. Appellant maintains that the presence of the parole officer was a pretext because the search warrant executed on his hotel room was not based on probable cause. Based on our finding that the search warrant was supported by probable cause, we need not address this issue. We note, however, that parole officers may arrest a parolee without a warrant for violating any of the terms of his parole. *See* 61 P.S. § 331.27

Our review of the record affirms the Commonwealth's contention that the reading of the victim's testimony was necessary to support the aggravating circumstance found under 42 Pa.C.S. § 9711(d)(9).[11] Appellant had previously been convicted of theft, burglary, and rape. Prior to the sentencing hearing, defense counsel attempted to have the burglary conviction excluded from the jury's consideration based upon this Court's decision in *Commonwealth v. Christy,* 511 Pa. 490, 515 A.2d 832 (1986), *cert. denied,* 481 U.S. 1059, 107 S.Ct. 2202, 95 L.Ed.2d 857 (1987). In *Christy,* this Court held that the trial court had erred in submitting a burglary conviction to the jury for purposes of 42 Pa.C.S. § 9711(d)(9) because the Commonwealth failed to present evidence that the conviction involved the threat or use of violence. *Id.* 511 Pa. at 507-08, 515 A.2d at 840-41. We concluded that "[i]n order for a felony to be includable under 42 Pa.C.S. § 9711(d)(9), the Commonwealth must present evidence that the defendant actually threatened another with violence or actually used violence on another." *Id.* at 508, 515 A.2d at 841.

In *Commonwealth v. Goins,* 508 Pa. 270, 495 A.2d 527 (1985), this Court held that a single felony conviction for a crime of violence does not suffice to establish a significant history under 42 Pa.C.S. § 9711(d)(9). In the instant case, a rape conviction was the only felony for which Appellant was convicted that clearly involved the use of violence. Thus, the Commonwealth had to show that a threat of violence or actual violence was used in the commission of

[11] 42 Pa.C.S. § 9711(d)(9) provides that an aggravating circumstance can be found by the jury where "[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person."

the burglary in order to establish a felony history under 42 Pa.C.S. § 9711(d)(9). In order to achieve that end, the Commonwealth had the testimony of the rape victim read into the record because the burglary involving the use of violence was part of the same episode.[12] By having an assistant district attorney read from a transcript, we believe that the Commonwealth presented the facts of Appellant's prior crime in a way that minimized the inflammatory impact of his prior crimes to the jury. Accordingly, we conclude that the trial court did not err in allowing the Commonwealth to present evidence of Appellant's prior crime through the reading of the victim's testimony.

Finally, it is our statutory duty to insure that the jury's sentence is based upon the facts presented at the sentencing hearing. *See* 42 Pa.C.S. § 9711(h). Our review of the record in this case satisfies us that the sentence imposed by the jury was not the product of passion, prejudice, or any other arbitrary factor. The record also supports the jury's finding of the aggravating circumstances set forth in 42 Pa.C.S. § 9711(d)(6), (8) and (9).[13]

[12] Appellant had broken into the victim's apartment which was located above a bar. According to the victim's testimony, Appellant initially entered the apartment in the belief that she kept a large sum of money there. (N.T. 11/1/88, 75-76). After discovering that the money was located in the bar's cash register, Appellant and the victim proceeded downstairs where he stole the money from the register. (N.T. 11/1/88, 78- 80). Appellant then brought the victim back up to the apartment and raped her at knifepoint. (N.T. 11/1/88, 82-90).

[13] The aggravating circumstances found by the jury were that "[t]he defendant committed a killing while in the perpetration of a felony," that "[t]he offense was committed by means of torture," and that "[t]he defendant has a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. § 9711(d)(6), (8) and (9), respectively.

Appellant killed his victim during the commission of the burglary and robbery of the victim's tavern. Moreover, the manner in which Appellant carried out this brutal murder is sufficient to support a finding that the killing was committed by means of torture. "In order to establish the aggravating circumstance of torture, the Commonwealth must prove that the defendant had a specific intent to inflict 'a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity.'" *Commonwealth v. Daniels,* 537 Pa. 464, 473, 644 A.2d 1175, 1180 (1994) (quoting *Commonwealth v. Thomas,* 522 Pa. 256, 277, 561 A.2d 699, 709 (1989); *Commonwealth v. Pursell,* 508 Pa. 212, 239, 495 A.2d 183, 196 (1985)). In the instant case, Dr. Isidore Mihalakis, a forensic pathologist, testified at the sentencing hearing that the victim was alive during the infliction of almost all of the injuries that he received. (N.T. 11/1/88, 101). These injuries included abrasions, lacerations, blunt force injuries, a fractured nose, and multiple stab wounds. (N.T. 11/1/88, 102). Dr. Mihalakis further testified that the number and location of the various wounds on the victim's body were indicative of injuries that were inflicted with the intent of causing pain. (N.T. 11/1/88, 110). Thus, there is ample evidence on the record to support the jury's finding of torture in this case. Lastly, with respect to Appellant's history of felony convictions involving the use of violence, the record fully supports the jury's finding. In addition to a rape conviction, Appellant was convicted of burglary in which he brandished and used a knife to harm his victim.

The information compiled by the Administrative Office of Pennsylvania Courts indicates that the sentence

imposed in this case is not disproportionate to the sentence imposed in similar cases.

Accordingly, the judgment of sentence is affirmed.[14]

MONTEMURO, J., is sitting by designation.

[14] The prothonotary of the Supreme Court is directed to transmit the full and complete record in this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	No. 682/1988
RONALD ROMPILLA	:	

ORDER

(Filed Aug. 23, 1996)

AND NOW, this 21st day of August, 1996, upon consideration of Defendant's Petition for Relief under the Pennsylvania Post-Conviction Relief Act, after carefully considering the briefs of the parties, and after oral argument, said Petition is DENIED and DISMISSED.

IT IS FURTHER ORDERED that the Stay of Execution, entered on August 22, 1995, is hereby LIFTED AND VACATED.

BY THE COURT:

/s/ Thomas A. Wallitsch
THOMAS A. WALLITSCH, J.

CERTIFIED FROM THE RECORD THIS 23rd DAY OF Aug. A.D. 1993 CLERK OF COMMON PLEAS CRIMINAL JUVENILE
/s/ Patricia M. Golden, DEPUTY

IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	No. 682/1988
RONALD ROMPILLA	:	

* * * * * * * * * * *

APPEARANCES: MICHAEL P. McINTYRE, ESQUIRE,
FIRST ASSISTANT DISTRICT
ATTORNEY,

For the Commonwealth

MICHAEL WISEMAN, ESQUIRE,
AND WITH HIM, PENNSYLVANIA
POST-CONVICTION DEFENDER
ORGANIZATION,

For the Defendant

* * * * * * * * * * *

OPINION

THOMAS A. WALLITSCH, J.

Petitioner, Ronald Rompilla, was convicted of murder in the first degree and related charges on November 1, 1988, before our late colleague, the Honorable David E. Mellenberg. On November 3, 1988, the jury returned a verdict of death in the sentencing phase and sentence was immediately imposed. After Mr. Rompilla's conviction and sentence were affirmed by the Pennsylvania Supreme Court, *Commonwealth v. Rompilla*, 539 Pa. 499, 653 A.2d 626 (1995), and after this court granted a stay of execution,

Mr. Rompilla filed this Petition for Relief under the Pennsylvania Post-Conviction Relief Act. On March 28, 1996, a hearing on this petition was held, and deposition transcripts were subsequently filed. Petitioner alleges numerous grounds for relief, all of which we reject.

Mr. Rompilla's first argument is that his right to due process of law was violated when the trial judge refused to answer the jury's question about Mr. Rompilla's parole eligibility. During the penalty phase of the trial, the trial judge did not inform the jury that in Pennsylvania "life imprisonment" actually means life imprisonment without the possibility of parole. During jury deliberations on the penalty phase, the jury asked the following question: "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?". The trial court did not directly answer that question but, instead, told the jury not to consider the issue of parole. Mr. Rompilla challenges the trial court's action in this regard despite the fact that Pennsylvania law on this issue is clear. *Commonwealth v. Strong*, 522 Pa. 445, 563 A.2d 479 (1989); *Commonwealth v. Edwards*, 521 Pa. 134, 555 A.2d 818 (1989).

Mr. Rompilla relies on the case of *Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187, 129 L. Ed. 2d 133 (1994), for the proposition that the trial judge's refusal to instruct that parole was not a possibility violates his federal constitutional right to due process. We believe that *Simmons v. South Carolina* is distinguishable from the facts of this case and therefore will not apply it to reverse the sentence imposed. In *Simmons*, the prosecution in its closing argument argued that the defendant's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. The prosecutor urged that a verdict for death would be "a response of society to

someone who is a threat. Your verdict will be an act of self-defense." There was no such argument in Mr. Rompilla's trial. The prosecution merely argued that Mr. Rompilla had a significant history of felony convictions which was proper argument as an aggravating factor under Pennsylvania law. Rompilla argues that the jury did not abide by the trial court's instruction that it must not consider the possibility of parole in its deliberations. Rompilla points to the fact that subsequently, the jury requested exhibits that were docket entries relating to Rompilla's prior conviction for burglary and rape. Such a request is no evidence that the jury did not abide by the trial court's instruction since the exhibits requested would shed no light on whether or not a defendant sentenced to life imprisonment would ever have the possibility of being paroled. Also, it must be presumed that the jury followed the trial court's instructions. *Commonwealth v. Travaglia*, 541 Pa. 108, 661 A.2d 352 (1995); *Commonwealth v. Stoltzfus*, 462 Pa. 43, 337 A.2d 873 (1975). Mr. Rompilla's argument in this regard is nothing more than conjecture without any proof which would overcome the presumption that the jury followed the trial judge's instructions.

Rompilla further argues that subsequent questions by the jury supports his position. The jury asked, "was the Defendant offered any type for (sic) rehabilitation either while in prison or after his release from prison?" Again, the trial court answered that he could not give them such information. This question by the jury relates more to the issues raised by the defense witnesses during the penalty phase who complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole after his 1974 rape and burglary convictions. In fact, that was a

mitigating factor found by the jury rather than an aggravating factor.

Rompilla next argues that the trial court's instruction on the aggravating circumstance of torture was vague, overbroad, and erroneous, therefore being violative of his constitutional rights. The jury found the existence of an aggravating circumstance in that the offense was committed by the means of torture. The trial judge instructed as follows:

> The second aggravating circumstance advanced by the Commonwealth was that the offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily hiatus [sic][1], atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not – the killer is not satisfied with the killing alone.

The trial court's instruction was proper and was not unconstitutionally vague under the Pennsylvania Supreme Court holding of *Commonwealth v. Pursell*, 508 Pa. 212, 495 A.2d 183 (1985). The Pennsylvania Supreme Court has continued to uphold the constitutionality of this aggravating factor with instructions just as provided by the trial judge in this case. *Commonwealth v. Jacobs*, 536 Pa. 402, 639 A.2d 786 (1994).

---

[1] This is an obvious typographical mistake, the word "heinous" is what was actually said.

Rompilla next argues that trial counsel was ineffective in the penalty phase for failing to investigate, develop and present significant mitigating evidence relating to his childhood and the possibility of an organic brain defect. On the issue of ineffective assistance of trial counsel, the court held a hearing and received the deposition testimony of various individuals. Mr. Rompilla presented the testimony of Dr. Barry Crown, a psychologist, who testified that Mr. Rompilla has brain damage. He opined that this brain damage occurred early in Mr. Rompilla's life, perhaps in utero. Also presented was the deposition testimony of Carol L. Armstrong, Ph.D., a neuropsychologist, who concluded that Mr. Rompilla had organic brain impairment. Rompilla also submitted affidavits and testimony from his [sic] some of his siblings who testified concerning dysfunction in the family during his childhood years. Rompilla argues that trial counsel did not take reasonable steps to gain information which would have revealed these mental deficiencies and abusive childhood that may have lead [sic] a jury to impose a sentence of life imprisonment.

In order to prevail upon a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under Pennsylvania law, there is a three prong test to be used in reviewing a claim of ineffectiveness of counsel which were summarized in *Commonwealth v. Buehl,* 540 Pa. 493, 658 A.2d 771 (1995):

> First, a defendant must demonstrate that his claim is of arguable merit. In the event this threshold requirement is satisfied, a defendant must show that counsel had no reasonable basis for the act or omission in question. Finally, a defendant must establish that but for counsel's act or omission, the outcome of the proceedings would have been different.

While we believe that the first prong has been met since the defendant is entitled to have relevant information of mental infirmity presented to a jury in the penalty phase of a capital case, we find that counsel had a reasonable basis for proceeding as they did during the penalty phase.

Rompilla argues that the two experts who were hired by the defense, Dr. Robert Sadoff and Dr. Gerald Cooke did not have all the relevant information in order for them to have rendered an informed and proper opinion as to the mental status of Mr. Rompilla. Secondly, Rompilla argues that his family was not asked sufficient questions about his background which precluded the introduction of certain mitigating factors to this theory.

Rompilla's first argument is that he suffered brain damage, as opined by Drs. Crown and Armstrong, and that Drs. Cook and Sadoff did not also come to that conclusion because they were not provided with necessary information. Counsel did employ two recognized experts in the field of psychiatry and psychology, Dr. Sadoff and Dr. Cooke, respectively. These experts administered tests, evaluated Mr. Rompilla, and reported back to defense counsel that there was nothing that could be used in mitigation and that there was no organic brain damage. Instead, defense counsel was told that Mr. Rompilla was diagnosed as a sociopath and that information would not have been of benefit to Mr. Rompilla's case. While it is true that defense counsel did not secure Mr. Rompilla's records from his school days to provide to Drs. Cooke and Sadoff, it is also true that these experts did not request them.

Counsel provided Drs. Cooke and Sadoff with whatever they asked for. It is also true that those records were not entirely helpful to Mr. Rompilla's case. While they did reveal a low IQ, low IQ can simply be part of the bell curve and a learning disability is not necessarily caused by an organic defect. Moreover, nothing that trial counsel was able to glean from Mr. Rompilla prior to trial was particularly useful, nor was it consistent to what he now says was his background. We accept the testimony of trial counsel that they spoke with members of the family in a detailed manner and that what now is claimed by them in support of Mr. Rompilla's Post-Conviction Relief Act conviction was not revealed to defense counsel at time of trial.

It must also be noted that Mr. Rompilla made contradictory statements to his counsel during the course of their representation of him and none included any indication of any mental problems or alcoholic blackouts. Defense counsel was reasonable in believing that the only avenue available to them was to ask the jury to show mercy upon Mr. Rompilla, asking them to be more humane than they found Mr. Rompilla to be. Under the circumstances of this case, this strategy was not only an appropriate one, but the only one reasonably available to counsel.

Defense counsel also obtained an evaluation by Dr. Paul Gross, a well respected Lehigh Valley psychiatrist. Dr. Gross evaluated Mr. Rompilla and found nothing that would have been beneficial in the penalty phase. Given the fact that three health care professionals, all of whom were experienced forensic experts, had provided opinions to defense counsel, and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions. We also reject the testimony of Rompilla's family members who attempted

to contradict what defense counsel indicated was asked of them during numerous communications prior to the trial. In summary, we find that there was a reasonable basis for the actions taken by defense counsel during the penalty phase of this trial and find no ineffective assistance of counsel.

Rompilla next argues that he was denied due process of law by the prosecutor injecting his personal opinion that the death penalty was appropriate. We have carefully reviewed the brief summation given by the prosecutor in the penalty phase and find that his argument was not violative of our law. He did not set forth his personal opinion that the jury should sentence Mr. Rompilla to death. While Rompilla argues that the prosecutor's comment that "[i]t's not easy for me to argue the death penalty. . . . " reflected his personal opinion, we reject such argument. Under the holding of such cases as *Commonwealth v. Peoples,* 536 Pa. 326, 639 A.2d 448 (1994), *Commonwealth v. Marshall,* 534 Pa. 488, 633 A.2d 1100 (1993), and *Commonwealth v. Basemore,* 525 Pa. 512, 582 A.2d 861 (1990), the prosecutor's comments were proper. The prosecutor's comment that the death penalty was appropriate in this particular instance was also proper argument under *Commonwealth v. Meadows,* 534 Pa. 450, 633 A.2d 1081 (1993) and *Commonwealth v. Sneed,* 514 Pa. 597, 526 A.2d 749 (1987)

The prosecutor did make brief comment upon the inability of the victim's family to take the stand and communicate their feelings with regard to the death of the victim, as compared to the right of the Defendant's family to take the stand and share their feelings, we do not believe that these comments are sufficiently inappropriate to constitute prosecutorial misconduct under *Travaglia*

and *Basemore, supra.* For all of these reasons, we do not believe that there has been prosecutorial misconduct that would justify a reversal of the sentence imposed by the jury.

The next argument propounded by Rompilla is that the uncertainty whether burglary was a violent crime for the purpose of constituting a significant history of violent felony convictions which would constitute an aggravating circumstance created a violation of the petitioner's due process rights. Rompilla claims that irreconcilable rulings of the Pennsylvania Supreme Court on the issue of whether burglary is always a violent felony for the purposes of the (d) (9) aggravating circumstance constitute arbitrariness and capriciousness which is a violation of the Defendant's due process of federal constitutional rights. We disagree and believe that the Supreme Court in *Commonwealth v. Rompilla, supra,* adequately addressed this question.

Rompilla next argues that trial counsel were ineffective at the penalty phase when they failed to argue the existence of the mitigating factor that Rompilla's participation in the homicidal act was relatively minor. We disagree. Rompilla argues that there was evidence at trial that he did not act alone and that, despite his presence at the scene, someone else did the actual killing. Rompilla argues that, therefore, counsel should have argued that his role was relatively minor.

When trial counsel testified at the time of the PCRA hearing, it was persuasively elicited that, after arguing during the liability phase that Rompilla was not at the scene of the crime when the murder occurred, to change the story and argue during the penalty phase that he was

there, but did not do the actual killing, would likely make the jury angry, thereby eliminating any chance of him receiving a life sentence. That was certainly a reasonable trial tactic and, in fact, had trial counsel done what Rompilla now suggests should have been done, and the verdict still the same, Rompilla would have been justified in complaining that such inconsistent argument constituted ineffectiveness. We are convinced that trial counsel acted appropriately in this regard.

The next argument is that the trial judge erred in telling the jury that there was no evidence to support an "accomplice" theory of liability after saying that they could consider such a theory. This issue was decided by the Pennsylvania Supreme Court in *Rompilla* and therefore will not be again addressed here.

Rompilla's argument that the aggravating circumstance found of a "significant" history of felony convictions involving the use or threat of violence is unconstitutionally vague has been decided against him in numerous Pennsylvania Supreme Court cases. *See Commonwealth v. Rivers,* 537 Pa. 394, 644 A.2d 710 (1994); *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986); *Commonwealth v. Holcomb,* 508 Pa. 425, 498 A.2d 833 (1985); and *Commonwealth v. Beasley,* 504 Pa. 485, 475 A.2d 730 (1984). Moreover, the holdings in these cases are consistent with decisions of the United States Supreme Court in *Tuilaepa v. California,* ___ U.S. ___, 114 S.Ct. 2630, 129 L. Ed. 2d 750 (1994) and *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960 (1976). Therefore, we find against Rompilla on this issue as well.

Mr. Rompilla's next argument is similar to the claim made in his ineffective assistance of counsel claim. He

alleges that he was not afforded a reliable evaluation of his impaired medical health by the experts hired by his counsel. We find that Mr. Rompilla, through his counsel, was afforded the services of three respected forensic experts who had the ability to do a complete evaluation and examination of Mr. Rompilla. We further do not believe that there is any existing case law which would grant Mr. Rompilla relief based upon his allegations that his forensic experts were ineffective.

Rompilla's last argument is that certain discussions about lesser-included offenses and length of summations were held without the presence of the Defendant but, instead, between the trial judge and counsel. We do not believe that such discussions could be considered "critical" to the outcome and we find that Defendant's presence at such discussions would not contribute to the fairness of the trial. They were essentially "housekeeping" discussions that did not, and could not, affect his fair trial. We do not believe that such discussions are critical phases of the trial under *Kentucky v. Stincer,* 482 U.S. 730, 107 S. Ct. 2658 (1987), or under Pa. R.C.P. 1117 and *Commonwealth v. Ford,* 539 Pa. 85, 650 A.2d 433 (1994).

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME II, PAGES 269 TO 455

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Relevant District Court Docket Entries 1

Notes of Testimony (11/1/88, penalty-phase)..... 2

Notes of Testimony (11/2/88, penalty-phase)..... 120

Notes of Testimony (11/3/88, penalty-phase)..... 211

Pennsylvania Supreme Court direct appeal opinion, *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) 241

Court of Common Pleas post-conviction opinion 257

Volume II

Pennsylvania Supreme Court post-conviction opinion, *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998)..... 269

Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 5) 288

Commonwealth's Response to Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 9)..... 441

Volume III

Relevant District Court Exhibits (District Court docket entry 17):

Notes of Testimony (3/28/96) 456

Volume IV

Notes of Testimony (3/29/96) 653

Deposition of Dr. Barry Crown 824

TABLE OF CONTENTS – Continued

Page

Volume V

Deposition of Dr. Carol Armstrong 939

Deposition of Dr. Paul Gross 1015

Deposition of Dr. Gerald Cooke 1057

Deposition of Dr. Robert Sadoff.....1102

Deposition of Dr. Frank Dattilio.....1162

Lodging

Sacred Heart Hospital Records on Ronald Rompilla ... *L1

School Records on Ronald Rompilla..... L11

Pennsylvania Department of Corrections Records (Initial Transfer Petition and Initial Classification Summary) L31

Juvenile Court records on Ronald Rompilla L41

Juvenile Court records on Nick Rompilla L49

Police reports provided to trial counsel through discovery L111

Reports and Commutation Recommendation prepared by Dr. Kate Erwin (1995) L121

Volume VI

District Court Opinion 1280

Third Circuit Panel opinion and dissent 1325

Third Circuit *en banc* ruling and dissent 1448

* Items paginated with L numbers are bound in a separate volume.

721 A.2d 786

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Ronald ROMPILLA, Appellant.

Submitted Aug. 5, 1997.
Decided Dec. 10, 1998.
Reargument Denied Jan. 19, 1999.

Billy H. Nolas, Philadelphia, for R. Rompilla, appellant.

Michael P. McIntyre, Allentown, Robert A. Graci, Harrisburg, for the Com., appellee.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN and SAYLOR, JJ.

OPINION

NIGRO, Justice.

In this capital case, Appellant Ronald Rompilla appeals from the Order of the Lehigh County Court of Common Pleas, which denied his petition for relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. For the reasons set forth below, we affirm.

On November 1, 1988, Appellant was convicted of murdering James Scanlon on January 14, 1988 in Scanlon's bar, the Cozy Corner Cafe, in Allentown, Pennsylvania. Scanlon's son discovered his father's body lying behind the bar in a pool of blood. Scanlon had been stabbed repeatedly and set on fire. His wallet had been stolen and about $500 to $1000 had been stolen from the

bar.[1] On November 3, 1988, after a penalty hearing, the jury found three aggravating factors outweighed one mitigating factor and sentenced Appellant to death.[2] This Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Rompilla,* 539 Pa. 499, 653 A.2d 626 (1995).

Following a stay of execution, on December 5, 1995, Appellant filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. On March 28 and 29, 1996, the PCRA court held hearings on the petition. By Order dated August 21, 1996, the PCRA court denied Appellant's petition for relief. Appellant then appealed to this Court. He raises twelve claims.

Appellant first argues that his trial counsel was ineffective in the penalty phase for failing to investigate, develop and present evidence of mitigation related to his childhood upbringing, alcoholism, mental retardation, cognitive impairment and organic brain defects, which may have caused the jury to impose a life sentence. Appellant specifically maintains that counsel did not obtain records that would have aided the mental health experts who evaluated him, including school records reflecting a

[1] Appellant was convicted of murder in the first degree, 18 Pa.C.S. § 2502(a); burglary, *id.* § 3502(a); criminal trespass, *id.* § 3503(a)(1)(ii); robbery, *id.* § 3701(a)(1)(i); two counts of theft, *id.* § 3921(a); and two counts of receiving stolen property, *id.* § 3925(a).

[2] With respect to aggravating factors, the jury found that Appellant committed a killing in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6), that the offense was committed by means of torture, *id.* § 9711(d)(8), and that Appellant has a significant history of felony convictions involving the use or threat of violence, *id.* § 9711(d)(9). The jury found as a mitigating circumstance other evidence of mitigation under 42 Pa.C.S. § 9711(e)(8).

low IQ, a hospital record reflecting a fever at age two, and Department of Corrections records reflecting in part low achievement test scores and alcohol abuse. Appellant also argues that counsel failed to learn about Appellant's abusive childhood from his family.

To establish a claim of ineffective assistance of counsel under the PCRA, a defendant must show that (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for the act or omission in question; and (3) but for counsel's act or omission, the outcome of the proceedings would have been different. *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313, 323 (Pa.1997).[3] At the PCRA hearings, Appellant questioned former trial and appellate counsel about their representation and three of his siblings testified about his childhood. Appellant subsequently submitted depositions of a psychologist and neuropsychologist who evaluated him in 1995 and 1996 respectively. The parties also submitted depositions of the mental health experts who evaluated Appellant in 1988 and the deposition of a psychologist who reviewed Appellant's 1995 and 1996 evaluations.

After the hearings, the PCRA court concluded that Appellant's claim has arguable merit because Appellant was entitled to have relevant information of mental infirmity presented to the jury. However, the court found that counsel had a reasonable basis for proceeding as they did. It explained that trial counsel employed two recognized experts in the field of psychiatry and psychology who

[3] While the Court is currently considering the stringency of the prejudice requirement applicable to ineffective assistance claims under the PCRA in *Commonwealth v. Kimball,* No. 38 M.D. Appeal Dkt.1997, as shown below, this requirement is not implicated in this case.

administered tests, evaluated Appellant, and reported that there was nothing that could be used as mitigation evidence. Rather, the experts told counsel that Appellant was a sociopath. Counsel also obtained an evaluation by another psychiatrist who after evaluating Appellant, found nothing that would be beneficial in the penalty phase. Although counsel did not obtain the records identified above, the PCRA court found them not entirely helpful to Appellant and further found that counsel gave the experts whatever information they requested.

With respect to Appellant's siblings' testimony about his childhood, the PCRA court accepted trial counsel's testimony that when they questioned Appellant and his family before trial, they did not reveal the information that they now claim should have been told to the jury. The court rejected the siblings' testimony to the contrary. The court also stated that Appellant made contradictory statements to counsel during his representation and that counsel was reasonable in believing that their only avenue was to ask the jury to have mercy on him.

We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. In addition to concluding that counsel acted reasonably, we further find that Appellant's claim lacks arguable merit. As recognized by the PCRA court, trial counsel employed three experts to evaluate Appellant. N.T., 3/28/96 at 68-69, 120-21. Based upon their testing, the experts found nothing helpful to Appellant's case and diagnosed him as a sociopath. *Id.* at 122-23. The fact that Appellant now has found two experts who conclude that he has brain damage does not negate the fact that trial counsel investigated Appellant's cognitive abilities with other experts. In addition, we agree with the

PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances. *See* N.T., 3/29/96 at 27-28, 33, 38-39. Thus, Appellant's claim that trial counsel failed to investigate his mental health is without arguable merit.

With respect to the mitigation evidence brought forth by Appellant's siblings, the PCRA court accepted as credible trial counsels' testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-19, 133, 143; N.T., 3/29/96 at 111. Thus, Appellant's claim that trial counsel failed to investigate his family background also lacks arguable merit.

Related to this claim, Appellant next argues that because trial counsel failed to investigate his background, he received inadequate evaluations by mental health professionals in violation of his constitutional rights. Having found above that trial counsel did not fail to investigate, this claim similarly has no merit.

Appellant next argues that the prosecutor's penalty phase summation contained improper argument that violated his right to due process and a fair capital sentencing proceeding. We disagree. A prosecutor's comments do not constitute reversible error unless their unavoidable effect would be to prejudice the jury and form in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a true penalty determination. *Commonwealth v. Johnson,* 542 Pa. 384, 404, 668 A.2d 97, 107 (1995). At the

penalty phase, the prosecutor has more latitude in presenting argument since the presumption of innocence is no longer applicable. *Commonwealth v. Washington,* 549 Pa. 12, 700 A.2d 400, 414 (Pa.1997).

In his closing argument, the prosecutor said "[i]t's not easy for me to argue for the death penalty. . . . " N.T., 11/2/88 at 45. The prosecutor also ended his argument by stating "if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for. . . . " N.T., 11/2/88 at 53. Appellant maintains that in making these statements, the prosecutor personally vouched for the propriety of imposing the death penalty.

Appellant misconstrues the first statement. The prosecutor did not inject a personal opinion that the jury should impose the death penalty but rather stated that it is a difficult penalty to ask for. With respect to his second statement, the prosecutor argued with permissible oratorical flair that the jury should impose a death sentence. *See Commonwealth v. Jones,* 546 Pa. 161, 206, 683 A.2d 1181, 1203 (1996) (statement that "this is just the kind of case that the legislature had in mind [for the imposition of the death penalty]" found proper).

In addition, Appellant challenges the following statements by the prosecutor:

> [Defense counsel] gave you a very inspired, a very emotional speech and that is her job, there's nothing wrong with that. And what the main touchstone of that speech was mercy . . . [B]ut ask yourselves this, ladies and gentlemen of Jury. Did Ronald Rompilla show any mercy to Jimmy Scanlon, any mercy whatsoever? I submit

> to you, he did not. He did not show one bit of mercy on January 14, 1988.
>
> Did he show Jimmy Scanlon any mercy, any mercy whatsoever? I submit to you, he didn't.
>
> . . . I'm only asking you to show the same mercy to him that he showed to Jimmy Scanlon.

N.T., 11/2/88 at 47, 49, 50. This Court, however, has held that it is permissible during the penalty phase for a prosecutor to ask the jury to show the defendant the same mercy he showed the victim. *See Commonwealth v. Washington,* 549 Pa. 12, 700 A.2d 400, 415 (Pa.1997) (rejecting a similar challenge). Thus, no relief is warranted on this claim.

Appellant also argues that the prosecutor improperly stated that he killed the victim in order to eliminate any witnesses to his burglary of the bar. *See* N.T., 11/2/88 at 51-52. Appellant asserts that there is no evidence supporting this argument. The Commonwealth concedes that the argument was not strong given the facts of this case but maintains that it was fair as it related to the aggravating circumstance that the killing took place during the perpetration of a felony. We agree with the Commonwealth that whatever its purpose, the argument did not have the unavoidable effect of prejudicing the jury and forming in their minds fixed bias and hostility towards Appellant so as to prevent them from weighing the evidence and returning a true verdict.

Lastly with respect to prosecutorial misconduct, Appellant maintains that the prosecutor improperly commented upon the victim's family's inability to testify as to their feelings about the victim's death as compared to Appellant's family's ability to share their feelings with the

jury. *See* N.T., 11/2/88 at 52-53. The Court rejected a similar argument in *Commonwealth v. Jones,* 546 Pa. 161, 206, 683 A.2d 1181, 1203 (1996), where the prosecution stated that the jury did not have an opportunity to hear from the victim's family and friends, who would feel exactly the opposite of the defendant's family members. As in *Jones,* these comments served to respond to Appellant's family's testimony and the jury was able to infer the victim's family's feelings. While we do not condone the prosecutor's additional comments that the victim's son misses his father, we cannot conclude that the unavoidable effect of these comments was to arouse the jury's emotions or prejudice the jury so they could not fairly weigh the evidence.[4]

Next, Appellant claims that the trial court's instruction on the aggravating circumstance that the offense was committed by means of torture, 42 Pa.C.S. § 9711(d)(8), was unconstitutionally vague. The court's instruction was as follows:

> The second aggravat[ing] circumstance advanced by the Commonwealth was that the . . . offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily h[einous], atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not – the killer is not satisfied with the killing alone.

N.T., 11/2/88 at 55. This Court has previously found this instruction proper and has held that the aggravating circumstance that an offense was committed by means of torture is not unconstitutionally vague. In *Commonwealth v. Pursell,* 508 Pa. 212, 238-39, 495 A.2d 183, 196-97 (1985), the Court explained that this aggravating circumstance is sufficiently specific because the meaning of torture is a matter of common knowledge and an ordinary man would not have to guess what was intended. Thus, the jury will not impose the death penalty in an arbitrary manner. The trial court's instruction defining torture in this case is essentially the same as that given in *Pursell. See id.* at 239 n. 13, 495 A.2d at 197 n. 13.

Appellant appears to concede that the trial court gave an instruction defining torture that comports with *Pursell* and its progeny.[5] Nonetheless, Appellant argues that the definition employed by the court is unconstitutionally vague under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Maynard,* however, found vague an aggravating circumstance in the Oklahoma death penalty statute that provided that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at

---

[4] This claim and most of Appellant's remaining claims were not raised on direct appeal. Appellant primarily argues the merits of each claim and notes that trial and appellate counsel were ineffective in handling the issues. The PCRA court ruled on the merits of Appellant's claims. We have also addressed the merits. Since we conclude that the claims do not have merit, it is unnecessary to address the other prongs of the test applicable to ineffective assistance of counsel claims, which is set forth on page three above.

[5] *See, e.g., Commonwealth v. Wharton,* 530 Pa. 127, 607 A.2d 710 (1992) (requiring instruction that defines the term torture); *Commonwealth v. Nelson,* 514 Pa. 262, 523 A.2d 728 (1987) (same).

363-64, 108 S.Ct. 1853. The Court explained that these words alone did not guide the jury as almost every murder could be characterized as especially heinous, atrocious, or cruel. *Id. Maynard* did not involve an aggravating circumstance that an offense was committed by means of torture. In addition, the Court in *Maynard* agreed that a limiting instruction that the aggravating circumstance at issue required torture would be constitutionally acceptable. *Id.* at 364-65, 108 S.Ct. 1853. Thus, *Maynard* does not preclude defining torture as the infliction of pain that is unnecessarily heinous, atrocious or cruel, with the intent to cause pain and suffering in addition to the intent to kill. Appellant's claim is without merit.

Appellant next argues that 42 Pa.C.S. § 9711(d)(9), which sets forth as an aggravating factor that the defendant has "a significant history of felony convictions involving the use or threat of violence to the person," is unconstitutionally vague. While acknowledging that the Court has consistently rejected this argument, *see, e.g., Commonwealth v. Rivers,* 537 Pa. 394, 644 A.2d 710 (1994); *Commonwealth v. Fahy,* 512 Pa. 298, 516 A.2d 689 (1986), Appellant contends that the Court wrongly decided the issue.

Appellant maintains that in *Rivers* and *Fahy* the Court improperly relied upon *Commonwealth v. Beasley,* 504 Pa. 485, 475 A.2d 730 (1984), which held that the mitigating circumstance that a defendant has "no significant history of prior criminal convictions" is not vague. *Beasley* relied upon *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), where the defendant challenged a similar mitigating circumstance under the Florida death penalty statute. The United States Supreme Court found that the death penalty statute presented

questions that required no more line-drawing than is commonly required of a factfinder and held that the mitigating circumstance is not unconstitutionally vague. *Id.* at 257, 96 S.Ct. 2960.

In evaluating a vagueness challenge, the Court considers whether the death penalty statute adequately channels the sentencing jury's discretion so that the death penalty is not imposed on arbitrary or capricious grounds. *See Commonwealth v. Holcomb,* 508 Pa. 425, 463, 498 A.2d 833, 852-53 (1985). While *Beasley* involved a mitigating circumstance and thus did not present the identical issue that was before the Court in *Rivers* and *Fahy,* the Court looked to that decision because the statutory language challenged as vague was the same. A finding that a mitigating circumstance adequately channels the sentencing jury's discretion supports that an aggravating circumstance with the same language also passes constitutional muster. Thus, Appellant's claim is without merit.[6]

Appellant next argues that the trial court and counsel improperly discussed outside of his presence whether an instruction on voluntary manslaughter would be provided to the jury. He maintains that this discussion violated his right to be present during all critical phases of the trial. Appellant relies upon a discussion in the record that references an agreement made on an earlier date on

---

[6] Appellant also argues that three other states have found similar aggravating circumstances unconstitutionally vague. *See State v. David,* 468 So.2d 1126 (La.1984); *Gall v. Commonwealth,* 607 S.W.2d 97 (Ky.1980); *Arnold v. State,* 236 Ga. 534, 224 S.E.2d 386 (1976). This Court distinguished these decisions in *Commonwealth v. Holcomb,* 508 Pa. 425, 463-64, 498 A.2d 833, 853 (1985), and we shall not revisit this issue.

whether the instruction would be given. *See* N.T., 10/31/88 at 92. Present counsel reviewed the record for the referenced date and found no discussion of the issue. Appellant thus claims a discussion was improperly held outside of his presence.

Defendants have a constitutional right to be present in court at every stage of a criminal trial. *Commonwealth v. Ford,* 539 Pa. 85, 100-01, 650 A.2d 433, 440 (1994). This right is based in part on the defendant's right to confront his witnesses under the Sixth Amendment of the United States Constitution and Article I, § 9 of the Pennsylvania Constitution. *See id.* In addition, the Pennsylvania Rules of Criminal Procedure provide:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial including the return of the verdict.

Pa. R.Crim. P. 1117(a).

The trial court explained that its discussions with counsel essentially involved housekeeping matters and that Appellant's presence would not contribute to the fairness of the trial. Appellant does not develop his constitutional argument in his brief to this Court. We conclude that the trial court's apparent discussion with counsel about the proceedings outside of Appellant's presence did not implicate his confrontation rights and his right to be present at all stages of the trial was not violated.

Appellant next argues that the trial court erred in answering the jury's question about accomplice liability. This Court ruled on this claim on direct appeal. *See Rompilla,* 539 Pa. at 508-09, 653 A.2d at 630-31. Appellant may not obtain relief under the PCRA on a claim that has already been litigated. 42 Pa.C.S. § 9543(a)(3). While Appellant contends in a footnote that appellate counsel did not adequately pursue this claim on direct appeal, post-conviction review of a claim already litigated on appeal cannot be obtained by alleging ineffective assistance of prior counsel and presenting new theories of relief. *Commonwealth v. Peterkin,* 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994).

Appellant next argues that the trial court improperly allowed the prosecutor to read to the jury the testimony of the victim of a prior rape during the penalty phase. Appellant was convicted of rape and burglary arising from a single incident in 1974. When Appellant objected to the introduction of the testimony, the prosecutor argued in part that it was necessary to establish that the related burglary conviction was violent for purposes of the aggravating circumstance that Appellant has a significant history of felony convictions involving the use or threat of violence, 42 Pa.C.S. § 9711(d)(9). *See* N.T., 11/1/88 at 33-38. The trial court admitted the testimony. *Id.*

On direct appeal, Appellant's former counsel argued that the trial court erred in admitting the rape victim's testimony because it appealed to the passions of the jury. The Commonwealth again maintained that it was necessary to establish the aggravating factor and that reading the transcript was the most efficient way to present the facts. This Court held that the trial court did not err in allowing the testimony to be read to the jury. *Rompilla,*

539 Pa. at 512-14, 653 A.2d at 633 (1995). Relying upon *Commonwealth v. Christy,* 511 Pa. 490, 515 A.2d 832 (1986), the Court stated that the Commonwealth had to show a threat or use of violence in the commission of the burglary to establish a significant history of felonies under 42 Pa.C.S. § 9711(d)(9). *Id.*[7] The Court also concluded that by reading the transcript, the Commonwealth presented the facts in a way that minimized the inflammatory impact.

The Court has thus already decided on direct appeal that the rape victim's testimony was admissible. Nonetheless, Appellant now argues that prior counsel was ineffective for not bringing *Commonwealth v. Rolan,* 520 Pa. 1, 549 A.2d 553 (1988), to the attention of the trial court and this Court on direct appeal. Appellant maintains that under *Rolan,* it was only necessary to introduce evidence of his burglary conviction to establish a felony involving the threat or use of violence.[8]

[7] In *Christy,* the Commonwealth introduced evidence of the defendant's prior burglary conviction to establish the aggravating factor. The Commonwealth did not introduce evidence showing that the burglary involved the threat or use of violence. On appeal, the Court stated that the Commonwealth must present evidence that the defendant actually threatened or used violence to include a felony under 42 Pa.C.S. § 9711(d)(9). 511 Pa. at 507-08, 515 A.2d at 840-41. However, since the jury did not find the aggravating factor, the Court held that the error was not prejudicial. *Id.*

[8] In *Rolan,* the Commonwealth introduced evidence of the defendant's prior burglary convictions in order to establish the aggravating factor. Appellate counsel argued that trial counsel was ineffective in allowing the evidence since burglaries are not felonies involving the use or threat of violence. The Court held that burglary is a crime involving the use or threat of violence and found counsel effective. 520 Pa. at 15, 549 A.2d at 559-60. It stated that the discussion in *Christy* as to the

(Continued on following page)

As stated above, a claim that has already been litigated cannot be revisited by alleging ineffective assistance of prior counsel and presenting new theories of relief. *Commonwealth v. Peterkin,* 538 Pa. 455, 460-61, 649 A.2d 121, 123 (1994). Even if it could, Appellant's claim does not have arguable merit. Regardless of the applicability of *Rolan,* the Commonwealth was entitled to introduce facts surrounding the burglary conviction. *See Commonwealth v. Jones,* 542 Pa. 464, 523-24, 668 A.2d 491, 520 (1995); *Commonwealth v. Beasley,* 505 Pa. 279, 288, 479 A.2d 460, 465 (1984). The Commonwealth may place the underlying facts of prior convictions before the jury so that it is able to assess the weight to be given to the aggravating factor. *Jones,* 542 Pa. at 523-24, 668 A.2d at 520. Here, when Appellant's trial counsel objected to the testimony and then offered to stipulate that the burglary is a crime of violence, the Commonwealth properly argued that the jury was entitled to know the underlying facts. *See* N.T., 11/1/88 at 33-38. Thus, no relief is due on this claim.[9]

Appellant next argues that his due process rights were violated because the trial court did not answer the jury's question about his parole eligibility. During jury deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" N.T., 11/2/88 at 73. The trial court responded:

evidence necessary to establish the aggravating factor was dicta since the jury did not find the aggravating factor. *Id.* n. 5.

[9] To the extent the Court's decision on direct appeal in this case departs from *Rolan,* this Court has since affirmed the principles in *Rolan*. *See, e.g., Commonwealth v. Gibson,* 720 A.2d 473 (Pa. 1998).

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

Id. at 73-74. Appellant argues that the jurors should have been told that a life sentence means life without parole under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), which mandates such an instruction when a defendant requests it and his future dangerousness is at issue.

Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998). Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The Court rejected this argument in *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44, 47 (Pa.1998). As stated in that case, this aggravating circumstance only addresses Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due.[10]

[10] This author agrees with the dissent's position that a *Simmons* instruction should be given in all cases and has previously so stated. *See Clark,* 710 A.2d at 43-44 (Nigro, J., concurring, joined by Flaherty,
(Continued on following page)

Next, Appellant argues that the trial court erred in failing to excuse a juror for cause and that trial counsel failed to challenge him for cause. This argument was not raised in Appellant's PCRA petition or in the proceedings before the PCRA court. Thus, Appellant has waived this claim. *See Commonwealth v. Albrecht,* 720 A.2d 693 (Pa. 1998).

Appellant next argues that this case should be remanded to the Court of Common Pleas for a hearing on recently discovered claims related to alleged violations of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This issue has already been litigated. Appellant filed a remand motion in this Court on March 10, 1997 alleging the possibility of misconduct by the Federal Bureau of Investigation in the handling of evidence in this case. This Court entered an order denying the motion for remand on May 20, 1997. Appellant now summarizes his remand motion and offers no reason why this Court should reconsider its earlier ruling. No relief is due on this claim.

Lastly, Appellant argues that he is entitled to a new trial and sentencing proceeding because the prejudicial effects of the cumulative errors in this case undermine confidence in the outcome at both stages of the trial. The Court rejected a similar argument in *Commonwealth v. McGill,* 545 Pa. 180, 680 A.2d 1131 (Pa.1996). In that case, the defendant's individual claims of error failed for lack of

J. and joined in relevant part by Zappala, J.); *May,* 710 A.2d at 49 (Nigro, J., concurring, joined by Zappala, J.). Under the current state of the law, however, Appellant's argument that he was entitled to the instruction because the Commonwealth argued the aggravating circumstance identified above, is without merit. *See May,* 710 A.2d at 47.

merit. As such, there could be no prejudicial cumulative effect when there was no harm in the first place. *Id.* 680 A.2d at 1136. The same is true here.

Having found that none of Appellant's claims warrants relief, the order of the Court of Common Pleas is affirmed.

Chief Justice FLAHERTY files a Dissenting Opinion.

Justice ZAPPALA and Justice NEWMAN concur in the result.

FLAHERTY, Chief Justice, dissenting.

I believe the majority is in error in its treatment of the issue pertaining to the jury's question about the defendant's parole eligibility. Under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998), the court must tell a jury that a life sentence means life without parole, if the defendant requests the instruction and his future dangerousness is at issue. Here, during deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" I view this question as a clear expression of the jury's concern about the defendant's future dangerousness. I would therefore hold that the trial court's refusal to explain the meaning of life without parole constituted error under *Commonwealth v. Clark, supra*. I would therefore reverse the order of the court of common pleas and remand for proceedings consistent with this opinion.

I would go further and require an explanation of the meaning of a life sentence in all capital cases. There can be no harm in instructing juries that in Pennsylvania

appellant would be statutorily ineligible for parole if sentenced to life in prison, but that a life sentence might nonetheless be commuted by the governor. On the other hand, if we do not so instruct, a jury, erroneously believing that a prisoner sentenced to life may be paroled within a period of years, may impose the death penalty for reasons which are not based in law.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD ROMPILLA, Petitioner, v. MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; PHILIP L. JOHNSON, Superintendent of the State Correctional Institution at Greene, and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview, Respondents.	CIVIL ACTION No. 99-737 JUDGE BUCKWALTER

PETITION FOR A WRIT OF HABEAS CORPUS AND CONSOLIDATED PRELIMINARY MEMORANDUM OF LAW

Petitioner, Ronald Rompilla, through undersigned counsel, hereby files this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1]

* * *

[1] All emphasis herein is supplied unless otherwise indicated.

TABLE OF CONTENTS

STATE COURT PROCEEDINGS AND RELEVANT PROCEDURAL HISTORY 1

GROUNDS FOR RELIEF 2

I. TRIAL COUNSEL WERE INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT MITIGATING EVIDENCE RELATED TO PETITIONER'S TRAUMATIC CHILDHOOD, ALCOHOLISM, MENTAL RETARDATION, COGNITIVE IMPAIRMENT AND ORGANIC BRAIN DAMAGE 3

A. Introduction 3

B. Factual Background 6

1. The evidence presented by trial counsel at capital sentencing 6

2. The evidence presented post-conviction .. 6

Barbara Harris 6

Randi Rompilla 8

Nicholas (Nick) Rompilla, Jr. 13

Hospital records 15

School records 15

Court and prison records 16

Police reports 19

Commutation recommendation 20

Dr. Carol L. Armstrong 21

Dr. Barry Crown 25

Dr. Gerald R. Cooke 34

– Dr. Robert Sadoff 36
Dr. Paul K. Gross 38
Maria Dantos 43
Frederick Charles 46
Albert Nelthropp 47
Dr. Frank M. Dattilio 48

C. The Sixth Amendment Violations 53

1. Petitioner was prejudiced by counsels' failures to investigate, develop and present mitigating evidence 53

a. Mitigating evidence of petitioner's alcoholism 54

b. Mitigating evidence of Petitioner's traumatic childhood 55

c. Mental health-related mitigation 57

d. The combined mitigating effect of Petitioner's history and deficits 63

e. Rebuttal of the aggravating circumstances 63

2. Counsels' performance was deficient 65

a. Counsel failed to investigate mitigating evidence of Petitioner's alcoholism 68

b. Counsel failed to obtain medical, school, prison and court records 70

c. Counsel failed to provide background information about Petitioner to mental health experts 74

d. Counsel failed to communicate with the mental health experts 78

e. Counsel failed to reasonably investigate Petitioner's traumatic childhood. 82

f. Counsel had no tactical or strategic reasons for their failures to investigate, develop and present mitigating evidence 84

D. Conclusion 86

II. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND DEATH SENTENCE BECAUSE OF THE TRIAL COURT'S IMPROPER INSTRUCTIONS ON ACCOMPLICE LIABILITY 86

A. Factual Background 87

B. The Constitutional Violations 88

1. The trial court's response to the jury question, which allowed the jury to consider an accomplice theory of liability when no such theory had ever before been suggested, violated Petitioner's due process right to notice 89

2. Trial counsel was ineffective for failing to request a bill of particulars, which would have prohibited a first degree murder conviction based upon an accomplice liability theory 90

3. The trial court's response to the jury question allowed the jury to convict Petitioner as an accomplice to first degree murder without finding that the Commonwealth had established every element of the offense beyond a reasonable doubt 91

4. The trial court's response to the jury question unconstitutionally prevented the jury from considering and giving effect to exculpatory and mitigating evidence 93

5. The trial court's response to the jury question deprived Petitioner of his rights to a fair and reliable adjudication of guilt by requiring the jury to either convict him of a capital offense or acquit him, in violation of *Beck v. Alabama*, 447 U.S. 625 (1980) 96

C. Conclusion 97

III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE, EVEN AFTER THE JURY REPEATEDLY ASKED ABOUT PAROLE ELIGIBILITY; AND THE TRIAL COURT'S PROVISION, INSTEAD, OF INACCURATE AND MISLEADING INFORMATION, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS 98

Factual Background 99

The Constitutional Violations 111

A. The Failure to Provide a Life Without Possibility of Parole Instruction Violated Petitioner's Due Process Rights 111

1. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process protections under *Simmons v. South Carolina* 112

2. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process protections against being sentenced to death based upon inaccurate information he had no opportunity to rebut or explain concerning his supposed parole eligibility 112

3. The failure to provide a life without possibility of parole instruction violated Petitioner's due process rights by subjecting him to a sentence imposed on the basis of inaccurate information that was material to the sentencing decision 113

4. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process liberty interest in having his punishment fixed by a jury that would choose between the lawful sentencing options of "life without possibility of parole" and "death." 115

B. The Failure to Provide a Life Without Possibility of Parole Instruction Presented the Jury with a False Choice of Sentencing Options, Denied Petitioner the Heightened Procedural Safeguards Required in Capital Cases, and Produced an Arbitrary and Capricious Sentence that Violated His Rights Under the Eighth Amendment 118

C. The Failure to Provide a Life Without Possibility of Parole Instruction Prevented the Jury from Considering Relevant Mitigating Evidence of Petitioner's Parole Ineligibility and That He Did Not Pose a Significant Future Danger to Society 122

D. The Failure to Provide a Life Without Possibility of Parole Instruction Prevented the Jury from Considering and Giving Full Effect to Other Relevant Mitigating Evidence That Was Present in this Case 124

E. The Imposition of a Death Sentence by a Jury That Had Been Deprived of the Material Sentencing Information That a Life Sentence Means Life Without Possibility of Parole Offended the Evolving Standards of Decency That Underlie the Eighth Amendment 125

F. The Failure to Provide a Life Without Possibility of Parole Instruction Resulted in a Capital Sentencing Hearing in Front of a Jury Uncommonly Willing to Condemn Petitioner to Die, in Violation of His Rights to an Impartial Jury Under the Sixth Amendment 132

G. Conclusion 133

IV. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (D)(8) AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED 133

V. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(9) "SIGNIFICANT HISTORY" OF FELONY CONVICTIONS AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE; THE JURY INSTRUCTIONS DID NOT CURE THIS VAGUENESS; AND THE JURY INSTRUCTIONS, TO THE EXTENT THEY PROVIDED GUIDANCE AT ALL, DIRECTED A FINDING OF THIS AGGRAVATING CIRCUMSTANCE 141

A. The (d)(9) Aggravating Circumstance is Unconstitutionally Vague 142

B. The (D)(9) Aggravating Circumstance Is Unconstitutionally Vague as Applied 145

C. The Trial Court Improperly Directed a Finding of the (D)(9) Aggravating Circumstance 148

D. Conclusion 148

* * *

CLAIMS FOR RELIEF

I. TRIAL COUNSEL WERE INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT MITIGATING EVIDENCE RELATED TO PETITIONER'S TRAUMATIC CHILDHOOD, ALCOHOLISM, MENTAL RETARDATION, COGNITIVE IMPAIRMENT AND ORGANIC BRAIN DAMAGE.

9. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

A. Introduction.

10. The importance of mitigating evidence in capital sentencing proceedings is a fundamental tenet of the United States Supreme Court's jurisprudence. *E.g.*, *Eddings v. Oklahoma,* 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978). A constitutionally reliable capital sentencing proceeding requires that the jury render an individualized decision only after full consideration of the mitigating evidence regarding the individual defendant before them. *Gregg v. Georgia,* 428 U.S. 153, 206 (1976); *McCleskey v. Kemp,* 481 U.S. 279, 304 (1987); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976).

11. A jury cannot make the life-or-death sentencing decision in a reliable, individualized and constitutional way without knowing the actual mitigating evidence about the defendant. Thorough investigation and presentation of mitigation are therefore absolute prerequisites to constitutionally effective assistance of capital counsel. The core Eighth Amendment principle that "respect for humanity" requires consideration of mitigating information about the offender, *Lockett,* 438 U.S. at 602 (quoting *Woodson,* 428 U.S. at 304), allows for no less.

12. Here, trial counsel failed in their duty to investigate, develop and present the available mitigating evidence, and Petitioner's capital sentencing jury was not presented with the overwhelming mitigating evidence that was actually available.

13. As described below, trial counsel failed to investigate, develop and present a wealth of documentary evidence describing Ronald Rompilla's traumatic childhood and lifelong history of mental retardation, cognitive impairment, psychological problems and alcoholism. Mr.

Rompilla's medical, school, prison and court records – all predating the time of trial – show that he suffered from serious medical problems as a young child; he suffered extreme neglect at the hands of alcoholic parents; he consistently received mentally retarded scores on IQ tests; he was never able to learn; his achievement test scores were in the lowest ranks; he was placed in special education classes, where he remained until he finally left school; he was still cognitively and psychologically impaired as an adult; and he has had a lifelong struggle with alcoholism.

14. Trial counsel, however, made *no* attempt to obtain *any* school, medical, prison or court, or any other records about Petitioner and his life. These records were not obscure or difficult to find. They were readily available. Indeed, some were available in the courthouse where the trial took place and others were across the street from the courthouse. Because of counsel's inadequate investigation, however, the jury did not hear any of this mitigating evidence.

15. Counsel also failed to investigate, prepare and present mitigating evidence showing that Ronald Rompilla was raised in a frightening, emotionally and physically abusive home. Both of his parents were alcoholics. His mother drank heavily even when she was pregnant. The parents were violent toward each other, and (especially the father) toward Ronald and the other children. Ronald was beaten regularly and viciously by his father; the father also devised bizarre and humiliating punishments for Ronald; and the father isolated Ronald and his siblings from outside contact or assistance. Ronald's siblings do not recall a single happy event in the family home. Instead, Ronald's childhood was an endless stream of abuse, mistreatment and neglect. Because of counsel's inadequate

investigation, the jury did not hear any of this mitigating evidence.

16. Counsel also failed to investigate, prepare and present mitigating evidence of Petitioner's struggle with alcoholism. Following in his parents footsteps and trying the blunt the pain of abuse and neglect he suffered, Ronald Rompilla (like his brothers) became an alcoholic. He suffered from blackouts and other debilitating effects of his alcohol addiction. Because of counsel's inadequate investigation, the jury did not hear any of this mitigating evidence.

17. Counsel also failed to investigate, prepare and present mitigating evidence showing that Petitioner suffers from organic brain damage, and so suffered at the time of the offense and throughout his life. As even the Commonwealth's expert witness agreed, Petitioner's brain damage has had drastic, debilitating effects on his personality and ability to function: it impairs and undermines his judgment, reasoning, cognition, mental flexibility, impulse control, emotional lability, ability to understand and respond appropriately to his environment, ability to predict the consequences of behavior and ability to control his behavior. Because of his brain damage, especially when combined with the childhood abuse he suffered and his alcoholism, Mr. Rompilla suffered at the time of the offense from an extreme mental and emotional disturbance and was substantially impaired in his capacity to appreciate the criminality of conduct or to conform his conduct to the requirements of law. Because of counsel's inadequate investigation, the jury did not hear any of this mitigating evidence.

18. Counsels' failure to investigate, prepare and present this overwhelming mitigating evidence of childhood abuse and suffering, alcoholism, mental retardation, cognitive impairment and organic brain defect rendered the death sentencing proceedings fundamentally unfair and unreliable, in violation of the Sixth, Eighth and Fourteenth Amendments.

B. Factual Background.

19. Facts relevant to this claim include the testimony presented at the capital sentencing hearing and testimony and documentary evidence presented in post-conviction, showing that counsel ineffectively failed to investigate, develop and present substantial mitigating evidence.

1. The evidence presented by trial counsel at capital sentencing.

20. At the capital sentencing proceeding, trial counsel raced through the testimony of several of Petitioner's family members. Not one of these witnesses was asked about Petitioner's abusive and neglectful upbringing; his head injuries; his mental retardation; his inability to succeed in school or in life; his placement in special education; his chronic and debilitating life-long alcoholism; his parents' alcoholism; his mother's excessive drinking during pregnancy, etc. *See* NT 11/2/88 at 4-30.

21. Instead, these witnesses were asked about Mr. Rompilla's "helping out around the house" in the few months between the time when he was released from his last ten year jail sentence and the time of the instant offense. Counsel failed to even begin to present the background and

mental health mitigation that would have shed light on *why* Mr. Rompilla has spent all but two years in prison since the age of fifteen.

2. The evidence presented post-conviction.

22. The evidence presented in post-conviction proceedings shows the substantial mitigating evidence that effective counsel could have presented at capital sentencing.

23. **Barbara Harris** is Petitioner's sister. She is six years older than he, and is the oldest of his siblings. NT 3/29/96 at 199. Ms. Harris described the terrible problems that plagued Petitioner's family during his childhood, and the effects of those problems on Petitioner.

24. Ms. Harris explained that both of Petitioner's parents were very heavy drinkers. *Id.* at 201-02. Petitioner and his brothers also developed serious drinking problems. *Id.* at 205. Indeed, one brother (Richard) "died from drinking. He had a brain hemorrhage. He had sclerosis of the liver. His kidneys failed." *Id.* Petitioner's mother was an alcoholic who "drank from day to night" – "every day, seven days a week." *Id.* at 201, 215-16. The mother drank in the same excessive way when she was pregnant. *Id.* at 206-07, 211.

25. The parents often had violent fights in front of Petitioner and the other children. *Id.* at 207, 215-16. The father had an especially violent temper. *Id.* at 212, 215-16. Ms. Harris and her youngest brother were favored by the father, and the father did not beat her. *Id.* at 200-03. But the father and the mother often beat and abused Petitioner and the other children. *Id.* at 200-02. Petitioner was

"[h]it all the time, picked on" by the parents. *Id.* at 202-03, 217. He was beaten at least "three times a week," with hands and belts – often in the face. *Id.* at 200-01. Ms. Harris sometimes tried to intervene and stop the father from beating Petitioner, but the father "was a big man" and "he just pushed me aside." *Id.* at 210.

26. Petitioner suffered more than just physical abuse. His childhood home was also emotionally cold and abusive. The children never had adequate clothing. *Id.* at 203. Petitioner never got any praise from his parents. The parents never told him they were proud of him. Ms. Harris never once heard either parent say anything nice or affectionate to Petitioner. *Id.* at 203-04. Instead, the parents constantly "hollered at" him that he was "dumb" and "stupid" and told him that he "wouldn't amount to anything." *Id.* at 204.

27. Ms. Harris described some of the effects that this childhood had on Petitioner. Petitioner "was always a different child" who "felt lost and rejected." *Id.* at 215-16. He "cried a lot. He was quiet, kept everything inside. He was very nervous." *Id.* at 204, 207. He became "the type of person who would sit by himself and say nothing." *Id.* at 216.

28. The jury never heard any of this evidence. No one from the defense team talked to Ms. Harris at the time of trial. If someone had asked her at the time, she would have told them all of the above and would have testified. *Id.* at 209-10.

29. **Randi Rompilla** is Petitioner's sister. She is four years younger than he. NT 3/29/96 at 127. In highly emotional testimony, *see, e.g., id.* at 138, 162, she described

the abusive, violent, alcohol-soaked household in which Petitioner grew up.

30. Both parents drank heavily – "they drank until they were drunk." *Id.* at 128. The mother was an especially heavy drinker. She "always drank, always" – "that was her breakfast [and] [s]he drank till nighttime." *Id.* at 128, 141. The mother did not stop drinking even when she was pregnant. *Id.* at 141-42. Ms. Rompilla explained that her mother's severe drinking problem stemmed in part from the fact that "my dad beat her, you know, and he cheated on her." *Id.* at 128. Petitioner and his brothers acquired their parents' serious drinking problems. Petitioner's brother, Richard, died from sclerosis of the liver because of his alcoholism. *Id.* at 167.

31. The parents' relationship with each other was hateful and violent. The father frequently beat the mother. *Id.* at 128. He "was the type of man that, when he cheated on her, he'd come home and brag about it." *Id.* at 136. Knowing that her husband was seeing other women, the mother would search for the father and his girlfriend and when she would catch them she would "attack her and my father." *Id.* at 137. Ms. Rompilla especially recalled an incident in which the father "had the gall to park behind our backyard . . . with Mary, his girlfriend in the car, and [the mother] seen them there. And when he came into the house, she just picked up the knife and stabbed him." *Id.* at 128, 136.

32. Petitioner and the other children were subjected to relentless physical and emotional abuse and neglect by both parents. It was "a very abusive family." *Id.* at 128. The violence came from both parents, but especially the father. *Id.* at 127-30. The children were beaten often –

with fists, belts, leather straps and brooms. *Id.* at 127-28, 134, 144. The children's grandfather was also a frightening figure: "[G]randfather was an evil man. . . . I think that's why my dad was the way he was." *Id.* at 134. "He wasn't loving. He was cold-hearted. And that's exactly how my dad was." *Id.* The children were "afraid of" their grandfather. *Id.*

33. The father beat Ronald Rompilla often:

> He just swung with that big leather strap. He didn't care if he hit your back, your head – he didn't care.
>
> * * *
>
> I mean, he was drunk half of the time. And when he wasn't drunk, he still swung. He did not care. I mean, he just did what he wanted to do.

Id. at 144. "Ronald tried to . . . get away from the blows" but he could not escape, and "he just cried. We all cried. We cried, we screamed, and [the father] didn't care. He just did what he wanted." *Id.* at 145.

34. The father's abuse of Ronald Rompilla and was so frightening that it caused Ms. Rompilla to have nightmares – nightmares that still haunt her to this day. *Id.* at 137:

> When the boys got beaten, I used to climb the walls and just scream get me out of here. And to this day I do have the same nightmares, and my husband has to hold me down until it subsides, because I'll never forget it.

Id. at 130.

35. The father also devised bizarre punishments for Petitioner and his brothers. For example, Ronald and his brother Richard were locked by the father in a "dog pen." *Id.* at 128. The dog pen in which Petitioner was caged

> was like a wire mesh. . . . [The father] would lock Richard and Ronald in it, and then he'd just go back in the house. And you couldn't stand in it. You had to be hunched in it. . . . [T]hey were like hunched over or kneeling until my dad left them out.

Id. at 132.

36. The pen was filled with dog excrement – "it was filthy." *Id.* The boys sat silently while locked in the dog pen because they feared their father – "you had to follow my dad's rules. If you didn't follow – you couldn't go up against my dad." *Id.* at 133.

37. The father's treatment of Ronald and the other children was disturbing in many other ways. The children were isolated from other people. They were not allowed to visit other children or bring other children to their house. "When you came home from school, you stayed in or you were allowed in the backyard. You couldn't bring your friends and that." *Id.* at 144.

> We couldn't have friends come in. . . . It was school, come home, and nothing else. There was no phone calls. If anybody called us up, it was "Hang up." We couldn't go to, you know, games, school games or anything. There was just no outside connection with anybody.

Id. at 131.

38. The violence and isolation suffered by the children were accompanied by constant surveillance from the father:

> [M]y dad wouldn't give us a bedroom door. He told his brother Rudy to take all the doors off, that we didn't need any doors. And he made Ronald sleep up in the attic. And there was no heat up there. But that was his bedroom. And then if we had to change or something, we'd just like go behind the dresser. Because my dad didn't want to give us any privacy.
>
> * * *
>
> He didn't want us to have any privacy. . . . [H]e just wanted to watch us. He'd go in our drawers. I mean, he was a strange father. He didn't even have a bedroom door on his bedroom. I mean, we could walk by. He was lying there. He didn't care.

Id. at 135.

39. The parents would not buy clothes or school supplies for Ronald and the other children. *Id.* at 127, 139. Instead, the father would give what little money he had to his girlfriend's children – "instead of us getting the money for the clothes and what we needed for school supplies, he would give it to her kids." *Id.* at 136. The Rompilla children were humiliated by "going to school knowing that [they were] beaten at home and then go to school the next day and look at kids with nice clothes," when they were dressed in "rags." *Id.* at 137.

40. The father would even take money from the children, and if they would not give it up he would beat them. *Id.* at 139. "He wanted all the money, and he would spend it the way he [wanted] – like on his gambling. He

played cards heavily. He drank. He spent it on Mary [his girlfriend]. . . . [W]e were deprived." *Id.* at 139-40. The children "didn't have no parties, no birthdays." *Id.* at 128. The parents "didn't take [Ronald and his brothers] fishing, baseball games, nothing." *Id.* at 131. Ms. Rompilla "couldn't even tell you an event, like we all went out as a family and we enjoyed ourselves." *Id.* at 143.

41. The children's physical deprivation, isolation and abuse was combined with traumatic emotional and psychological mistreatment. The parents never helped Ronald or his siblings with their school problems. NT 3/29/96 at 143. They

> didn't put no money in the bank and say, "When you grow up, you can go to college." No. You were stupid, and you weren't going to be anything. And over the years [the father] said that to the boys over and over again. Then he used to take me and Ronnie and circle Camp Hill [prison] and tell Ronald, "If you don't behave, this is where I'm putting you." And so over the years when he took us, how could – how could he grow up to be anything like for a father to be proud of when that's all my dad was was abusive with kids? He didn't love us. It was like all threats and beatings. We just didn't have a chance, and we had nobody to really go to. And that's how it was, really, in our life.

Id. at 140.

42. The father's verbal abuse and belittlement were constant – "he was always saying" vicious, hurtful and frightening things. *Id.* at 143. Ms. Rompilla could not recall a single nice thing ever said to her or her siblings by the parents. Instead, all the parents ever told the children

was that "We were stupid. We'll never amount to nothing." *Id.* at 130. "We were there just to watch them drink and abuse us." *Id.* at 143.

43. Ronald Rompilla grew up in a family where "[w]e weren't loved," *id.* at 127, and from which there was no escape or help:

> There was no love in our family. None. You didn't get a hug. You didn't get "good night." You didn't get a "happy birthday." You got nothing. You just had to do what he [the father] said. And if you didn't do it, you got beaten. And my mom over the years drinking, and she was abused by my dad, she just – we were deprived of a mother. We weren't loved. . . . And we were deprived. We didn't get any counseling. We didn't get any help. . . . [W]hen we went to school and they said that there was something wrong, we should have, you know, someone talk to us because we went to school being abused, my dad would lie and say, "Nothing happened. Nothing's wrong."

Id. at 129-30.

44. Ronald Rompilla was

> brought up with no love, no nothing. He was always in trouble because of my father. He was beaten. He wasn't loved. He got nothing. And if he wanted something, "No, you're not getting it."

Id. at 156. "We were abused kids. We were beaten. We had no love. That is true." *Id.* at 161.

45. The jury never heard this compelling evidence of Petitioner's deprived, neglectful, abusive childhood. No one on the trial defense team ever approached Ms. Rompilla, asked her to testify, or asked her about Petitioner's

childhood. *Id.* at 142, 156-57. She attended the trial, would have testified if asked, and would have told the jury the above information about Petitioner's life. *Id.* at 142-43, 159.

46. **Nicholas (Nick) Rompilla, Jr.** is Petitioner's older brother. NT 3/29/96 at 169. Like his siblings, Nick Rompilla described the violent, neglectful and emotionally cold home in which Petitioner lived as a child.

47. The father drank "every day," and drank to intoxication "like four times a week." *Id.* at 170. The mother also "drank every day" – "she would start in the morning, and she wouldn't finish till she went to bed. And that's seven days a week." *Id.* at 171. The mother never slowed in her drinking, even when she was pregnant with Petitioner and the other children. *Id.* at 172. When she was pregnant:

> She drank to the day that she went to the hospital. She would drink when she knew she was going – when she was going to deliver. My dad wasn't around. She would drink . . . and then she would walk to the hospital . . . , and she would deliver the kid, the baby.
>
> * * *
>
> She drank every day. Every day. She never stopped.

Id. at 171.

48. The family was very poor and lived in a house with no indoor plumbing. *Id.* at 178. The children "didn't have nothing. We were on our own." *Id.* at 178. The father "was abusive" to his wife and the children. *Id.* at 170. The parents fought violently and often: "He would punch her. She would have black eyes. She'd be bruised." *Id.* at 180. The father hit the children with his hand, his fist, "with a

belt, broom, stick." *Id.* at 172. He hit the children "[w]herever his hand reached" including on the head. *Id.* at 180, 184. The children were beaten regularly – several times a week, beginning from "when they was just babies." *Id.* at 183, 197. And "when he hit, he hit you hard. You felt it. You flew." *Id.* at 195. Nick Rompilla recalled more than one time when the father hit him so hard it knocked him out. *Id.* at 194.

49. The parents never showed any affection or approval to the children. *Id.* at 177. The father

> was always putting us down. You know, if you didn't do something right, he would call you a nitwit, whack you across the head. "You'll never learn. You'll be stupid." He done that for years. Even if I would go over there today and talk to him, he says, "You're still stupid." That's the way he was.

Id. at 176. The father "didn't do anything for the family. He didn't take us nowhere. He didn't do nothing. We were just there." *Id.* at 177. Nick Rompilla could not recall any happy occasions in the household. *Id.*

50. Nick Rompilla described how the horrors of the household affected the children's lives:

> [L]ook at my life. I did almost eleven and a half years [in jail], you know. The only reason I got away from the situation was I found it better to go to jail. And that's exactly what I did. I didn't have to be with the family. I didn't have to see this. It got to the point where I told my dad I'd kill him, if you want to know. . . . I said, "I should have killed you years ago, because you brought the family nothing but misery." I mean, he's my father. I hate to talk like this. But, look, I went

through it. A lot of them went through it. My family.

Id. at 191.

51. The abuse and neglect clearly affected Petitioner – he was "[q]uiet, drawn back" as a child. *Id.* at 178. He drank excessively before he went to jail in the 1970's. *Id.* at 181. Petitioner lived with Nick Rompilla when he got out of jail in 1987, and he resumed his excessive drinking again about a month after he got out. *Id.*

52. The jury never heard this evidence about Petitioner's background. Nick Rompilla testified at Petitioner's trial, but "nobody ever asked" him about the family background. *Id.* at 182. When the lawyers discussed his testimony with him, "[t]he only thing was just about the three months he was out [before being arrested]. They didn't ask anything about childhood or anything like that." *Id.* at 183. He "wasn't asked these questions" about the family and Petitioner's background – "It was just during the three months that he was out. That was it. The three months he was out, that's all he asked about." *Id.* at 182, 187-89. The trial lawyers never asked about being hit by the parents; the parents' drinking; the parents' fighting, etc. *Id.* at 197-98. Nick did not discuss these matters with the attorneys because "[t]hey never asked." *Id.* at 191.

53. Petitioner's **hospital records** (Exhibit 10), which resulted from his hospitalization in Sacred Heart Hospital at age two, show that when Petitioner was two years old he was hospitalized for "Diarrhea due to undetermined cause" and a fever that exceeded 105 °F.

54. Trial counsel did not obtain or make use of these records.

55. Petitioner's **school records** (Exhibit 11) were obtained by post-conviction counsel from the Board of Education, which is located across the street from the Court of Common Pleas courthouse. Although these records were not voluminous, they include test results indicating that Petitioner's IQ scores were consistently in the mentally retarded or borderline mentally retarded range, as well as several other indications of cognitive deficits and family dysfunction.

56. The IQ test dates[2] and scores include:

- September 1954: IQ in the 60's
- April 1957: WISC[3] IQ=75
- October 1959: WISC Verbal IQ=61, Performance IQ=75, Full Scale IQ=64
- December 1961: WISC Verbal IQ=69, Performance IQ=75, Full Scale IQ=69

57. These IQ scores are all in the *mentally retarded* (69 and below) or *borderline mentally retarded* (70-79) ranges.

58. The school records also show that Petitioner was placed in special education classes starting in the fourth grade, where he remained until he left school in ninth grade. Achievement test scores in the school records show that Petitioner's abilities never progressed beyond the third grade level throughout his schooling.

---

[2] Petitioner was born in 1948.

[3] The "WISC" is the "Wechsler Intelligence Scale for Children," a standardized, reliable and widely used measure of intelligence in children.

59. The school records also indicate that school officials could obtain "no cooperation" from Petitioner's father.

60. Trial counsel did not obtain or make use of these records.

61. **Court and prison records** relating to Petitioner (and pre-dating the offense and trial) were obtained by post-conviction counsel. These records contain significant background information about Petitioner, including evidence of his cognitive dysfunction, psychological disturbance, alcoholism and dysfunctional childhood home.

62. The Court of Common Pleas file from Petitioner's prior rape/burglary conviction, which is maintained in the Clerk's office at the Lehigh County Courthouse and was so maintained at the time of the trial and sentencing hearing, *see* NT 3/28/96 at 206, includes a 1976 "Initial Transfer Petition and Initial Classification Summary" (Exhibit 12), prepared by the Pennsylvania Department of Corrections ("DOC").

63. These DOC records contain very low Wide Range Achievement Test ("WRAT")[4] scores that are consistent with the very low scores in Petitioner's school records, and show that Petitioner still had not progressed beyond the third grade level in spelling and arithmetic, putting him below approximately 97% of the population in these areas. These DOC records also contain scores from a Minnesota Multi-Phasic Personality Inventory ("MMPI") test administered to

[4] The WRAT is a standardized, reliable and widely used measure of achievement.

Petitioner in 1976.[5] As described in more detail below, these MMPI scores are abnormal and psychologically significant, and show highly elevated scores on the schizophrenia and other scales.

64. These DOC records also indicate that Petitioner had a history of "over-indulgence in alcoholic beverages"; that he needed "counseling pertaining to his long standing abuse of alcohol"; and that he was the "6th of nine children raised in the slum environment of Allentown, Pa. vicinity."

65. These DOC records also refer to Petitioner's Juvenile Court history (Exhibit 13), which contains further significant information. For example, a Juvenile Court "summary" prepared on November 27, 1964 (when Petitioner was sixteen years old) describes some of the dysfunctional conditions in Petitioner's childhood home:

> In 1945 the City Health Department . . . became interested in this family. . . . Following this, the Probation Office was alerted of *neglected children*. . . . September 6, 1945 the *mother was picked up by the police in a drunken condition* at which time the Probation Office was obliged to enter into the home and family; the children were placed in a hospital and the home of relatives at that time. . . . [After 1946,] [*o*]*ver a period of years the mother was missing from home frequently for a period of one or several weeks at a time*; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. . . . She has been reported over a period of years to be

[5] The MMPI is a standardized test that is widely used by mental health professionals.

frequently under the influence of alcoholic beverages, with the result that *the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.*

66. The Juvenile Court file also contains an "Informative Report" from the Allentown School District, dated November 20, 1964, noting that Petitioner's IQ score was 69;[6] and stating that "Ronald is easily influenced by others into different events, no matter if it is bad or good."

67. Moreover, Petitioner's "Juvenile Case History" notes that other relevant information about his family history is contained in the Juvenile Court records of Petitioner's brother, Nicholas Rompilla, Jr. These records (Exhibit 14) are also revealing.

68. A letter from Raven H. Ziegler, Chief Probation Officer, to Windell W. Powell, Superintendent of the Glenn Mills School, dated April 6, 1957, when Petitioner was nine years old, states: "I regret to say that *the home conditions in this [Rompilla] family group have not changed.* The mother *still is neglecting her children with filth and lack of supervision existing at all times.*" A Probation Department "summary" from October 7 of that same year notes that the Rompilla children had been reported to be "neglected"; that the mother had been "picked up by the police in a drunken condition"; that, because of the neglect and the mother's drunkenness, the children were removed from the home and "placed in a hospital and homes of relatives"; that "the mother was frequently missing from

[6] As stated above, the school records indicate that Petitioner's full scale WISC IQ was measured to be 69 in December 1961.

the home for weeks at a time" and that "[t]he children at all times have been poorly kept, always on the filthy side, as well as the mother; the house always showed signs of neglect."

69. A Department of Corrections "Classification Summary," dated May 13, 1960, when Petitioner was twelve years old, notes that in the Rompilla family, the "father-son relationships were weak"; the mother was an "alcoholic" with "a history of drinking" who was "often off with other men" and away from "home [for] weeks at a time"; there were "poor home conditions" and "an unstable home situation"; there was "[n]eglect of children"; and the "children were always dirty."

70. Trial counsel did not obtain or make use of any of these records.

71. **Police reports** (Exhibit 15), provided to trial counsel in discovery, reflect Petitioner's alcoholism and his heavy drinking on the night of the offense:

- When Petitioner was arrested for this offense, his "Parole Officer was with us [the police]. At this time he told Ronald Rompilla that he was being violated and sent back to jail because of *his drinking bout all night*";
- A witness reports that she met Petitioner "at Candida's bar" at 4:00 p.m. on January 15, 1988, and:
  - "he *bought rounds of drinks* for everybody, about two or three rounds";

- they then "went to the Franklin Fire Company, *he bought a couple rounds of drinks* for everybody there,"
- they then "went to the Madison Inn and *he bought some rounds of drinks* there, about two rounds of drinks for everybody";
- Petitioner stated that he had "spent over five hundred dollars today on drinks."

Allentown Police Bureau Investigative Report, 15-JAN-88, sheet 6, 7;

- a witness reports that on January 13, 1988 "sometime in the early afternoon he was with Ronald Rompilla ... at the Linden Hotel and that *they were consuming alcoholic beverages*";
- "sometime in the afternoon ... they left the Linden Hotel and proceeded to Hondo's Bar ... and that they remained there *again drinking alcoholic beverages*";
- "he then describes his intoxication and *Mr. Rompilla's intoxication as both being drunk*";
- "He described *Mr. Rompilla's intoxication as more severe than his*";
- "*Mr. Rompilla as he describes passed out on the floor*"
- motel employees "state that *Mr. Rompilla seemed drunk or high* at the time

he signed in in the early morning hours of the 14th of January, 1988"

Allentown Police Bureau Investigative Report, 16-JAN-88, sheet 2, 3;

- Petitioner "arrived approx 5 AM on 1-14-88 and checked in [to motel] ... *he was not very coherent and could not find it [the room] on his own*"

George Washington Lodge Incident Report (1/15/88, 2:30 a.m.).

72. Counsel did not investigate or present any evidence of Petitioner's alcoholism or drinking at the time of the offense.

73. **A commutation recommendation** (Exhibit 16) was prepared in 1995 by Dr. Kate Erwin, Chief Psychiatrist for the Pennsylvania Department of Corrections at the State Correctional Institution-Pittsburgh.[7] After seeing and evaluating Petitioner in 1995, Dr. Erwin recommended that his death sentence be *commuted*. Dr. Erwin's commutation report states:

> Mr. Rompilla is a 47 year old white serving an execution sentence for which he has been incarcerated since 1988. He apparently was drinking which is typical of him when he [sic] out of prison and during a blackout murdered someone. He also committed a rape for which he was sentenced some time ago under the same circumstances. He has a very significant alcohol

[7] Dr. Erwin's reports were admitted for both their facts and their opinions. NT 3/28/96 at 4.

problem which includes frequent blackouts. It is apparently is during these blackouts that he has committed his crime. . . . He has been in institutions since age 15, and reports that he had been out of prison for only approximately two years since that time. . . .

DIAGNOSIS: Axis I: Alcohol dependence in remission due to incarceration

* * *

RECOMMENDATIONS: Commutation is recommended

July 3, 1995 Report by Kate Erwin, M.D.

74. A March 24, 1995 Annual Psychiatric Report from Dr. Erwin notes:

- "whenever he gets out of prison he drinks very heavily and has frequent blackouts"
- "dropped out of school after 9th grade and started drinking heavily that summer"
- mother "herself did drink a fair amount at home"
- "borderline intelligence (WAIS=79)"

75. **Dr. Carol L. Armstrong** is a psychologist and neuropsychologist. Deposition of Carol Armstrong, Ph.D., at 3 (April 2, 1996). She is an Assistant Professor in the Department of Neurology at the Hospital of the University of Pennsylvania. She evaluated Petitioner on March 5, 1996, when she spent about five hours with him, administered a battery of neuropsychological tests, interviewed

him, and, reached conclusions to reasonable degree of psychological and neuropsychological certainty. *Id.* at 9-10.

76. Dr. Armstrong described the tests she administered and the results of her neuropsychological testing and evaluation. *See Id.* at 10, *et seq.* It is "very clear" from the testing that Petitioner suffers from *organic brain damage. Id.* at 26-27, 38, 39. Petitioner's brain damage includes parietal area dysfunction, *Id.* at 13, and frontal lobe dysfunction, *Id.* at 13, 23, 26, and causes numerous significant and severe impairments in his emotional, psychological and cognitive functioning.

77. Dr. Armstrong also explained that Petitioner was not malingering or trying to appear impaired. The test results are *not* the "product of poor motivation. He's very motivated." They are *not* "the product of faking of any kind. They are *not* the product of poor education." *Id.* at 38-39. *See also Id.* at 29-30 (no evidence that Petitioner was malingering or falsifying in any way; validity control tests shows he was trying his best); *Id.* at 76 ("the performances I got from him were the best he was capable of. That means he was not faking."); *Id.* at 80 (Petitioner was trying hard and was pleased when he did well).

78. As a result of his brain damage, Petitioner suffers from numerous debilitating impairments. He suffers from severe cognitive impairments. *E.g., Id.* at 35. This is consistent with all the records pre-dating the trial, including the school records and the psychological testing reflected by the prior court and DOC records. *E.g., Id.* at 44, 47-49.

79. "Cognitive abilities are very important for all components of a person's life; their social behaviors, their family behaviors, certainly their emotional behaviors,

their work behaviors, even their recreational behaviors." *Id.* at 37-38. In an unimpaired individual, the primitive, emotional part of the brain is controlled by "a more advanced part of the brain" which contains "monitoring, reasoning capacities." Unimpaired people "use our cognitive abilities to control and monitor and mediate that emotion." *Id.* at 37. In Petitioner's case, however, these cognitive, emotion-controlling, abilities are significantly impaired by his organic brain damage.

80. Petitioner's brain damage impairs "his ability to control, to guide his behavior." *Id.* at 85. His "cognitive impairments . . . cause him to act without thinking." *Id.* at 85. His reasoning ability is "severely impaired." *Id.* at 33. He cannot "respond appropriately to the environment and . . . think something through in just a reasonable fashion." *Id.* at 31. He is "unable to maintain mental set" – i.e., he cannot keep a train of thought. *Id.* at 34. "He has a big problem with distracters" – "his thoughts are constantly being interrupted and he's not able . . . to follow a train of thought which is necessary to solve problems." *Id.* His deficits adversely affect and impair his judgment "because he would be making judgments with basically invalid information." *Id.* His deficits adversely affect and impair his ability to measure future consequences of his behavior – "He's unable to make a plan" and is not "able to think of all the implications of an action." *Id.* at 35. His behavior is governed by "what's immediately in front of you and not in terms of consequences." *Id.* at 36. His deficits cause him to be emotionally labile and have "impulse control problems." *Id.* at 36-37.

81. Dr. Armstrong's evaluation and testing show that Petitioner suffered from this brain damage and these impairments throughout his life and at the time of the

offense. *Id.* at 27-29, 39-40. His brain damage dates back "at least to childhood," and quite possibly was pre-natal in origin. *Id.* at 28, 40, 44. As a result of his organic brain damage, at the time of the offense Petitioner suffered from an extreme mental and emotional disturbance, and his capacity to appreciate criminality of conduct or conform his conduct to requirements of law was substantially impaired. *Id.* at 40.

82. Dr. Armstrong also discussed the significance of Petitioner's school, hospital and prison/court records and his abusive, neglectful and alcoholic family background. This "collateral" background information (i.e., information from sources other than Petitioner), none of which was obtained or provided to mental health experts by trial counsel, provides numerous "red flags" indicating the need for brain damage testing and supports the testing results and the conclusion that Petitioner's organic brain damage is longstanding and dates back, at least, to early childhood. *Id.* at 53-55.

83. Petitioner's school records, *see supra,* are significant. His IQ scores, which were consistently in the mentally retarded range, *Id.* at 41-42; his achievement test scores, which were "very significantly below what he should have achieved at that time," *Id.*; and his placement in special education, *Id.* at 44-45, are all warning signs for the presence of organic brain damage, support Dr. Armstrong's test findings of brain damage, and indicate that the deficits revealed by Dr. Armstrong's testing were present from childhood or even in utero, *Id.* at 44, 79.

84. The WRAT and MMPI test scores in Petitioner's court and DOC records, *see supra,* are also significant. The DOC test results are consistent with Dr. Armstrong's test

scores, and the "overall picture" created by these scores is of "learning disability or retardation." *Id.* at 47. These scores in the DOC records, like the school records, "raise red flags" for organic brain damage and learning disability, "red flags" that would demand further exploration by mental health professional. *Id.* at 48.

85. The medical records showing that Petitioner suffered from diarrhea and a fever of over 105 degrees when he was two years old, *see supra,* are also significant, and are consistent with the type of physical trauma that can cause brain damage in the developing child. *Id.* at 48-49.

86. The descriptions of the neglectful, abusive and alcoholic home in which Petitioner was born and raised, *see supra,* are also clinically significant. Such collateral information about Petitioner's background is especially important because Petitioner remembers very little about his childhood, except that he was always called a "dummy." *Id.* at 27. The mother's "drinking during pregnancy is very dangerous to the fetus," "[o]ften causes mental retardation," and is consistent with the conclusion that Petitioner had brain damage from birth. *Id.* at 43-45, 50. The violence Petitioner suffered as a child is also consistent with and a warning sign for brain damage, since such abuse is "a potential origin for the organicity." *Id.* at 51. Indeed, childhood blows to the head "cause a very high rate of brain injury." *Id.* at 50-51.[8] Even apart from the organic damage that abuse causes, "[t]hat kind of

[8] Petitioner has "had a few times that he's had serious blows to the head." Armstrong Deposition at 51. One significant incident occurred when he was twelve years old, was hit with a large rock thrown from a cliff, and lost consciousness. *Id.* at 51-52.

behavior toward a child permanently injures their concept of themselves and permanently detracts from their ability to resolve problems in the future and leads to . . . depression." *Id.* at 51.

87. Petitioner's own alcoholism is also significant. He began drinking at age fifteen, and by age seventeen he was binge drinking and passing out. *Id.* at 55. Some of his deficits are "consistent with brain injury due to alcohol," and alcohol exacerbates the deficits caused by his pre-existing organic brain damage. *Id.* at 57.

88. Dr. Armstrong explained that the neuropsychological testing and evaluation she performed was widely available and used at the time of Petitioner's trial and capital sentencing proceedings. *Id.* at 31, 66. The jury, however, did not hear any of this evidence, because counsel did not obtain the school, hospital, court and prison records that were "red flags" for Petitioner's organic brain damage and did not request brain damage (neuropsychological) testing be done in order to develop mental health mitigating evidence.

89. **Dr. Barry Crown** is a psychologist and neuropsychologist and a specialist in evaluating child abuse and its effects. Deposition of Barry Crown, Ph.D., at 3, 4, 6, 65 (April 2, 1996). He has testified for prosecution and defense in numerous criminal cases, and has been appointed as a court expert, in state and federal court. *Id.* at 5, 131. At the request of post-conviction counsel, Dr. Crown met with and interviewed Petitioner and administered to him a battery of neuropsychological tests. *Id.* at 12, 15, 70-71. He also reviewed Petitioner's school, medical, and prior court records; DOC mental health and medical records;

trial testimony and documents; information from Petitioner's family and numerous other documents. *Id.* at 7-8.

90. Dr. Crown's testing and evaluation show that Petitioner suffers, and suffered at the time of the offense, from organic brain damage. Dr. Crown's testing shows that the frontal lobes of Petitioner's brain are damaged. *Id.* at 23. "The frontal lobes of the brain are where executive functions are organized and monitored"; they are "the site of reasoning and judgment and conceptual flexibility." *Id.* at 23-24. Thus, there is physical damage to those parts of Petitioner's brain "that control our generalized behavior; our reasoning, our judgment, our attempts to make sense out of the things around us, our ability to accept the long-term consequences of immediate behavior and also to monitor and assess our own conduct." *Id.* at 24. Because of his brain damage, Petitioner is significantly impaired in these important areas. *Id.*

91. Dr. Crown explained that "there are no indications of malingering or faking" on the testing, and "[t]he research literature indicates that even a Ph.D. trained psychologist cannot successfully fake a battery of neuropsychological tests." *Id.* at 30.

92. Petitioner's brain damage is "bilateral" – i.e., it "not only impinges on the dominant left language based hemisphere [of the brain] but also on the nondominant, nonlanguage based hemisphere." *Id.* at 21. "When there's a bilateral problem it means that both verbal and nonverbal information is having difficulty being transferred between the two hemispheres." *Id.* at 22. This damage thus "short circuits the [reasoning] process because he is unable to logically move through the sequences necessary to arrive at a reasoned response, so instead is most likely to exhibit

impulsive behavior and impulsive responsiveness." *Id.* at 22-23. Because Petitioner cannot process information properly, his brain damage also causes him to "engage in confabulation, which is the nonvoluntary filling in of missing information in order to arrive at something that makes sense to the person." *Id.* at 23.

93. Petitioner's brain damage has drastic, debilitating effects on his personality and ability to function. His brain damage impairs and undermines his judgment, reasoning, cognition, mental flexibility, impulse control, emotional lability, ability to understand and respond appropriately to his environment, ability to predict the consequences of behavior and ability to control his behavior. *Id.* at 12-14, 62. "[H]e has a great deal of difficulty figuring things out, making sense out of experience." *Id.* at 19. "[B]ecause of not having the ability to think things through, to reason," and because his brain "can't store information and then be able to retrieve it in a logical and consistent manner," he is "very likely to reach faulty conclusions, very likely to be pressured by others to reach conclusions and very likely to act impulsively." *Id.* at 19-20, 26-27. Petitioner is also learning disabled as a result of his brain damage. *Id.* at 31.

94. Dr. Crown explained that the problems caused by Petitioner's brain damage were especially debilitating because they were combined with other misfortunes, including his dysfunctional childhood and family background, alcoholism and related stress.

95. Petitioner was an abused and neglected child. This exacerbated the adverse impact of his organic brain deficits, "because there would be psychologically no trust, no acceptance, and difficulties with interpersonal interactions."

Id. at 53, 61. Petitioner's alcoholism also combined with his brain damage in a destructive way, because "alcohol [use] exacerbates the problems and the impairments" associated with brain damage – including impulsivity, lack of judgment and inability to judge future consequences. *Id.* at 52. Brain damage impairments are also exacerbated by stress, and Petitioner was under a great deal of stress at the time of the offense because he was trying to adjust to "outside" life after fourteen years in prison. *Id.* at 52-53. "[B]eing re-exposed to . . . the real world, rather than the limits of the confined world, takes a great deal of adjustment" for anyone. *Id.* at 53. It is especially stressful for a brain-damaged individual such as Petitioner, since he has "a great deal of difficulty figuring things out" and adjusting to new, changing and unstructured situations. *Id.*

96. In short, Petitioner's brain damage significantly impaired him and gave him very "limited reserve," "very little to fall back on." *Id.* at 12-13. When the deficits caused by his brain damage were combined with his alcoholism, his recent release from jail, and his dysfunctional childhood, they created a "snowballing effect, and as one stressor was placed on another, even any limited reserve would very rapidly diminish." *Id.* at 54.

97. Dr. Crown explained that his testing and evaluation of Petitioner, the nature of Petitioner's impairments, and Petitioner's history, show that Petitioner suffered from brain damage and its effects throughout his adult life. His brain damage dates back at least to childhood and quite possibly occurred in utero. *Id.* at 51, 60-61. Because of his brain damage and its effects, Petitioner suffered at the time of the offense from an extreme mental and emotional disturbance and was substantially impaired in his capacity to appreciate the criminality of conduct or to

conform his conduct to the requirements of law. *Id.* at 61-63, 132-33.

98. Dr. Crown also explained why the collateral background information from Petitioner's hospital, school, court and prison records and from his family members is significant to a mental health professional. This information, none of which was obtained by trial counsel or provided to the mental health experts who saw Petitioner at the time of trial, provides numerous signs of organic brain damage, supports Dr. Crown's testing results and is consistent with the conclusion that Petitioner's organic brain damage has plagued him throughout his life.

99. The IQ scores in Petitioner's records show "a great deal of consistency" and "place him within the bounds of mental retardation" *Id.* at 32. The possible causes of such low IQ scores include: "genetics, perinatal problems, neonatal problems, neural development problems, external trauma, exposure to disease entities, nutritional deficits at an early age," and an abusive or dysfunctional family life. *Id.* at 35-36. Thus, these low scores are "red flags" showing that further mental health evaluation needed to be done, including testing "for an organic impairment." *Id.* at 59.

100. Petitioner's placement in special education classes is also significant, especially because

> he was placed in special education beginning at what must have been the fourth grade level. In terms of brain development, that's the time of the secondary development of the frontal lobe.

> So he was exhibiting . . . the precursors to frontal lobe deficits even by school measures at that time, which would have been [19]57, [19]58.

Id. at 38.

101. In addition to their significance as signs of organic brain dysfunction, the low IQ scores and special education assignment are also psychologically significant "because the child is clearly identified as being different," thus impairing his self-esteem. *Id.* at 58.

102. Dr. Crown explained that Petitioner's abusive and dysfunctional childhood environment are also psychologically and neuropsychologically significant. Petitioner was subjected to both physical and emotional abuse. Such a traumatic childhood environment has long-term adverse effects:

> The most salient effect that it [child abuse and neglect] has is the introduction of mistrust, the loss of trust, . . . faulty construction, conceptualization of what life is like.
>
> * * *
>
> [T]here is no self-esteem. Self-esteem is eliminated along with trust, and there's also a general feeling of hopelessness in the situation, in that there will be no change. There's both hopelessness and helplessness.
>
> * * *
>
> Having been exposed to a faulty world with faulty expectations and having been abused in situations where others would not have, that creates a faulty image of what life is supposed to be like.

> As a result, when challenged by things that don't fit into that simple mold, impulsive behavior is likely.

Id. at 55-56.

103. An abused child becomes impaired in his ability to understand cause and effect "because the rules are not always consistent." *Id.* at 58. The abuse makes him impulsive because he never learns how he is supposed to behave, and there is no way for him to predict which behaviors will be punished and which will bring rewards. *Id.* at 59.

104. The verbal and emotional abuse that Petitioner suffered, such as always being called "dummy" and being put down by his father, is also

> significant because it addresses the issue of self-esteem. Having been told countless times over and over again that you are no good, it creates a self-fulfilling [prophecy] in which the person sees themselves as being that way and knows of no other way to act.

Id. at 57. The physical and psychological abuse become a "vicious cycle" in which one reinforces the other. *Id.* at 57.

105. Dr. Crown explained that the testing information in Petitioner's school and prior court and prison records is consistent with the abuse and neglect he suffered as a child. "[C]hildren from an abusive upbringing very typically score low" on IQ tests, and placement in special education is also consistent with suffering abuse, *Id.* at 128 – it is "more likely and probable that someone going through an abusive situation would not be able to keep up with his age mate peers in schooling [and] wind

up in special education." *Id.* at 37-38. Petitioner's organic brain damage is also consistent with the physical trauma he experienced as a child. Taken together, the historical testing (reflected in Petitioner's school records and prison records), Petitioner's placement in special education, and Dr. Crown's testing and evaluation, all support the conclusion that Petitioner had an abusive childhood. *Id.* at 58. The family's descriptions confirm it. *Id.*

106. The parents' abuse of alcohol was also a significant feature of Petitioner's childhood and development. Parental alcohol abuse is significant because it is associated with violence against the children and because it makes it "very clear where [Mr. Rompilla's own alcoholic] behavior was learned." *Id.* at 46. Moreover, the mother's continuing abuse of alcohol during her pregnancies suggests possible in utero development of Petitioner's brain damage – fetal alcohol syndrome:

> Children who manifest the syndrome tend to have borderline to full level mentally retarded Wechsler scores and performance. They tend to have neuropsychological impairment which are bilateral. They tend to have a great deal of difficulty in dealing with reasoning and judgment. They tend to be impulsive and they also tend to have certain facial characteristics in terms of wide-set eyes.

Id. at 46-47. Petitioner meets all of these criteria. *Id.*

107. Petitioner's childhood history also suggests several other early causes of his organic impairments. The high fever and diarrhea that Petitioner suffered at age 2, as reflected in his hospital records, are significant. *Id.* at 38-39:

> The diarrhea causing the hospitalization would . . . have affected his . . . electrolyte balance, . . . [which] is what controls the operation of the nervous system, particularly within the brain. . . . [I]t appears that . . . nutritional marasmus would have taken place. In addition the fever going up to 105 at the same time would also have an effect on that developing nervous system. We know that children who experience high fevers very well may develop problems concerning brain function and behavior.

Id. at 39. It is especially significant that this trauma occurred at age two, since under the age of 3 is "the most vulnerable period." *Id.* at 40. These records are thus consistent with Petitioner's brain damage, since they provide a possible explanation for his poor IQ performance and his impairments on the neuropsychological testing. *Id.* at 40, 48.

108. Petitioner also has a history of head injury that is consistent with his organic brain damage. He "has a history of loss of consciousness. He has a history of a left frontal injury. In fact, there's a scar in the left frontal area of his head." *Id.* at 48. This injury over Petitioner's left brow is "reflective of a left frontal-orbital syndrome," consistent with his brain damage. *Id.* at 49.[9]

109. The test results in Petitioner's prior court and prison records, *see supra* are also psychologically significant. The WRAT scores in the prison records show "significant

[9] November 8, 1988 DOC records indicate that Petitioner had this scar at the time of trial and sentencing. Crown Deposition at 49, 51. Trial co-counsel Maria Dantos recalled seeing the scar at that time. NT 3/28/96 at 146, 148.

impairment," are "consistent with the earlier [school] IQ scores and with the neuropsychological testing," *Id.* at 41, and are consistent with learning disability and organic brain damage, *Id.* at 43-44. The MMPI scores show "personality deficits." *Id.* at 42. These types of scores are present in patients who are impulsive, live socially isolated lives and are schizoid – i.e., they have "difficulty in making sense out of reality." *Id.* at 42-43. All of these features are present in Petitioner, "particularly the impulsivity and the . . . difficulty in making sense out of reality." *Id.* The MMPI scores "reflect[] lack of trust, which developed very early," and show that Petitioner has "a great deal of difficulty figuring things out leading to faulty conclusions and prematurely being suspicious." *Id.* at 43. These MMPI scores are consistent with Petitioner having suffered child abuse. *Id.* at 128. They are *not* consistent with anti-social personality disorder. *Id.*

110. In short, Petitioner's medical, school, prison and court records, his dysfunctional family background and his history of head trauma are psychologically and neuropsychologically significant, and are important information that a mental health evaluator would have wanted to have at the time of the trial and sentencing proceedings in 1988. *Id.* at 131. The full development and presentation of such collateral information is especially important here because Petitioner's brain damage creates "difficulties with his reasoning and judgment," and makes him "likely to confabulate because of his confusion, and as a result everything that he says indeed may not be consistent." *Id.* at 82. These collateral data, none of which were obtained by trial counsel, are "red flags for an organic impairment," *Id.* at 59, and, had they been presented to mental health experts in 1988, would have demanded that complete

neuropsychological testing be done. *Id.* at 130, 137. "There's no question about it." *Id.* at 60.

111. Dr. Crown explained that all of his testing and evaluation techniques were available from qualified mental health professionals at the time of the capital trial and sentencing proceedings. *Id.* at 88. Child abuse and organic brain damage were well known areas for mitigation in 1988. *Id.* at 130. The tests Dr. Crown administered were available in 1988, and the adverse effects of brain damage were well known. *Id.* at 15, 93. The debilitating effects of child abuse were also long-recognized at the time of the trial court proceedings. *Id.* at 55.

112. The jury, however, never heard any of this evidence, because counsel failed to investigate, obtain and present to the mental health experts the records showing Petitioner's impairments, failed to have brain damage testing performed, and failed to investigate, prepare and present the evidence of Petitioner's dysfunctional family background and alcoholism.

113. **Dr. Gerald R. Cooke** is a psychologist. Deposition of Gerald Cooke, Ph.D., at 4 (April 3, 1996). He was retained by trial counsel and saw Petitioner in 1988. *Id.* at 6. Dr. Cooke did *not* do any neuropsychological (brain damage) testing of Mr. Rompilla. *Id.* at 6-7.

114. Dr. Cooke did not have Petitioner's school records or prior prison/court records when he saw Petitioner. *Id.* at 8, 13. The records were never provided to him by trial counsel. Dr. Cooke testified that the test scores contained in these records are highly significant to a mental health evaluation and *would have been important for him to have at the time he saw Petitioner*. If counsel had provided Dr. Cooke these records, *he would have done*

neuropsychological testing and would have made further inquiries into Petitioner's background and mental health. *Id.* at 8-11, 21, 26.

115. Dr. Cooke explained that the IQ scores in Petitioner's records are very significant because they are in "the retarded to borderline range of intellectual functioning." *Id.* at 7. These low IQ scores, had they been provided to Dr. Cooke, "*would have been a red flag* and that *would have been something I would have pursued.*" *Id.* at 21. One of the most prominent problems for which these low scores are a "red flag" is organic brain damage. *Id.* at 8-11. Therefore, if counsel had provided Dr. Cooke with these records, Dr. Cooke *would have tested Petitioner for brain damage* (as Dr. Armstrong and Dr. Crown did). *Id.* at 8-11. Petitioner's placement in special education is also a red flag that would have demanded further inquiry by Dr. Cooke into organic brain damage, if the records had been provided by counsel. *Id.* at 26.

116. Moreover, the low IQ scores in the records would have prompted Dr. Cooke to look further into Petitioner's background and developmental history. As Dr. Cooke explained, when, as here, the low IQ scores were from a child:

> you would look at the family situation, whether or not it was an abusive situation, a dysfunctional situation. You'd want to see more about . . . the child's adjustment in school.
>
> * * *
>
> You'd also get historical information: . . . including, was the pregnancy difficult? Were there any abnormalities? things of that nature.

Id. at 10. Because counsel did not provide these records to Dr. Cooke, the doctor did not undertake any of this inquiry into organic brain damage, childhood abuse and other problems.

117. Dr. Cooke explained that the test scores in Petitioner's prison records (and included in his prior court files) are also significant and would have been important for him to have at the time that he saw Petitioner in 1988. The WRAT scores in these records show that Petitioner was developmentally delayed in spelling and arithmetic, and are consistent with his suffering from a learning disability. *Id.* at 12-13. Learning disability is often due to, and a function of, organic brain damage. *Id.* at 13. Therefore, if Dr. Cooke had been presented with these WRAT scores when he saw Petitioner in 1988, he would "definitely" have considered brain damage as a potential cause for those scores, and would have administered brain damage testing. *Id.* Because learning disabilities can also be caused by child abuse, the doctor would also have looked further into that area if he had been provided these scores. *Id.* at 13-14. Given the significance of these prison records, if he had been provided them by counsel he "would have gone back to the attorneys" and asked for more information about Petitioner's developmental history – "'Is this guy a special education?' 'Did he have developmental problems?' and so on." *Id.* at 22. But counsel did not provide this information to the doctor.

118. Dr. Cooke explained that organic brain damage and child abuse would have been important avenues to pursue for purposes of the capital sentencing proceedings. Brain damage "is a mental defect that *certainly qualifies as a mitigating factor.*" *Id.* at 29. The fact that Petitioner suffered from child abuse is also important mitigating

evidence. Child abuse can cause long-lasting emotional disturbance, *Id.* at 30, and it "often helps to explain, certainly, to a jury how the person got to where they are, why they are the types of people they are," *Id.* at 29. However, because the school and prior prison/court records were never obtained by counsel or provided to the doctor, the doctor was unaware at the time he saw Mr. Rompilla of the "red flags" contained in those records that would have prompted an exploration and development of this mitigating evidence.

119. **Dr. Robert Sadoff** is a psychiatrist. Deposition of Robert Sadoff, M.D., at 4 (April 23, 1996). He met with Petitioner in 1988 at defense counsel's request. *Id.* at 5. When he met with Petitioner, Dr. Sadoff did not have the information from the hospital, school, prison and court records, and did not know of Petitioner's traumatic childhood or history of mental impairments, because counsel did not provide him with any of the information.

120. Dr. Sadoff testified that collateral background information, of the type contained in the school, medical and prior prison/court records and the family statements, is very important for mental health experts to have in a forensic case. *Id.* at 30. The expert needs such collateral information – i.e., information from sources other than the defendant – because a defendant who is the subject of a forensic examination is not a reliable source of information, including information regarding child abuse and symptoms of mental illness. *Id.* at 31.

> [I]n forensic work it isn't the same as a person coming to me because he's hurting, he's in emotional pain and he wants relief of that pain.

> He comes to me because he's involved in some difficulty, civil or criminal. And the veracity, validity, credibility, whatever word you use, is not of the same caliber as if he were coming for treatment. So it's very important for me to have collateral information that would either substantiate or negate what he tells me.

Id. at 30-31. Counsel, however, did not provide the doctor with this information.

121. The information contained in Petitioner's school, medical, prison and court records is the type of collateral information that it is important for a mental health expert to have when conducting a forensic examination. *Id.* at 34. Such information is especially important in a capital case, where it is essential to "get as much information as we can." *Id.* at 35. These records, if counsel had provided them to the doctor, would have been considered by him as very important in a forensic mental health evaluation. *Id.* at 10, 28.

122. This information, if trial counsel had provided it to Dr. Sadoff, would have had a profound effect on the doctor's evaluation:

> First as a forensic psychiatrist having had that information and doing my psychiatric examination, I might have examined different questions. I might have probed in the area of reasons why he might have [scored so poorly]. Is it genetic? Did he ever have an accident or a fall that would have hit his head?
>
> * * *
>
> Any toxic substances, high fevers that might have caused him to have some brain dysfunction?

> And *I would have recommended a battery of psychological and neuropsychological testing* to probe the cause, if we could find it, of these low IQ scores.
>
> And I would also have the psychologist do the testing contemporaneously to compare these scores. . . .

Sadoff Deposition at 10.[10]

123. Doctor Sadoff explained that Petitioner's records contain many warning signs for organic brain damage, requiring further evaluation and testing. The mentally retarded scores in the school IQ testing are important as a "building block" in a psychological evaluation – they are a red flag for brain damage. *Id.* at 8, 37. The hospital records, showing that Petitioner suffered from a very high fever and diarrhea at age two, are also very significant – "when children get high fevers when they are a year or so old, the fever as a youngster might effect his brain . . . that would leave him scarred or mentally challenged for the rest of his life." *Id.* at 15. Petitioner's fever of over 105 degrees is certainly high enough to cause such long-lasting effects. *Id.* at 16. Thus, the hospital records would have also been a red flag for

[10] Dr. Sadoff explained that neuropsychological testing "probes to see whether there is any brain damage." Sadoff Deposition at 12. Dr. Sadoff has no expertise in or familiarity with psychological or neuropsychological testing. Instead, he relies upon other experts to do such testing. *Id.* at 13-15. Dr. Sadoff did not recall working with or relying on Dr. Cooke in this case. *Id.* at 9, 30. However, it is Dr. Sadoff's experience, from working with Dr. Cooke, that if Dr. Cooke had known of these school IQ scores he would have done neuropsychological testing. *Id.* at 9. (Dr. Cooke himself so testified. *See supra*.)

organic brain damage and would have indicated the need for neuropsychological testing. *Id.*

124. Dr. Sadoff explained that the areas for which the records provide evidence or warning signs, including brain damage, mental retardation and poor school performance, are relevant to mitigation, and were so at the time of the trial and sentencing proceedings. *Id.* at 27-28.[11] The neuropsychological and psychological testing that was needed to follow up on the "red flags" contained in the records were also available at that time. *Id.* at 28. However, none of this mitigation was presented because counsel did not provide him with this important collateral information.

125. **Dr. Paul K. Gross** is a psychiatrist. Deposition of Paul K. Gross, M.D., at 3 (April 1, 1996). He saw Petitioner in 1988, at trial counsels' request. *Id.* Dr. Gross has never prepared for or testified at the penalty phase of capital case. *Id.* at 6. In this case, Dr. Gross believed that his role was limited solely to looking for possible guilt-phase mental health defenses such as insanity. *Id.* at 44. Dr. Gross explained that trial counsel did not ask him to determine if Petitioner's capacity to conform his conduct to the requirements of law was substantially impaired, *id.* at 34-35; did not ask him to look into social and development issues, *id.* at 35; and did not ask him to look into the existence or absence of any mitigating factors at all, *id.* at 35, 44. In short, Dr. Gross was *not looking for mitigation* when he met with Petitioner in 1988.

[11] Dr. Sadoff so testified despite possessing an overly narrow view of what constitutes mitigating evidence, as described in more detail below.

126. When Dr. Gross saw Petitioner in 1988, his evaluation was limited to a "standard MSE [Mental Status Exam]," that relied solely on information provided by Petitioner. *Id.* at 40-41. Dr. Gross testified that one role of mental health expert is gathering and compiling a history of the defendant for mitigation purposes. He did not do this, however, because *he was not evaluating Petitioner for mitigation purposes. Id.* at 29.

127. Dr. Gross testified that psychological testing is an important part of a professionally adequate mental health evaluation. *Id.* at 17. ("you can pick up, certainly, things in testing which you're not going to pick up in a clinical evaluation"); *id.* ("[N]o matter how thorough the psychiatric examination itself may be, there are aspects of functioning that should be conducted by experts in other disciplines. For example, the results of routine psychological tests are invaluable. Moreover, more specialized neuropsychological tests . . . often reveal organic deficits not elicited in either the psychiatric or the routine psychological examination."). However, Dr. Gross did not have any testing. *Id.* at 18.

128. Dr. Gross also lacked any collateral information – i.e., information from sources other than Petitioner – about Petitioner's background and history. Trial counsel did not provide Dr. Gross with any school records, prior prison/court records, records from prior offenses, or any other records, and did not provide him any background information about Petitioner's family life or childhood. *Id.* at 24. Dr. Gross testified that such records and background information are significant to a mental health evaluation, and that if he had been asked to look into mitigation the records would have been useful to him. *Id.* at 44.

129. Dr. Gross explained that Petitioner's school records are significant to a mental health evaluator. The test scores in Petitioner's school records, including his mentally-retarded range IQ scores, his placement in special education, and his very poor performance on achievement tests, are all significant from a mental health standpoint. They are consistent with, and red flags for, child abuse and organic brain damage. *Id.* at 22-23, 31. These records would be important to any mental health professional evaluating Petitioner. *Id.* at 25-26, 30-31.

130. Dr. Gross testified that test scores in Petitioner's prior prison and court records are also significant from a mental health standpoint. The very low WRAT scores in these records, showing that Petitioner was in the fourth percentile in spelling and the third percentile in arithmetic, would be useful to a mental health evaluator. *Id.* at 33. The MMPI scores in the records are also highly significant to an evaluation of Petitioner's mental health. *Id.* at 45. They reflect serious psychological deficiencies in Mr. Rompilla: "This is an abnormal MMPI." *Id.* at 46.

131. Dr. Gross testified that the prevalence of alcohol abuse in Petitioner's family is also significant and that "alcohol in anybody in the immediate family would have been important to know" when he saw Petitioner. *Id.* at 44-45. Counsel, however, did not provide the doctor with any information about the alcoholism in Petitioner's family or Petitioner's own alcohol abuse.

132. While trial counsel failed to provide Dr. Gross any information about the alcoholism of Petitioner and his family, Dr. Gross's report to trial counsel (Exhibit 6) is replete with information that should have caused counsel to investigate Petitioner's alcohol abuse, and *explicitly*

suggests that counsel investigate Petitioner's reaction to alcohol, and the possibility of alcoholic blackout. The report states:

> – on the day of the offense Petitioner "left work at lunch time and went to visit *several local bars.* He returned to his house at dinner time and then went out after supper again, *to some local taverns*" where he stayed "until closing time at 2:00 a.m.";
>
> – "He *does not recall the exact amount of alcohol that he had*";
>
> – "He *does admit to drinking,* although not a great amount *which was a parole violation.*";
>
> – He "does not consider himself an alcoholic. *He did,* however, *attend AA* [*Alcoholics Anonymous*] *while he was in prison.*"
>
> – "The possibility does remain . . . that *Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior* although he himself strongly denies this."
>
> – "*My recommendation is that this area should be further evaluated* before any definitive conclusions are drawn."

133. Dr. Gross told counsel that Petitioner's problems with alcohol needed further investigation; and described the tendency of alcoholics to be in denial about their drinking problems. Gross Deposition at 6-7. Dr. Gross also explained that the long term effects of alcohol

abuse include organic brain damage, and that people with brain damage are more prone to blackouts that others. *Id.* at 8. Therefore, the report's suggestion to counsel was meant to include exploring possible organic brain damage. *Id.* Dr. Gross testified that he had no further involvement or contact with counsel after he sent out his report. *Id.* at 9.

134. Dr. Gross, in the report he provided to trial counsel, also noted Petitioner's history of antisocial behavior. *Id.* Dr. Gross testified that such a history is a strong indicator that Petitioner suffered from child abuse. The doctor testified that antisocial behavior "is caused by real, faulty dysfunctional family relationships." *Id.* at 19; *see also id.* at 10-11 ("a consistent finding in the histories of extremely violent recidivists is a history of being severely physically abused"); *id.* at 14-15 (abusive upbringing is "commonly thought of and agreed to" cause antisocial behavior); *id.* at 14-15 (antisocial behavior "has to do with the way they were raised by their parents"); *id.* at 19 ("in general, [antisocial behaviors] are due to childhood experience in a very unhealthy family, and that causes the antisocial behavior").

135. This strong causal link between an abusive childhood and later antisocial behavior arises because

> the experience of such aggression [in childhood] seems to have lasting effects on the victims. There are several ways in which being the object of such violence contributes to the development of antisocial behavior.
>
> First, it provides a model for behavior. Second, it frequently results in injury to the child's CNS [central nervous system], thereby impairing the child's ability to control impulses, think logically,

> functional [sic] adequately at school, and behave in socially appropriate ways. Finally, it engenders rage in the victimized child, which frequently seems to be displaced onto teachers, peers, and even strangers.

Gross Deposition at 12.

136. Accordingly, Dr. Gross explained, when someone's history has strong antisocial elements, one should suspect that the person had an abusive childhood, and should look carefully into that possibility. *Id.* at 12-13.[12] Dr. Gross testified that the subject of a forensic mental health examination is "usually reluctant to admit that their parents have hurt them physically." *Id.* at 16. Therefore, reliable information about abuse cannot be obtained from the subject, and "family histories . . . are essential." *Id.* Dr. Gross did not speak to any of Petitioner's family members, and counsel did not provide him with any information from the family or about the family situation. *Id.* at 17.

137. Dr. Gross explained that childhood abuse often causes central nervous system deficits and organic brain damage: "If you suspect that the person has been physically abused," "you should look into" organic brain damage. *id.* at 20; *see also id.* at 13 ("Many [abused children] have identifiable cognitive impairments, manifested by wide discrepancies on subtests of intelligence scales, poor short-term memory, and impaired reasoning on mental status examination. Most have histories of school problems, learning disability, especially reading problems, and

[12] Surprisingly, given his knowledge of the link between childhood abuse and later antisocial behavior, Dr. Gross was *not aware* that an abusive childhood can be mitigating at the penalty phase of a capital case. Gross Deposition at 28.

altercations with peers and teachers."). He explained that brain damage is mitigating at capital sentencing because it impairs and adversely affects judgment, reasoning, cognition, impulse control and emotional lability, and impairs the capacity to conform conduct to the requirements of law. *Id.* at 21-22, 28-30. Dr. Gross had no testing.

138. **Maria Dantos** was co-counsel, along with Frederick Charles, at trial. This was her first capital case and her first homicide trial. NT 3/28/96 at 18-19. Her role was to "handle the penalty phase" and to "assist" Mr. Charles at the guilt phase of the trial. *Id.* at 14. Ms. Dantos contacted the mental health professionals in this case. *Id.* at 19-20. Ms. Dantos is no longer a defense lawyer; she has been a prosecutor in the Lehigh County District Attorney's office since September of 1989. *Id.* at 12.

139. Ms. Dantos testified that the defense did not have any tactical or strategic reasons for failing to present the evidence of Petitioner's traumatic childhood, poor school performance, mental retardation, impaired mental health and organic brain damage. She explained that all of this evidence is important for a capital sentencing jury to hear, and would have been presented by the defense if they had been aware of it.

140. Ms. Dantos testified that trial counsel did not present Petitioner's school records to the jury or mental health experts because counsel failed to investigate Petitioner's school performance – counsel did not seek or obtain Petitioner's school records. *Id.* at 28, 30, 150. Ms. Dantos testified that counsel did not have any strategic or tactical reason for not obtaining the school records or presenting them to the jury and mental health experts. *Id.* at 49. To the contrary, when Ms. Dantos did see Petitioner's

school records for the first time during the post-conviction proceedings, she testified that these records, which show Petitioner's mentally-retarded IQ scores; his substantially impaired abilities in reading, spelling and arithmetic; and his placement in special education classes, are the type of records that she would want to present at capital sentencing and that should be shown to mental health experts in preparation for the capital sentencing proceedings. *Id.* at 27-28, 31-36, 151.

141. Ms. Dantos testified that trial counsel never gathered any of Petitioner's medical records, despite her recognition that Petitioner's medical history could be important to an evaluation of his mental health. *Id.* at 40. She saw Petitioner's hospital records for the first time during these PCRA proceedings – records showing that Petitioner suffered from high fever and diarrhea when he was two years old. *Id.* at 41-42. Ms. Dantos testified that the defense did not have any tactical or strategic reasons for failing to obtain these medical records or provide them to experts. *Id.* at 44, 49. She testified that, although she was not sure what mental health significance these records might have, she would have given the records to an expert to determine their significance. *Id.* at 45.

142. Ms. Dantos testified that trial counsel never obtained any of Petitioner's prior prison and court records, including the records from the prior convictions that were used in aggravation in the capital sentencing proceeding. *Id.* at 60-62; *see also* NT 11/1/88 at 31 (when co-counsel Charles complained during trial that he did not have information about the prior convictions, the prosecutor responded: "*it's a public record, Fred, you could have gone over lunch and looked at it just like I did*"). Therefore, Ms. Dantos saw the DOC records contained in the Common

Pleas Court file (and the psychological tests included therein, reflecting Petitioner's mental impairments) for the first time during these PCRA proceedings. NT 3/28/96 at 62.

143. When Ms. Dantos was shown these prison/court records, she testified that information they contained was important and was the type of information that she would want to provide to a mental health expert. In particular, she testified that the achievement test scores (showing Petitioner's substantially impaired abilities) and the MMPI results (showing serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales) were significant and should have been provided to the experts at the time of the trial and capital sentencing proceedings. *Id.* at 63-66.

144. Ms. Dantos testified that information regarding Petitioner's traumatic childhood – e.g., the parental neglect and abuse and bizarre treatment of Petitioner and his siblings; the fact that Petitioner's brother was in reform school from an early age; alcoholism in the parents and the family; the mother's drinking while she was pregnant with Petitioner; and Petitioner's head injury – were important and should have been presented to the mental health experts and the jury. *Id.* at 109-15.

145. Ms. Dantos testified that Petitioner's alcoholism and long history of severe drinking problems was the type of evidence that should have been presented to the sentencing jury and the mental health experts. *Id.* at 54. Petitioner told Ms. Dantos that he had been drinking on the night of the offense. *Id.* at 126-27. Yet, Ms. Dantos did not recognize or investigate the presence of alcohol-related mitigation. *Id.* at 129.

146. At the time of the original trial court proceedings, Ms. Dantos noticed the large scars on Mr. Rompilla's forehead (resulting from childhood head injury), but she did not ask Mr. Rompilla or his family members about the scarring or what caused it. *Id.* at 146, 148.

147. Ms. Dantos testified that trial counsel did not ask the mental health experts to do any neurological or neuropsychological testing for brain damage. *Id.* at 58. Instead, she recalled that counsel asked the experts to look only into Mr. Rompilla's "mental state at the time of the commission of the offense" (not a mitigation evaluation, which looks to an individual's life history and to mental health issues other than guilt-phase insanity). *Id.* at 24, 67-68.

148. **Frederick Charles** was co-counsel, along with Maria Dantos, at Petitioner's trial. This was his first capital case that went to a jury. NT 3/29/96 at 4. Mr. Charles was primarily responsible for the guilt phase, while Ms. Dantos was primarily responsible for the penalty phase. NT 3/28/96 at 210-11.

149. Mr. Charles explained that his ability to adequately investigate this case was impaired by the fact that his office (the Lehigh County Public Defender) had only two investigators for approximately two thousand cases. NT 3/29/96 at 13. Mr. Charles did not seek out, obtain or read Petitioner's school, medical, prison, court, or any other records. He testified that he would never do so in any capital case, as a general rule. *Id.* at 17, 55, 71-72. Mr. Charles also testified that he does not look for signs, such as facial scars, that a capital defendant had suffered head injuries, and he did not recall if he had noticed Mr. Rompilla's scars. *Id.* at 81-82.

150. Even though he did not here (and generally does not) pursue prior records to investigate potential mitigating evidence, Mr. Charles acknowledged that brain damage evidence such as that presented by post-conviction counsel is important because it is mitigating. *Id.* at 48-49. At the time of the original trial court proceedings, Mr. Charles "expected" that Dr. Cooke would "test to determine if there was any brain damage." *Id.* at 43. However, he did *not* ask Dr. Cooke to do such testing, and he never asked any of the doctors if brain damage testing was done. He simply assumed that it would be done, although he never asked for it. *Id.* at 45, 47. Mr. Charles was also aware that alcohol can cause brain damage, but he never asked Mr. Rompilla if he had a drinking problem. *Id.* at 93-94.

151. Mr. Charles testified that evidence of mental retardation would also be important to present in a capital case. *Id.* at 29. However, he believed that counsel had no duty to seek out such evidence, such as that presented in Mr. Rompilla's school records. *Id.* at 65. When post-conviction counsel showed Mr. Charles Petitioner's school records, he acknowledged that he never obtained them, did not read them, and did not provide them to the experts or ask the experts whether they included significant information; he also said that he did not know the significance of the mentally retarded IQ scores and special education placements included in those records. *Id.* at 63. Similarly, Mr. Charles said he did not know the significance of Mr. Rompilla's extremely low achievement scores and high schizophrenia score, on tests contained in his prison/court records. *Id.* at 67, 71. Mr. Charles never obtained these records, did not read them, and did not provide them to

the experts or ask the experts whether they included significant information.

152. **Albert Nelthropp** was appointed in 1988 to represent Mr. Rompilla on direct appeal. NT 3/28/96 at 160. It was Mr. Nelthropp's first homicide case. *Id.* at 163. Mr. Nelthropp never visited Petitioner and never spoke to him about the case. *Id.* at 161. He failed to file a timely notice of appeal. *Id.* at 165. He testified that he "couldn't make it [this case] my main priority" because he had to make a living, and was not able to do "as much as I wanted" because of his heavy caseload. *Id.* at 177, 189. Pennsylvania Supreme Court Prothonotary Charles Johns complained to Nelthropp about the quality of his representation on direct appeal. *Id.* at 188.

153. **Dr. Frank M. Dattilio** is a psychologist. Deposition of Frank M. Dattilio, M.D., at 4 (May 7, 1996). The Commonwealth retained and called Dr. Dattilio as a "rebuttal" witness in the post-conviction proceedings. Dr. Dattilio, however, *never met with, examined or tested Petitioner in any way*. *Id.* at 7, 53. He also acknowledged that he is not a neuropsychologist. *Id.* at 11-13.

154. Because Dr. Dattilio is, by his own admission, *not* an expert in neuropsychology, Petitioner's counsel objected to his testimony on neuropsychological matters. *Id.* at 11-13. Petitioner's counsel also objected to Dr. Dattilio's testimony as being inadmissable under *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771 (1995), since the doctor has never actually seen or met with Petitioner. Dattilio Deposition at 3. *See Buehl,* 658 A.2d at 781 (testimony of an expert who does not actually see and evaluate the defendant is unreliable and inadmissable). Dr Dattilio himself testified that face-to-face evaluation and

interview is "imperative" for an adequate neuropsychological evaluation. Dattilio Deposition at 53. Yet he testified here without ever performing such an adequate evaluation. For all of these reasons, Petitioner's counsel objected to Dr. Dattilio's testimony in the PCRA trial court, *see* Dattilio Deposition at 3, 11-13, and Petitioner's counsel renewed the objection on appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court did not rule on the objections.

155. Nonetheless, Dr. Dattilio's "rebuttal" testimony actually *supports* Petitioner and shows that Petitioner is entitled to relief. Although Dr. Dattilio was called by the Commonwealth as a "rebuttal" witness, he substantially confirmed the testimony of Dr. Crown and Dr. Armstrong regarding Petitioner's brain damage and abusive childhood and their effects on Petitioner.

156. Dr. Dattilio testified that Dr. Armstrong and Dr. Crown – the neuropsychologists who evaluated Petitioner for post-conviction proceedings – are well-qualified, *id.* at 62-63; that the neuropsychological tests they administered are "quite accurate and are often used," *id.* at 54; that their testing was consistent, "valid and reliable," and "clearly . . . accurate," *id.* at 17, 54, 60, 111; that Petitioner was not malingering on the tests, *id.* at 111; and that the testing shows that Petitioner *does suffer from organic brain damage, id.* at 55-60.

157. Dr. Dattilio described some of the debilitating, mitigating effects of Petitioner's organic brain damage. He explained that such organic brain damage adversely affects and impairs personality, ability to function, emotional lability, impulsivity, cognition, reasoning, judgment,

ability to predict future consequences, and ability to control behavior. *Id.* at 50-51, 97.

158. Dr. Dattilio testified that Petitioner's organic brain damage constitutes an extreme emotional disturbance, may have prevented Petitioner from appreciating the criminality of his conduct or conforming his conduct to the requirements of law, and is otherwise mitigating. *Id.* at 99, 118-19.

159. Dr. Dattilio testified that the background information about Petitioner, including his school, prison and court records and family accounts of Petitioner's dysfunctional childhood, are all consistent with Petitioner's brain damage being long-standing – dating back at least to childhood. Dr. Dattilio noted that Petitioner has a lifelong record of significant underachievement in both IQ and achievement testing, showing that he has been cognitively impaired since (at least) his childhood. *Id.* at 113. This is consistent with Petitioner suffering organic brain damage dating to his childhood. *Id.* at 82, 102-03, 113. The evidence that Petitioner suffered physical abuse as a child is also consistent with the early origin of his organic damage and psychological dysfunction. *Id.* at 109-10. Moreover, the descriptions of Petitioner's mother drinking during pregnancy suggest that Petitioner had organic brain damage at birth, as a result of fetal alcohol exposure. *Id.* at 102, 120.

160. Dr. Dattilio also described some of the effects child abuse has on those who suffer it. Abused children are hurt by the very people to whom they must look for security, which is "extremely" confusing to the child. *Id.* at 64-65. The long term, lasting effects of the abuse include impulse control problems, emotional lability, problems

controlling behavior, underachievement in school and life, impaired social relationships, social isolation, inability to relate healthily to others, inability to predict future consequences of actions, and central nervous system deficits. These problems often cause the abuse victim to engage in antisocial behavior later. Thus, child abuse is mitigating. *Id.* at 64-66, 70, 97, 114, 118-19. Here, the collateral sources show severe abuse and neglect, consistent with Petitioner suffering organic brain damage and with the psychological dysfunctions discussed above. *Id.* at 109-10.

161. Dr. Dattilio testified that a mental health expert performing a forensic evaluation should have information about the subject from sources other than the subject himself – i.e. the expert "absolutely" must have "collateral" data. *Id.* at 94, 105. Adequate collateral information is essential to an adequate forensic evaluation – the evaluator cannot rely upon the subject's self-reporting, especially since a cognitively impaired person often is incapable of being a good historian of his own life and background. *Id.* at 94, 104-05.

162. Moreover, collateral information is especially crucial when the subject comes from an abusive family, since there is so much denial in abusive families – in the child victim, in adult abusers and in other family witnesses. *Id.* at 106-07. In an adequate mental health evaluation, collateral data should be used along with very careful questioning of the subject. The evaluator must not just ask simple, direct "have you been hit in the head"-type questions, but must use the information garnered from the collateral data to undertake careful, in-depth probing. *Id.* at 111.

163. Dr. Dattilio, the Commonwealth's expert, also testified that the collateral information presented in these post-conviction proceedings – including family members' declarations, school records, medical and testing records and records about prior incarcerations and court involvement – are the kind of collateral data that a mental health professional would want and need in order to do an adequate forensic evaluation. *Id.* at 94, 109. He also explained that the particular background information about Petitioner is highly significant from a mental health standpoint.

164. Dr. Dattilio testified that Petitioner's school records are psychologically significant. The doctor noted that the school IQ scores are very low – when tested, between ages six and thirteen, Petitioner consistently scored in the mentally retarded range, with his highest score being a 75 (borderline retarded). *Id.* at 76-78. These IQ scores would make a mental health professional look for both organic brain damage and child abuse. *Id.* at 78. Petitioner's placement in special education is another red flag for brain damage and abuse at home. *Id.* at 78-79. *See also id.* at 82 (school records are consistent with presence of organic brain damage in childhood); *id.* at 102-03 (same). Given these school records, a mental health expert would "absolutely" and "definitely" want to look further for abuse and organic brain damage and explore these areas of mental health mitigation. *Id.* at 79-80, 99. In particular, a competent psychologist presented with these records would insist that neuropsychological testing be performed. *Id.* at 80.

165. Dr. Dattilio described the mental health significance of Petitioner's prison records from his prior incarceration. He testified that these are the types of records

that are important for a mental health expert to see. He testified that the prison MMPI results show the profile of a disturbed person. *Id.* at 73. These MMPI scores are consistent with Petitioner having been abused as a child and having organic brain damage – Dr. Dattilio explained that such test results require the exploration of child abuse and brain damage as causes. *Id.* at 68, 70-71, 114. These prison testing records are especially significant when combined with the school records, since they present a consistent, lifelong pattern of cognitive impairment and poor performance dating back to childhood. *Id.* at 112-13, 114. These prison records are the kind of collateral data that provide mental health mitigation and require further and thorough investigation into Petitioner's impairments. *Id.* at 99.

166. Dr. Dattilio also described some of the deficiencies in the mental health evaluations performed at the time of trial. None of the trial experts were provided any collateral data. Neither did they conduct the needed testing. Collateral data is essential; its absence here resulted in the failure to find or pursue several areas of mitigation; and its absence here led to inaccuracies in the trial expert reports. *See id.* at 105. Dr. Gross was not in a good position to find mitigation because he was not looking for it. *Id.* at 117. The only expert who tested Petitioner at all (in a limited way), Dr. Cooke, did not test for brain damage. *Id.* at 75-76. Because of these problems, Petitioner's brain damage and mental health mitigating factors went unexplored at the capital sentencing proceedings, and the jury never learned of this mitigation.

C. The Sixth Amendment Violations.

167. The Sixth Amendment standard for evaluating an ineffective assistance of counsel claim is set out in *Strickland v. Washington,* 466 U.S. 668 (1984). Petitioner must show: (1) counsels' deficient performance, *i.e.*, that his attorneys' performance fell below "an objective standard of reasonableness," *id.* at 688; and (2) prejudice, *i.e.*, that confidence in the result of the original sentencing proceeding is undermined due to counsels' deficiencies, *id.* at 694.

168. Both prongs of the *Strickland* test are established in this case: counsels' performance was deficient because they failed to reasonably investigate and develop mitigating evidence for capital sentencing; and counsels' failures were prejudicial because the unpresented mitigating evidence undermines confidence in the death sentence.

1. Petitioner was prejudiced by counsels' failures to investigate, develop and present mitigating evidence.

169. Prejudice is not an outcome-determinative test. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 693-94 (1984). The question is *not* whether representation by prepared and effective counsel would have actually changed the jury's ultimate sentencing verdict, nor even whether representation by effective counsel would "more likely than not" have changed the verdict. Instead, prejudice is established when *confidence in the outcome is undermined* because of counsel's deficiencies. *Strickland,* 466 U.S. at 693-94; *United States v. Day,* 969 F.2d 39, 45 n.8 (3d Cir. 1992) (prejudice showing "does not require

certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only 'reasonable probability' that that is the case").

170. In the context of a claim of ineffective assistance of counsel at capital sentencing, "the demonstrated availability of undiscovered mitigating evidence clearly me[ets] the prejudice requirement." *Blanco v. Singletary,* 943 F.2d 1477, 1505 (11th Cir. 1991); *accord Armstrong v. Dugger,* 833 F.2d 1430, 1433 (11th Cir. 1987); *Glenn v. Tate,* 71 F.3d 1204, 1211 (6th Cir. 1995); *Hill v. Lockhart,* 28 F.3d 832, 845 (8th Cir. 1994); *Cave v. Singletary,* 971 F.2d 1513, 1518-19 (11th Cir. 1992); *United States ex rel. Emerson v. Gramley,* 883 F. Supp. 225, 242 (N.D. Ill. 1995), *aff'd, Emerson v. Gramley,* 91 F.3d 898 (7th Cir. 1996).

171. Here, prejudice is established by the mitigating evidence presented post-conviction – mitigating evidence of Petitioner's neglectful and traumatic childhood, head injury, mental retardation, cognitive impairment, brain damage and alcoholism that could have been presented by effective counsel.

a. Mitigating evidence of petitioner's alcoholism.

172. The jury never heard about Petitioner's alcoholism. Following in his parents' footsteps and attempting to escape from the loveless, abusive environment in which he was raised, Petitioner and his brothers all began to drink heavily when they were very young, and Petitioner soon became an alcoholic. He drank extremely heavily before he went to jail in the 1970's. He again succumbed to his addiction and resumed his compulsive and excessive

drinking when he got out of prison before the instant offense. His heavy drinking throughout his life and at the time of the offense was confirmed by numerous entries in his prison records and police reports, which were available at and before the time of trial.

173. This substantial history of alcoholism, and its origins in Petitioner's abusive childhood at the hands of alcoholic parents, explains much about Petitioner and is mitigating. Indeed, the Commonwealth's own prison psychiatrist, Dr. Kate Erwin, found Petitioner's alcoholism to be so significant and mitigating that she *recommended his death sentence be commuted.* This evidence, however, was never presented to the jury. Counsels' failure to investigate, develop and present this evidence was prejudicial.[13]

b. Mitigating evidence of Petitioner's traumatic childhood.

174. The jury also never heard anything about the dysfunctional, violent and alcohol-soaked home into which

[13] *E.g., Kenley v. Armontrout,* 937 F.2d 1298 (8th Cir. 1991) (counsel ineffective for failing to investigate and present mitigating evidence of history of alcohol abuse and intoxication); *Eutzy v. Dugger,* 746 F. Supp. 1492, 1497-98 (N.D. Fla. 1989) (same), *aff'd,* 912 F.2d 1468 (11th Cir. 1990); *Middleton v. Dugger,* 849 F.2d 491 (11th Cir. 1988) (counsel was ineffective for failing to present mitigating evidence of history of drug abuse); *Stevens v. State,* 552 So.2d 1082, 1086 (Fla. 1989) (counsel was ineffective for failing to introduce evidence of defendant's history of alcohol abuse); *see also Hargrave v. Dugger,* 832 F.2d 1528, 1534 (11th Cir. 1988) (en banc) (death sentence violates eighth amendment when jury is not allowed to consider and give effect to history of drug abuse); *Mason v. State,* 597 So.2d 776, 780 (Fla. 1992) (same); *Commonwealth v. Bailey,* 480 Pa. 329, 390 A.2d 166 (1978) (non-capital case finding counsel ineffective for failing to investigate and present evidence of intoxication).

Petitioner was born and in which he spent his formative years. The evidence presented in post-conviction shows that Petitioner childhood home was an emotionally cold, frightening and violent place in which beatings and bizarre punishments constantly rained down on him; in which he was constantly subject to emotional abuse; in which he was physically neglected; and in which no love was ever expressed or felt.

175. Petitioner's parents were alcoholics. Their relationship with each other was hateful, emotionally abusive, and violent. The mother would disappear on drinking bouts or with other men. The father openly cheated on the mother, and the mother reacted violently, even attacking the father with knives in the family home. The father often beat the mother, driving her deeper into fear, despair and alcoholism. Her drinking was constant – she drank every day and never stopped – even when she was pregnant with Petitioner. As the children grew up, Petitioner and his brothers also developed severe drinking problems. Petitioner became an alcoholic.

176. The parents, especially the father, were frighteningly violent toward Petitioner and his siblings. Petitioner was beaten constantly, at least several times each week. These were not "spankings" – they were brutal beatings. The father was a big man, and the children were beaten with fists, sticks and leather straps. They were beaten hard all over their bodies, including on the head. When Petitioner's siblings sometimes tried to intervene and stop the father from battering Petitioner, they were violently shoved aside. Petitioner could not escape from the blows. No matter how Petitioner and his siblings screamed and cried, the beatings continued. The beatings

were so severe that Petitioner's sister still has nightmares about them.

177. The abuse Petitioner suffered was not just physical. In addition to the beatings, the father subjected Petitioner to other bizarre punishments. The father drove Petitioner to a nearby prison and threatened to send him there. The father locked Petitioner in a filthy, excrement-filed [sic] dog cage, where he had to crouch in fear until he was released, knowing that any attempt to escape would be met by further punishment.

178. The home was cold, unloving and emotionally abusive, and the children were physically neglected. Petitioner and his siblings were deprived of the necessities of life by the father's gambling and womanizing and the parents' alcoholism. They were left dirty and without care or supervision.

179. Petitioner was never given any love by his parents. He was never praised, never told he was a good boy, never told that someone was proud of him, never given any affection or approval at all. He never got any attention from his parents unless they were beating him. In this family, "You didn't get a hug. You didn't get 'good night.' You didn't get a 'happy birthday.' You got nothing." NT 3/29/96 at 129. Instead, the parents constantly screamed at Petitioner that he was dumb, that he was stupid, that he was a "nitwit," that he was worthless and would never amount to anything.

180. The children, while being subjected to this violence, neglect and abuse, were forced to live in isolation from the outside world and under the constant, intrusive gaze of their terrifying father. The father would not allow the children to have friends; they were not allowed to have

anyone visit; they were not allowed to visit others; and they were not allowed to go to athletic or social events. They had no outside connection with anybody. The father watched the children constantly – forbidding them to even have the privacy of a bedroom door. Petitioner's siblings could not recall a single happy moment in the family's life.

181. The jury never heard any of this compelling evidence of Petitioner's childhood mistreatment, neglect and unhappiness. Counsels' failure to present this evidence was prejudicial.[14]

c. Mental health-related mitigation.

182. Petitioner was also prejudiced by counsel's failure to investigate, develop and present this mental-health related mitigating evidence.

183. Petitioner's traumatic upbringing, in addition to providing substantial mitigation in-and-of itself, also constitutes significant mental health-related mitigation.

---

[14] *E.g.*, *Wade v. Calderon*, 29 F.3d 1312, 1323 (9th Cir. 1994) (vacating death sentence on ineffective assistance of counsel grounds when counsel failed to present evidence of defendant's traumatic childhood); *Blanco*, 943 F.2d at 1499-1503 (same); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (same); *Kenley v. Armontrout*, 937 F.2d 1298, 1305 (8th Cir. 1991) (same); *Brewer v. Aiken*, 935 F.2d 850, 857-60 (7th Cir. 1991) (same); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) (same); *Eutzy v. Dugger*, 746 F. Supp. 1492, 1497-98 (N.D. Fla. 1989) (same), *aff'd*, 912 F.2d 1468 (11th Cir. 1990); *Jermyn v. Horn*, No. 1:CV-97-634, 1998 WL 754567, at *8-17 (M.D. Pa. Oct. 27, 1998) (same); *see also Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) ("because of [defendant's] history of childhood abuse, [the sentencer] could also conclude that [defendant] was less morally culpable than defendants who have no such excuse"); *id.* at 324 (death sentence overturned because sentencer was not permitted to give full effect to evidence of childhood abuse).

Petitioner's siblings described some of the terrible effects that this childhood had on him. They described a boy who was always "different," who felt lost and rejected, who cried often, who was very nervous and who would sit silently and alone, isolated from any help and in fear of his vicious and hateful father. Petitioner began to drink heavily when he was young, and soon became an alcoholic.

184. Moreover, it is uniformly acknowledged in the mental health profession that victims of such child abuse and neglect are left psychologically impaired by their suffering. *See, e.g.*, Helfer & Kempe, THE BATTERED CHILD, Chapters 9-10, 17-20 (4th ed. University of Chicago Press); Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY at 1365-67 (5th ed.) (schizoid and paranoid disorders have direct correlations to childhood abuse and neglect); *id.* at 1964-66 (results of childhood abuse and neglect include cognitive and developmental impairment; post-traumatic stress disorder; pathological object relationships; primitive defense mechanisms; impaired impulse control; poor self-concept and depression; masochistic and self-destructive behavior; difficulties in school adjustment; and central nervous system impairment).[15] The experts who testified post-conviction, including those retained by trial counsel and even the Commonwealth's "rebuttal" expert, Dr. Dattilio, described the debilitating, permanent, mitigating mental health deficits caused by Petitioner's childhood. The mental health professionals uniformly agree that the lasting adverse effects of abuse and neglect

[15] Kaplan & Sadock is a standard work in the mental health field that is relied upon by mental health professionals and has been often cited by the courts. *See, e.g., Mills v. Rogers,* 457 U.S. 291, 293 n.1 (1982); *Hays v. Murphy,* 663 F.2d 1004, 1010 n.10 (10th Cir. 1981).

include impulse control problems, emotional lability, depression, hopelessness, despair, problems controlling behavior, underachievement in school and life, low self-esteem, impaired social relationships, social isolation, inability to relate healthily to others, fear and mistrust, inability to deal with and resolve problems, inability to understand cause and effect, inability to predict future consequences of actions, and central nervous system deficits.

185. In short, child abuse and neglect such as that suffered by Petitioner causes permanent emotional and psychological disturbances, and "helps to explain," to a sentencing jury that has just convicted the defendant of first degree murder "how the person got to where they are, why they are the types of people they are." Cooke Deposition at 29. Because counsel failed to investigate, develop and present the evidence, the jury never heard any of this powerful mitigation. Even the Commonwealth's "rebuttal" expert agreed that a dysfunctional family background – including abuse, deprivations and mistreatment such as that suffered by Petitioner – is important and provides significant mental health mitigation. Petitioner was prejudiced by counsels' failure to investigate, develop and present this mitigating evidence.

186. The jury also never heard anything about Petitioner's severe and long-standing organic brain damage. It is undisputed that Petitioner suffers from organic brain damage. Even the Commonwealth's "rebuttal" expert, Dr. Dattilio, so testified. It is also undisputed that Petitioner's brain damage is mitigating. The experts, including the Commonwealth's "rebuttal" expert, agreed that Petitioner's brain damage causes significant and

severe impairments in his emotional, psychological and cognitive functioning.

187. Petitioner's organic brain damage is undoubtedly mitigating. The experts, including Dr. Dattilio, explained that Petitioner's brain damage has a drastic, debilitating impact on his personality and ability to function. His brain damage impairs and undermines his judgment, reasoning, cognition, mental flexibility, impulse control, emotional lability, ability to solve problems, ability to make sense out of experience, ability to understand and respond appropriately to his environment, ability to plan, ability to predict the consequences of behavior and ability to control his behavior. *See also* Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY at 599 (5th ed.) (describing some of the debilitating effects of brain damage, including "psychotic features"; "anxiety features"; "affective features"; "mood Problems"; "features usually associated with personality disorders"; "emotional problems"; and "cognitive impairment features"). The jury, however, never heard any of this mitigating evidence.

188. The experts who have tested and evaluated Petitioner for brain damage testified that his brain damage is long-standing. Again, even Dr. Dattilio agreed that there is real evidence of brain damage here and that it is important and mitigating. The effects of his brain damage have plagued Mr. Rompilla throughout his adult life. It dates back at least into his childhood, and possibly occurred in utero. As a result of his organic brain damage, at time of the offense Petitioner suffered from an extreme mental and emotional disturbance, and his capacity to appreciate criminality of conduct or conform conduct to requirements of law was substantially impaired. The jury, however, did not hear any of this powerful mitigating

evidence because counsel did not investigate, prepare and present it. Petitioner was prejudiced by counsels' failures.

189. Counsel also failed to obtain or present to the jury or to mental health experts a wealth of documentary evidence of Petitioner's lifelong history of mental retardation, cognitive impairment and inability to function, including medical records, school records, prison psychological records (which were included in prior court files that were readily available pretrial and at the time of trial), and information regarding Petitioner's history of head injuries.[16]

190. Petitioner's medical records show that he was hospitalized at age two with severe diarrhea and a fever that exceeded 105°F. The mental health experts testified that this type of childhood medical trauma is related to permanent organic brain damage, that these medical records are therefore, at least, a "red flag" for brain damage, and that any mental health expert presented with these records would perform brain damage testing or request that such testing be done. Trial counsel, however,

[16] The experts described the connection between Petitioner's history of impairments and his impairments at the time of the offense. Moreover, even if the expert testimony had not related to the existence of deficits at the time of the offense (it did), expert testimony about the defendant's *history* of mental impairments is still admissible, relevant and valid mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (failure to consider evidence of emotional disturbance preceding offense and difficult family history constitutional error); *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring) ("Evidence concerning . . . [the defendant's] emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment"); *Smith v. Singletary*, 61 F.3d 815, 817-18 (11th Cir. 1995) (sentencer's failure to consider evidence of alcohol abuse and mental problems preceding offense violated the constitution).

did not obtain or make use of these records. Therefore, the jury and the experts never learned of them and the experts never tested Petitioner for brain damage – because they never knew that Petitioner's history presented, at least, substantial signs demanding that brain damage testing be done.

191. Petitioner's school records show that he consistently scored in the mentally retarded range on standardized, reliable IQ tests; that he was placed in special education classes starting in the fourth grade, where he remained until he left school in ninth grade; that his academic abilities never progressed beyond the third grade level throughout his schooling; and that his father would not cooperate with school officials in their attempts to help Petitioner. Trial counsel, however, did not obtain or make use of these records. Therefore, the jury never learned of this compelling mitigating evidence of Petitioner's lifelong history of mental deficits. Moreover, at the PCRA hearing the mental health experts testified that these school records, like the hospital records, are unmistakable "red flags" indicating that Petitioner was suffering as a child from the effects of brain damage and child abuse. Because counsel failed to obtain these records, however, the trial experts never learned of these substantial signs of brain damage and child abuse, and never undertook the necessary brain damage testing and child abuse inquiry and the jury never heard about it.

192. Petitioner's prison records from 1976, long before the offense, contain psychological and achievement test results showing that he was still suffering from the cognitive deficits exhibited in his school records, that he was psychologically disturbed, and that he had a history of alcoholism. Trial counsel did not obtain or make use of

these records, notwithstanding the fact that they were included in the court file from Petitioner's prior conviction that was used against him at the penalty phase and was maintained in the same building in which the capital proceedings were conducted. The jury never learned of this mitigating evidence. Moreover, like the medical and school records, these prison/court records contain numerous significant signs that Petitioner was suffering from organic brain damage and from lasting effects of his abusive childhood. Because counsel did not obtain these records or provide them to mental health experts, Petitioner's significant mental health and cognitive deficits were never considered by the jury.

193. Petitioner has a history of serious head injuries dating back to childhood. These head injuries, like his impaired performance on standardized tests documented in his school and prison/court records, are another sign of Petitioner's organic brain damage, since head trauma is a common cause of such damage. Counsel should have been aware that Petitioner had suffered head injuries, since at the time of trial the scars were still visible on Petitioner's forehead. But counsel never pursued this important information, never presented it to the jury, and never presented it to the mental health experts who could have conducted the appropriate testing for brain damage. The jury never heard this mitigating evidence.

194. In short, there was a wealth of compelling mental health-related mitigation to present in this case,

but counsel never presented any of it. Petitioner was prejudiced by counsels' failures.[17]

d. The combined mitigating effect of Petitioner's history and deficits.

195. Each of the above-described areas of mitigation is compelling, would have given the capital sentencing jury a powerful case for life, and establishes prejudice. Moreover, the sum total of Petitioner's deficits was particularly debilitating at the time of the offense and provides even more powerful mitigation. The combination of his brain damage, the lasting effects of his abusive childhood, his alcoholism and the stress of his recent release from prison created a "snowballing effect" which led to severe psychological, emotional and cognitive impairments at the time of the offense.

196. Thus, the jury did not know that Petitioner's impairments and history constitute an extreme mental and emotional disturbance, *see* 42 Pa.C.S. § 9711(e)(2); a substantially impaired capacity to conform conduct to the requirements of law, *see* section 9711(e)(3); and myriad background mitigating factors under section 9711(e)(8). Petitioner was clearly prejudiced by counsels' failure to

[17] *E.g.*, *Middleton v. Dugger*, 849 F.2d at 495; *Blanco*, 943 F.2d at 1505; *Brewer v. Aiken*, 935 F.2d 850, 857-60 (7th Cir. 1991); *Glenn*, 71 F.3d at 1211; *Armstrong v. Dugger*, 833 F.2d 1430, 1433-34 (11th Cir. 1987); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991); *Eutzy*, 746 F. Supp. at 1497-98, *aff'd*, 912 F.2d 1468; *Commonwealth v. Smith*, 544 Pa. 219, 675 A.2d 1221, 1233-34 (1996) (prejudice results when counsel fails to present evidence that defendant "has suffered some mental problems").

investigate, prepare and present this overwhelming mitigating evidence.

e. Rebuttal of the aggravating circumstances.

197. In addition to its enormous weight as mitigation, the evidence of Petitioner's alcoholism, traumatic childhood, organic brain damage and other deficits also would have substantially weakened the prosecution's aggravating evidence. The aggravating circumstances found by the jury in this case included 42 Pa.C.S. § 9711(d)(8) ("The offense was committed by means of torture.") and (d)(9) ("The defendant has a significant history of felony convictions involving the use or threat of violence to the person."). The weight accorded to these aggravating circumstances would have been substantially lessened if the jury had known about Petitioner's organic brain damage, alcoholism, abusive childhood and other deficits.

198. In support of the (d)(9) aggravating circumstance, the prosecution presented evidence of Petitioner's prior convictions for rape and burglary. The overwhelming deficits caused by Petitioner's organic brain damage, childhood trauma and alcoholism cast this criminal history in a very different light, greatly reducing its aggravating weight, and making it less "significant." Because the jury did not know about Petitioner's organic brain damage and other deficits, however, it did not know that Petitioner acquired these prior convictions while suffering from organic deficits that constitute an extreme mental and emotional disturbance and that substantially impaired his capacity to appreciate the consequences of conduct or to

conform his conduct to the requirements of law. Accordingly, the jury gave this aggravation much greater weight than it would have been given if the jury had known the accurate facts about Petitioner.

199. The same is true of the (d)(8) "torture" aggravating circumstance. If the jury had known of Petitioner's traumatic childhood, alcohol abuse and brain damage, and the deficits associated with these problems, it would have been less likely to find this aggravating circumstance, and would have accorded less weight to it even if it had found it.

200. In short, Petitioner's abusive and neglectful childhood, alcoholism, mental retardation, history of cognitive impairment and organic brain damage, had it been presented to the jury, would have "totally change[d] the evidentiary picture" at the capital sentencing proceeding, since it would have provided powerful "mitigation, [and] also [would have] significantly weaken[ed] the aggravating factors." *Middleton v. Dugger,* 849 F.2d 491, 495 (11th Cir. 1988); *accord Baxter v. Thomas,* 45 F.3d 1501, 1515 (11th Cir. 1995). Counsels' failure to investigate, prepare and present this evidence undermines confidence in the outcome of the sentencing proceeding. Petitioner was prejudiced by counsels' failures.

2. Counsels' performance was deficient.

201. As described above, the mitigating evidence that could have been presented but was not clearly establishes prejudice. It is equally clear that this prejudice arose from counsels' deficient performance – their failure to adequately investigate and develop the mitigating evidence.

202. Thorough investigation, preparation and presentation of mitigating evidence is a fundamental prerequisite to the constitutionally effective representation of counsel in a capital case. "Given the severity of the potential sentence and the reality that the life of [the defendant] [is] at stake," it is capital counsel's "*duty . . . to collect as much information as possible about [the defendant] for use at the penalty phase.*" *Hill v. Lockhart,* 28 F.3d 832, 845 (8th Cir. 1994). Accordingly, "[i]n cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant," counsel's representation has consistently been held to be "beneath professionally competent standards." *Jackson v. Herring,* 42 F.3d 1350, 1367 (11th Cir. 1995).[18]

203. As part of capital counsel's constitutional duty to [sic] "to collect as much information as possible," *Hill,* and "formulate an accurate profile" of the client for the capital sentencing hearing, *Jackson,* counsel must investigate and develop mitigating evidence of childhood abuse and neglect, alcoholism and mental health impairments. *See* cases cited *supra.* To do so, counsel must obtain and make use of records pertaining to the client, his family and

[18] *See also Emerson,* 883 F. Supp. at 242-44 (under the Sixth Amendment, counsel must conduct a full and "meaningful investigation for mitigating evidence"; counsel is "under a greater obligation to discover and evaluate potential evidence of mitigation" in capital cases because the penalty phase is the stage "where counsel can do his or her client the most good"), *aff'd,* 91 F.3d 898; *Glenn,* 71 F.3d at 1208 (capital counsel must fully and "systematic[ally]" investigate and develop "their client's social history"); *Williamson v. Ward,* 110 F.3d 1508, 1514 (10th Cir. 1997) ("in a capital case, counsel's duty to investigate all reasonable lines of defense is strictly observed").

background;[19] counsel must fully interview family members who are familiar with the client's background;[20] and

[19] *E.g., Hill*, 28 F.3d at 845 (information that must be collected by effective counsel includes records about the defendant); *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) (same); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981) (same); *Glenn*, 71 F.3d at 1208 (capital counsel have a duty to fully investigate "their client's social history" by, *inter alia*, seeking out and examining school, medical, probation and other records); *Claibourne v. Lewis*, 64 F.3d 1373, 1377, 1385 (9th Cir. 1995) (counsel was ineffective for failing to seek out records about the defendant); *Baxter v. Thomas*, 45 F.3d 1501, 1512-14 (11th Cir. 1995) (counsel was ineffective for failing to seek out the client's school and juvenile delinquency records, and the low IQ scores in the records counsel did not obtain established prejudice for purposes of capital sentencing); *Middleton v. Dugger*, 849 F.2d 491, 493-94 (11th Cir. 1988) (capital counsel is ineffective when counsel fails to obtain school, hospital, juvenile and prison records even if those records are in another state hundreds of miles away [Florida/New York] from the trial state; and the evidence of low IQ, childhood mistreatment and mental problems in those records demonstrated prejudice for purposes of capital sentencing); *Martinez-Macias v. Collins*, 810 F. Supp. 782, 820 (W.D. Tex. 1991) (counsel was ineffective for failing to obtain records from juvenile facility), *aff'd*, 979 F.2d 1067 (5th Cir. 1992); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4.1, Investigation, §§ 2C & 2D (capital counsel should secure releases and obtain hospital, treatment, school and mental health records; *cf. Strickland*, 466 U.S. at 689 (ABA standards are useful guides for determining if counsel's performance was reasonable)); *Commonwealth v. Mabie*, 467 Pa. 464, 359 A.2d 369, 374 (1976) (even in non-capital case, counsel has duty to seek out records and is ineffective if she fails to do so).

[20] *E.g., Martinez-Macias*, 810 F. Supp. at 787, 817-18 (W.D. Tex. 1991) (ineffective assistance of counsel where counsel failed to fully interview the defendant's family about the defendant's life history before proceeding to capital sentencing), *aff'd*, 979 F.2d 1067 (5th Cir. 1992); *Baxter v. Thomas*, 45 F.3d at 1512-13 (same); *Kenley v. Armontrout*, 937 F.2d 1298, 1306-07 (8th Cir. 1991) (same); *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (counsel's failure to interview potential witnesses violates the duty to investigate and constitutes deficient performance); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*,

(Continued on following page)

counsel must obtain expert mental health evaluations for mitigation, work closely with the mental health expert and present expert testimony regarding mental health-related mitigating circumstances.[21]

Guideline 11.4.1, Investigation, §§ D.2.C, D.3.B & D.3.C (directing counsel to seek out information regarding "family and social history (including physical, sexual or emotional abuse)" by, *inter alia*, interviewing family members and others familiar with the defendant's life history); *id.*, Guideline 11.8.3, Preparation for the Sentencing Phase, § F (same); *see also Eddings*, 455 U.S. at 116 (defendant's "background and mental and emotional development" are relevant mitigating circumstances).

[21] *E.g., Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987) (counsel ineffective at capital sentencing when he fails to present mental health testimony at the sentencing hearing, when expert testimony "would have provided the jury with a more long-term view of [the defendant's] emotional problems"); *Middleton*, 849 F.2d at 495 (counsel ineffective for failing to present expert mental health testimony that "could well have met the standard for statutory mitigating factors"); *Antwine v. Delo*, 54 F.3d 1357, 1366-67 (8th Cir. 1995) (counsel was ineffective at the penalty phase where he relied on mental health evaluation that was prepared for purposes of investigating guilt phase defenses); *Claibourne v. Lewis*, 64 F.3d 1373, 1377, 1384-85 (9th Cir. 1995) (counsel was ineffective at sentencing when his guilt phase questioning of mental health experts did not include questions about statutory mitigating circumstances and he did not recall the experts at sentencing; "In short, [counsel] never asked these experts ... to expound on mitigation."); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981) (courts have "repeatedly stressed the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel" (citing *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974))); *Glenn*, 71 F.3d at 1210 n.5 ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant"); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.8.6, The Defense Case at the Sentencing Phase, §§ B.1, 8 (counsel should always investigate and consider presenting the client's "[f]amily and social history (including physical, sexual or

(Continued on following page)

204. Here, counsel failed to take these steps, which are the minimum requirement of effective representation at capital sentencing.

a. Counsel failed to investigate mitigating evidence of Petitioner's alcoholism.

205. Counsel failed to investigate, develop or present the mitigating evidence of Petitioner's alcoholism, and the jury never heard the mitigating evidence of Petitioner's lifelong alcohol addiction.

206. At the time of trial there was significant available evidence of Petitioner's long history of alcoholism – evidence that was either known to trial counsel or would have been known if counsel had reasonably investigated.

207. Information *in counsels' possession* would have led effective counsel to investigate and present the mitigating evidence of Petitioner's longstanding alcohol abuse. Petitioner *told counsel* that he had been drinking on the night of the offense. He told counsel that during the hours leading up to the offense he had been drinking in bars all night – from supper time until the bars closed at 2:00 a.m. NT 3/28/96 at 126-27 (Ms. Dantos). This alone should have spurred counsel to investigate, and there was much more.

208. Police reports, provided to counsel in discovery and in their possession at the time of trial (Exhibit 15),

---

emotional abuse, neighborhood surroundings" as well as "[e]xpert testimony concerning [such a background] and the resulting impact on the client"); *see also Ake v. Oklahoma*, 470 U.S. 68 (1985) (stressing importance of expert mental health assistance in capital cases).

indicate that Petitioner had been drinking very heavily at and around the time of the offense; that he had started drinking heavily in the early afternoon prior to the offense and had been on a "drinking bout all night" on the night of the offense; that he was "drunk," "severe[ly]" intoxicated and "passed out" that night; and that when he arrived at a motel shortly after the offense he was so "drunk or high" that "he was not very coherent and could not find [his room] on his own." Despite this clear evidence – in counsels' possession – that Petitioner was grossly impaired from alcohol consumption, counsel failed to investigate.

209. Moreover, the report from Dr. Gross to counsel (Exhibit 6), also in counsels' possession at the time of trial, is replete with information that should have caused counsel to investigate the mitigating evidence of Petitioner's alcohol abuse – including *a specific recommendation that counsel investigate this area.*

210. Dr. Gross' report indicates that Petitioner *had been drinking for fourteen hours straight* (from lunch time until approximately 2:00 a.m.) on the day and evening of the offense, with only a brief break for supper; that he *could not recall how much he had drunk* during that time; that he was spending nearly all his time in bars and drinking heavily in the days near the time of the offense; that he *attended Alcoholics Anonymous* while he was in prison; and that *he was fearful of admitting his drinking* because it was a parole violation. Dr. Gross concluded by recommending that Petitioner's heavy drinking and the possibility of alcoholic blackout *ought to be further investigated.* Counsel, however, did no such investigation.

211. Thus, trial counsel *had information in their possession,* from Petitioner, from police reports, and from

Dr. Gross, that Petitioner was an alcoholic who had been drinking heavily during the hours before the offense and was so drunk around the time of the offense that he was incoherent. Despite this knowledge, and despite Dr. Gross' specific recommendation that counsel further investigate Petitioner's alcohol problems, counsel did *nothing* to investigate, prepare or present this mitigating evidence. Counsel were ineffective.

212. Moreover, there was even more information showing Petitioner's lifelong struggle with alcoholism that counsel did *not* possess, but would have possessed if they had reasonably investigated. Petitioner's prior prison and court records (Exhibits 12-14), which would have been obtained by effective counsel, *see infra,* unambiguously state that Petitioner had a history of "over-indulgence in alcoholic beverages"; that he needed "counseling pertaining to his long standing abuse of alcohol"; and that there was a history of alcoholism in his family. Petitioner's family would also have described to trial counsel the development and effects of Petitioner's alcohol abuse if they had been asked. Counsel, however, failed to do the needed investigation and, therefore, was not aware of this evidence about Petitioner's alcoholism. They were ineffective.

213. Counsel testified that the evidence of Petitioner's alcohol dependency was not presented to the jury because counsel was not aware that there was any alcohol-related mitigation to present. NT 3128/96 at 129. Counsels' claimed ignorance of any alcohol-related mitigation, however, is entirely inconsistent with counsels' testimony that Petitioner himself told counsel of his drinking on the night of the offense and with Dr. Gross's specific recommendation that this area be further investigated. Moreover, to the extent that counsel were ignorant of

Petitioner's alcoholism, that ignorance resulted from counsels' failure to read the police reports in their possession; failure to investigate and follow up on Dr. Gross' recommendation; and failure to otherwise investigate, as described above. Thus, this evidence was never investigated and presented simply because counsel ineffectively failed to follow up on and develop evidence of Petitioner's drinking problems that was *known* to counsel, and failed to do the rudimentary investigation of Petitioner's records that would have revealed conclusive evidence of Petitioner's alcoholism. Counsel were ineffective.

b. Counsel failed to obtain medical, school, prison and court records.

214. Counsel completely ignored their duty to obtain records that might assist in "formulat[ing] an accurate profile" of Petitioner. *Jackson v. Herring*, 42 F.3d at 1367. Counsel made *no* attempt to obtain, and did not obtain, any school records, medical records, records from prior incarcerations, records from prior convictions, prior court records, or any other records about Petitioner and his life. As a result of this failure to obtain any records about Petitioner, counsel were unable to present to the jury the wealth of mitigating evidence these records contain, including Petitioner's long history of psychological and cognitive impairment and mental retardation; his history of failure in school and life; his physically and emotionally impoverished family background; his neglectful childhood at the hands of alcoholic parents; and his alcoholism.

215. These records were not obscure or difficult to find. For example, Petitioner's school records were in the Board of Education building across the street from the

courthouse in which the pretrial and trial proceedings were held; the prison mental health evaluation records were readily available by request to the Department of Corrections, and were also contained in the Court of Common Pleas Clerk's Office, in the same courthouse; and the medical records were obtained from the same hospital where Petitioner's blood was tested for forensic purposes when he was arrested in this case. Counsel were ineffective for failing to take the rudimentary investigative steps required to obtain these records. *Compare Middleton v. Dugger,* 849 F.2d 491, 494 (11th Cir. 1988) (counsel is ineffective when counsel fails to obtain records about the client, even if those records are in another state hundreds of miles away (Florida/New York) from the trial state).

216. In addition to the duty that counsel have in *every* capital case to seek out such medical, school, incarceration, court and other background records about the defendant, there are specific factors about this case that made the collection of such records especially imperative and made counsels' duty to obtain the records especially clear.

217. First, the prison records that contain the relevant mitigating and mental health evidence (for example, the 1976 "Initial Transfer Petition and Initial Classification Summary") were available *in the Court of Common Pleas file* on Petitioner's prior rape/burglary conviction, which is maintained in the Clerk's office at the Lehigh County Courthouse. *See* NT 3/28/96 at 206. Thus, if trial counsel had made even the most rudimentary investigation of the prior rape/burglary convictions – by simply looking through the court file for that case – counsel would have discovered this crucial evidence.

Counsel, however, failed to take even this most rudimentary step.

218. "Few aspects of representation can be more critical than understanding the client's criminal history." *Siripongs v. Calderon,* 35 F.3d 1308, 1316 (9th Cir. 1994) (counsel is ineffective at the penalty phase when her poor understanding of client's criminal record results in failure to present mitigating evidence). A thorough understanding of these particular prior convictions was especially essential to effective representation in this case because *the prosecution used these convictions,* as defense counsel knew long before trial that it would, *to establish an aggravating circumstance* that Petitioner had "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.C.S. § 9711(d)(9).

219. Counsel, however, never bothered to look at the court file related to these prior offenses and therefore never discovered or utilized the invaluable mitigating evidence the file contained. *E.g.*, NT 11/1/88 at 31, 40-44. Counsel knew well before the penalty phase began that the prosecutor would use the prior convictions and records about them at the penalty phase. NT 3/28/96 at 231. Yet, even as the penalty phase was about to begin, counsel still had not examined the court records from the prior case that was about to be used in aggravation. *See, e.g.,* NT 11/1/88 at 31 (when defense counsel complained that he did not have information about the prior convictions, the prosecutor responded: "it's a public record, Fred, you could have gone over lunch and looked at it just like I did"); NT 11/1/88 at 40-41 (defense counsel reviews, for the first time, copies of the indictment and the transcripts from the prior conviction, after they are provided to counsel by the prosecutor). At the PCRA hearing, counsel confirmed that

they never bothered to look at the court file on these crucial prior convictions. *E.g.*, NT 3/29/96 at 54 (counsel's action on prior convictions limited to what prosecution chose to provide by discovery).

220. Thus, even though Petitioner's prior convictions were used to establish an aggravating circumstance at the capital sentencing proceeding, and even though counsel knew long before trial that they would be so used, counsel never bothered to investigate the facts of these prior convictions and never bothered to take even the simple step of looking at the court files regarding those convictions. Instead, counsel said he relied on the prosecutor to provide "discovery." It is axiomatic that "investigation consisting solely of reviewing [the] prosecutor's file 'fell short of what a reasonably competent attorney would have done.'" *United States v. Gray,* 878 F.2d 702, 711 (3d Cir. 1989) (quoting *Thomas v. Lockhart,* 738 F.2d 304, 308 (8th Cir.1984)); *accord Commonwealth v. Mabie,* 467 Pa. 464, 359 A.2d 369, 374 (1976) (reliance on "the prosecution's file is not a substitute for an independent investigation by defense counsel"); *Commonwealth v. Baxter,* 537 Pa. 41, 640 A.2d 1271, 1275 n.3 (1994) (same). Counsel rendered deficient performance when they failed to examine the prior case files, and thus failed to discover the DOC records and the mitigating evidence they contained and would have led to.

221. Moreover, there is another particular aspect of this case that would inexorably have led effective counsel to obtain the prior prison records and thus uncover the powerful mental health mitigating evidence that actually existed. It was well-established by the time of this trial that "evidence bearing on the defendant's ability to adjust to prison life" is relevant mitigating evidence. *Skipper v.*

South Carolina, 476 U.S. 1, 6 (1986). At the time that Petitioner was arrested for the instant offense, he had spent much of his life in prison or juvenile facilities. He had only recently been released from a lengthy incarceration resulting from his prior convictions. Indeed, counsel complained at the PCRA hearing that Petitioner's family "didn't really feel as though they knew" Petitioner as an adult because he had spent so much time in custody. NT 3/28/96 at 47. Under these circumstances, Petitioner's prison evaluations and reports offered counsel a potentially rich source of mitigation that should have been investigated. Counsel, however, did not investigate this area of mitigation at all, and did not get Petitioner's prison records.

222. If counsel had performed effectively and obtained Petitioner's prison records as part of an investigation for potential mitigation, they would have found the Department of Corrections 1976 "Initial Transfer Petition and Initial Classification Summary" (Exhibit 12). As described above, these prison records contain psychological tests reflecting cognitive, emotional and psychological impairments; they show that Petitioner had a history of severe alcoholism; and they indicate that Petitioner was raised in a "slum environment." Moreover, these prison records, which would have been obtained by effective counsel, refer to, and would have led effective counsel to, Petitioner's juvenile court records (*see* Exhibits 12-14) which, as described above, state that Petitioner's IQ is in the mentally retarded range; note that he is easily influenced and led by others; and describe the extreme neglect, lack of supervision, alcoholism and instability in his childhood home. Thus, these records contain significant mitigating evidence that the jury never heard. Counsel

rendered deficient performance by failing to seek or obtain them.

c. Counsel failed to provide background information about Petitioner to mental health experts.

223. In addition to presenting the mitigating evidence that is apparent on the face of the medical, school, prison and court records, effective counsel would have provided the records to the mental health experts, leading to the development and presentation of the mental health-related mitigating evidence of Petitioner's organic brain damage, abusive childhood and alcoholism.

224. The mental health profession and the courts have recognized that a reliable forensic mental health evaluation must include consideration of "collateral information" about the defendant – *i.e.*, information that comes from sources other than the defendant himself. Collateral sources of information are critical to a reliable forensic mental health evaluation because the defendant's ability to relate his own history and problems is often impaired – mentally ill persons tend to be poor historians; they hide rather than reveal symptoms; they are often (irrationally) afraid of what will happen to them if they do reveal their history or symptoms; and they often lack insight into their problems. As a result, without collateral sources of information, the defendant's mental illness and its full extent and implications may remain hidden. *E.g.*, Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY at 488, 550 (4th ed.); Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process,* 66 VA. L. REV. 427 (1980); American Psychiatric Association, *Report of the Task Force on the Role of Psychiatry in the*

Sentencing Process, ISSUES IN FORENSIC PSYCHIATRY 202 (1984); Pollack, *Psychiatric Consultation for the Court,* 1 BULL. AM. PSYCH. & L. 267, 274 (1974); H. Davidson, FORENSIC PSYCHIATRY 38-39 (2d ed. 1965); *Mason v. State,* 489 So.2d 734, 737 (Fla. 1986).

225. The experts who testified post-conviction, including trial experts and the Commonwealth's "rebuttal" expert, Dr. Dattilio, agreed that independent, collateral information about the defendant is a crucial prerequisite for a professionally appropriate and reliable forensic mental health examination. *See, e.g.,* Sadoff Deposition at 30-31 (testimony of Dr. Sadoff regarding importance of collateral information in forensic examination, discussed *supra*); Dattilio Deposition at 94, 104-107, 111 (testimony of Dr. Dattilio, same). Moreover, the doctors explained, collateral information about Petitioner was especially needed here because Petitioner remembers little about his childhood, except that he was always called a "dummy," Armstrong Deposition at 27; because Petitioner's brain damage, low intelligence and cognitive impairments make him a poor historian, Crown Deposition at 82; Dattilio Deposition at 94, 104-05; and because Petitioner is the product of an abusive family, which results in "denial" and the need for particularly careful questioning based upon independent information, Dattilio Deposition at 106-07, 111. *See also Williamson v. Ward,* 110 F.3d at 1518 ("An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment."); *Blanco v. Singletary,* 943 F.2d 1477, 1502 n.121 (11th Cir. 1991) (same).

226. Because of the critical importance of such collateral information, capital defense counsel are ineffective when they fail to provide such information to mental health experts who are performing evaluations for capital sentencing.[22] Here, counsels' ineffective failure to seek or obtain

[22] *E.g.*, *Glenn v. Tate*, 71 F.3d 1204, 1208, 1210 n.5 (6th Cir. 1995) ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant"; counsel was ineffective when "[t]he lawyers made no systematic effort to acquaint themselves with their client's social history" and, instead, relied upon expert evaluations); *Antwine v. Delo*, 54 F.3d 1357, 1365-66 (8th Cir. 1995) (counsel was ineffective for not independently investigating the client's mental health history and relying instead on a psychiatrist's report where the report was based on an interview and review of police background sheet); *Kenley v. Armontrout*, 937 F.2d 1298, 1304-08 (8th Cir. 1991) (counsel was ineffective for not fully investigating the client's background and mental health history and, instead, relying on a psychiatrist's report, where the report contained incomplete psychological test results, did not indicate that the psychiatrist had reviewed the defendant's military records, and contained no evidence that the psychiatrist had contacted the defendant's family); *Claiboume v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (counsel was ineffective where defendant was seen by three mental health doctors, but counsel failed to provide the doctors with collateral information, such as records and statements from those who knew the defendant); *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) (counsel were ineffective where they had their client examined by a psychiatrist and relied on the expert's report without doing any other investigation into the defendant's mental health history; the attorneys' failure to further investigate Profitt's mental health background and history "clearly [fell] below the level of customary skill and knowledge required of attorneys"); *Beavers v. Balkom*, 636 F.2d 114, 116 (5th Cir. 1981) (courts have "repeatedly stressed the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel"; finding counsel ineffective for failing to obtain mental health records about his client and relying instead on a doctor's report (citing *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974))).

any collateral information about Petitioner – the school, medical, prison, court and other records – led directly to counsels' failure to present the overwhelming mental health mitigation that was presented post-conviction.

227. In post-conviction, every mental health expert, including the experts retained at the time of trial and the Commonwealth's "rebuttal" witness, testified that the kind of collateral background information that would have been discovered upon reasonable investigation in this case (*e.g.*, Petitioner's medical, school, prison and court records) is important and necessary information for a professionally adequate and reliable mental health evaluation. Every expert testified that Petitioner's medical, school, prison and court records contain numerous, unmistakable, and important indications that Petitioner suffered from child abuse and organic brain damage. Every expert testified that a competent mental health expert presented with these records would have demanded that further inquiry, testing and evaluation be done to determine the source of the real psychological impairments these records reveal. Every expert testified that if these records had been presented to them at the time of the trial they would have performed neuropsychological (brain damage) testing, or would have requested that such testing be done by a qualified expert.[23]

228. In short, if counsel had performed effectively, obtained Petitioner's records and provided them to the

[23] Of the experts retained by the defense at trial, only Dr. Cooke is qualified to test for brain damage. Dr. Sadoff and Dr. Gross are not qualified to do such testing themselves, but testified that they would have requested such testing if they had been presented with the records showing Petitioner's history of dysfunction and impairment.

experts, *brain damage testing would have been done* and *Petitioner's organic brain damage and other impairments would have been revealed and presented to the jury.* Because counsel failed to perform these rudimentary duties, the experts were not made aware of the need for brain damage testing, Petitioner was never tested for brain damage, and his severe mental health impairments went undiscovered and unpresented. Counsel were ineffective.

---

d. Counsel failed to communicate with the mental health experts.

229. Trial counsels' failure to obtain any of the crucial background information, and their resulting failure to present it to the mental health experts, was compounded by their failure to communicate reasonably with the experts. Counsel did not discuss the appropriate legal standards with the experts, including the standards governing mitigating evidence; counsel did not communicate with the experts regarding the nature and purpose of their evaluations; counsel did not follow up on the experts' explicit suggestions for further investigation; and counsel simply *assumed* that brain damage testing would be done, but never asked the expert to do it, never asked if it was done, and, therefore, never realized that *it was not done.*

230. Counsels' failure to communicate reasonably with the experts is shown by the complete lack of communication between counsel and Dr. Gross about the nature and purpose of Dr. Gross's evaluation. While counsel thought that Dr. Gross was evaluating Petitioner for mitigation purposes, Dr. Gross, who has never prepared for or testified at the penalty phase of a capital case, believed that his evaluation was limited to possible guilt-phase

defenses, such as insanity. *See supra* (discussing testimony of Dr. Gross, Mr. Charles and Ms. Dantos). Since Dr. Gross was not looking for mitigation, he obviously was not in a good position to find it, as the Commonwealth's own "rebuttal" expert, Dr. Dattilio, testified. *See* Dattilio Deposition at 117. Counsel was ineffective.[24]

231. Counsel's failure to communicate with Dr. Gross also resulted in counsel's failure to recognize and understand one of the many indicia that Petitioner suffered a traumatic and abusive childhood. Dr. Gross' report noted that Petitioner had a history of antisocial behavior. In post-conviction, Dr. Gross testified that this history is a *strong indicator that Petitioner suffered from child abuse* – "in general, [antisocial behaviors] *are due to childhood experience in a very unhealthy family, and that causes the antisocial behavior.*" Gross Deposition at 19. Because of this, Dr. Gross explained, Petitioner's history indicates that he suffered an abusive childhood, and abuse should be carefully investigated and explored. *Id.* at 12-13; *see also supra* (discussing Dr. Gross' testimony).

232. Because counsel failed to communicate reasonably with Dr. Gross, counsel never learned of this

---

[24] *E.g., Antwine v. Delo,* 54 F.3d 1357, 1366-67 (8th Cir. 1995) (counsel was ineffective at the penalty phase where he relied on mental health evaluation that was prepared for purposes of investigating guilt phase defenses); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir. 1989) (finding ineffective assistance of counsel where failure to present mitigating evidence resulted from misunderstanding between attorneys as to who was responsible for gathering mitigating evidence); *Baxter v. Thomas,* 45 F.3d at 1514 (finding ineffective assistance where failure to present mental health mitigating evidence resulted from counsel's mistaken belief that defendant had spent much of his youth in a juvenile detention facility, when it was actually a mental hospital).

connection between anti-social behavior and childhood trauma. As described above, counsel thought that Dr. Gross was looking for mitigation, but Dr. Gross did not know that counsel expected him to look for mitigation, and Dr. Gross did not look for mitigation. Moreover, Dr. Gross, who has never prepared for a capital sentencing hearing, *did not know that an abusive childhood is mitigating*:

> Q. *Are you aware* in your role as an expert in a forensic setting, *that an abusive childhood can be a mitigating circumstance in a capital case?*
>
> A. *No. I'm not aware of that.*

Gross Deposition at 28.

233. Thus, counsel's failure to appreciate the significance of Dr. Gross's report resulted from counsel's failure to communicate with Dr. Gross about the purpose of the evaluation; counsel's failure to discuss the meaning of Dr. Gross' report with him; and counsel's failure to inform Dr. Gross about the relevant law of mitigation.

234. Moreover, as described above, Dr. Gross' report also contains significant indicia that Petitioner's alcoholism should be investigated, and explicitly recommends that counsel further investigate Petitioner's history of alcoholism. Counsel failed to do any investigation, despite the report's specific urging that such investigation be done.

235. Similarly, counsels' failure to communicate reasonably with Dr. Sadoff resulted in that doctor having a legally incorrect understanding of the nature and scope of mitigating evidence. Dr. Sadoff testified that his understanding of mitigation is that it relates solely to the defendant's state of mind at the time of the offense:

> I have not in my experience used irrelevant material that had nothing to do with the crime itself as a mitigating factor. It had to be something that would have impacted on his state of mind at the time.

Sadoff Deposition at 39.

236. Dr. Sadoff's overly narrow conception of mitigation, however, does not comport with the broad definition of mitigation that the Eighth Amendment commands – "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). *See also Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (mitigation is anything that "might serve as a basis for a sentence less than death"; it need "not relate specifically to [the defendant's] culpability for the crime he committed") (quoting *Lockett*). Because counsel did not communicate effectively with Dr. Sadoff, and did not inform his of the proper legal standards, the doctor's misconceptions were never corrected and this potential witness failed to even consider a wide spectrum of potential mitigating evidence.

237. Counsels' failure to communicate reasonably with Dr. Cooke was especially prejudicial, since Dr. Cooke is the only one of the trial experts who could have tested Petitioner for brain damage. Sadoff Deposition at 13-15; Gross Deposition at 18.

238. Counsel testified in post-conviction that they *assumed* that Dr. Cooke would perform brain damage testing. NT 3/28/96 at 67-68 (Ms. Dantos); NT 3/29/96 at 43 (Mr. Charles: "When I sent Ron Rompilla to Dr. Cooke, I *expected that he would . . . test to determine if there was*

any brain damage."). However, counsel never actually *asked* Dr. Cooke (or anyone else) to do brain damage testing; counsel never *asked* the doctors if brain damage testing was actually done; and, in fact, *brain damage testing was not done*. Cooke Deposition at 7. Instead, Dr. Cooke testified, he did only a few incomplete tests that provided only "a rough estimate of intellectual function." *Id.*

239. If Dr. Cooke had done what counsel silently "expected that he would" do, brain damage testing would have been done, and Petitioner's brain damage would have been known to counsel and presented to the capital sentencing jury. Thus, counsels' failure to communicate reasonably with the trial mental health experts about the purpose, content and extent of their evaluations resulted in the failure to present the evidence of Petitioner's brain damage and other mental-health related mitigation. Counsel were ineffective for simply assuming something of such importance, and not taking any steps to be sure that their assumptions corresponded to reality.

e. Counsel failed to reasonably investigate Petitioner's traumatic childhood.

240. Counsel also rendered deficient performance when they failed to reasonably investigate, prepare and present the mitigating evidence of Petitioner's traumatic childhood and its lasting adverse effects.

241. The school, prison and court records that counsel ineffectively failed to obtain would have led effective counsel to the evidence of Petitioner's neglectful and abusive childhood. For example, Petitioner's school records explicitly state that school officials could obtain

"no cooperation" from his father in their attempts to help Petitioner, consistent with the dysfunctional home described in post-conviction; and Petitioner's juvenile court records explicitly refer to the extreme neglect, lack of supervision, parental alcoholism and instability in Petitioner's childhood home.

242. Moreover, the mental health experts, including the Commonwealth's "rebuttal" expert, Dr. Dattilio, agreed that Petitioner's school and prison records – with their mentally retarded IQ scores, low achievement test scores, special education placement, and abnormal MMPI test results – are consistent with, and indicators of, the abuse Petitioner suffered as a child, and show the need for careful and thorough investigation of Petitioner's childhood. *E.g.*, Dattilio Deposition at 70-73, 78-80. Counsel, however, failed to obtain any of these records and so was unaware of this evidence of Petitioner's traumatic childhood.

243. Counsels' failure to present the evidence of Petitioner's dysfunctional upbringing also resulted from their failure to reasonably communicate with the trial mental health experts. Dr. Gross noted in the report he provided to trial counsel that Petitioner had a history of antisocial behavior. Dr. Gross explained in post-conviction that such a history is typically "caused by *real, faulty dysfunctional family relationships,*" and *is a sign of Petitioner's dysfunctional and abusive childhood.* Gross Deposition at 19. Because counsel did not reasonably communicate with Dr. Gross, they never learned this significant fact about the meaning of Petitioner's history.

244. The Pennsylvania Supreme Court held that counsel were not ineffective with respect to child abuse

mitigation because "when they spoke to the family members before trial, none of the family members revealed abuse." *Commonwealth v. Rompilla,* 721 A.2d 786, 790 (1998). The Pennsylvania Supreme Court's conclusion is erroneous, for several reasons.

245. First, the above-described records, which would have been obtained by effective counsel, contain evidence of abuse and neglect that is independent of family members' testimony. Accordingly, if counsel had reasonably investigated the abuse and neglect would have been revealed irregardless of the information provided by the family.

246. Second, at least two of Petitioner's siblings were never interviewed by counsel at all. *E.g.,* NT 3/29/96 at 209-10 (Barbara Harris); NT 3/29/96 at 142, 156-57 (Randi Rompilla). Both of these siblings were available and would have testified about Petitioner's abusive and neglectful childhood if asked.

247. Finally, counsel did not recall asking Petitioner's family members any *specific* questions about abuse and neglect. *E.g.,* NT 3/28/96 at 109 (Ms. Dantos). Instead, counsel asked vague, general questions – *e.g.*, Was there "anything important or noteworthy about his family, upbringing?" *Id.* The Commonwealth's "rebuttal" expert, however, explained that *such general questions are inadequate* when inquiring about child abuse – because there is so much "denial" in abusive families, independent background information must be used along with very careful questioning. Dattilio Deposition at 106-07, 111; *see also* Gross Deposition at 16 (people who have suffered an abusive childhood are "usually reluctant to admit that their parents have hurt them physically"). Because counsel failed

to obtain the background records about Petitioner, and failed to communicate with the mental health experts, they never obtained the records and other information showing the presence of neglect and abuse in Petitioner's childhood home and the need for careful questioning and probing about the abuse.

248. Counsel did not do the needed background records investigation (which would have revealed the documentary evidence and indicators of child abuse and neglect); counsel did not communicate reasonably with the mental health experts (who would have told counsel that Petitioner's history is consistent with someone who has suffered abuse); and counsel did not speak to some family members; and counsel failed to confront the denial of other family members with documentary evidence of abuse and neglect. As a result of these failures, Petitioner's traumatic childhood was never revealed to the jury. Counsel were ineffective.

f. Counsel had no tactical or strategic reasons for their failures to investigate, develop and present mitigating evidence.

249. The significant mitigation presented post-conviction was readily available to trial counsel. Counsel, however, failed to present any of it to the jury, because counsel failed to reasonably investigate. Counsels' failure to present this mitigating evidence was not a strategic or tactical choice. To the contrary, counsel testified at the PCRA hearing that the mitigation presented post-conviction was the type of mitigation that *should have been presented* to the jury.

250. Moreover, even if counsel did claim to have a tactical or strategic reason for failing to present this mitigation, which they do not, given counsel's lack of investigation the failure to present the mitigating evidence *cannot* be deemed a "strategy" or "tactic," as a matter of law.[25] The failure to present this mitigating evidence

[25] *E.g.*, *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (counsel's failure to assert a possible defense can never "be characterized as 'strategy' " unless counsel has thoroughly investigated and done legal research regarding the defense); *United States v. Gray*, 878 F.2d 702, 711-12 (3d Cir. 1989) ("counsel can hardly be said to have made a strategic choice . . . when s/he has not yet obtained the facts on which such a decision could be made"; "Under [such] circumstances, counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence," and counsel is ineffective); *United States v. Bayne*, 622 F.2d 66, 69 (3d Cir. 1980) ("failure to investigate a critical source of potentially exculpatory evidence" cannot be characterized as "strategy"); *Baxter v. Thomas*, 45 F.3d at 1514 (decision not to investigate records relevant to defendant's background cannot be tactical; counsel, because of ineffectiveness in failing to read the records, was unaware of the content of the records); *Jackson v. Herring*, 42 F.3d 1350, 1350 (11th Cir. 1995) ("case law rejects the notion that a 'strategic' decision can be reasonably made when the attorney has failed to investigate his options and make a reasonable choice between them" (citing and quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991))); *Commonwealth v. Legg*, 551 Pa. 437, 711 A.2d 430, 434 (1998) ("Because counsel did not investigate . . . Appellant's mental history, we cannot agree with the Superior Court that he made a rational decision to avoid a diminished capacity defense."); *Commonwealth v. Perry*, 537 Pa. 385, 644 A.2d 705, 709 (1994) ("Failure to prepare is not an example of forgoing one possible avenue to pursue another approach [for tactical or strategic reasons]; it is simply an abdication of the minimum performance required of defense counsel."); *Commonwealth v. Mabie*, 467 Pa. at 474, 359 A.2d at 374 (counsel cannot reasonably "formulate strategy" until after counsel has reasonably investigated and is therefore aware of the essential facts).

Mr. Charles testified that he has a general policy against seeking prior records to investigate his client's functioning. Such a general policy against seeking out or reviewing potentially mitigating evidence

(Continued on following page)

resulted from counsel's failure to investigate fully and properly, not from strategic or tactical choice. "It was not that such [mitigating] information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons. The information was not presented . . . because *counsel never took the time to develop it.*" *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995). As such, counsels' failure to investigate, develop and present this evidence constituted deficient performance.

D. Conclusion.

251. Given the fundamental importance of mitigation in capital jurisprudence, defense counsel have clear constitutional obligations to investigate and develop mitigating evidence. Ineffective assistance of counsel is established where counsel fail to investigate, prepare and present mitigating evidence about the client's organic brain damage or other mental illness; where counsel fails to investigate, prepare and present the evidence about the defendant's traumatic childhood; *or* where counsel fails to investigate, prepare and present the evidence of the defendant's alcoholism. Here, counsel failed in all of these ways.

cannot be a reasonable strategy or tactic as a matter of law, "because those kinds of [tactical or strategic] decisions must be based on the specific facts of a case, not on a general policy." *Martinez-Macias v. Collins*, 810 F.Supp. 782, 811 (W.D. Tex. 1991) (citing *Crisp v. Duckworth*, 743 F.2d 580, 587 (7th Cir.1984); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir.1990); *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985); *Profitt v. Waldron*, 831 F.2d 1245, 1248-1249 (5th Cir. 1987)), *aff'd*, 979 F.2d 1067 (5th Cir. 1992) ("We affirm the judgment below for essentially the reasons stated by the . . . district court.").

252. Substantial mitigating evidence was available in this ease: Ronald Rompilla suffers from organic brain damage; the abuse he had to endure in childhood and his alcoholism exacerbated the deficits caused by his damaged brain; he suffered from an extreme mental and emotional disturbance and a substantially impaired capacity to conform his conduct to the requirements of law and understand his actions, throughout his life and at the time of the offense. The jury learned none of this. Counsel were ineffective and Petitioner is entitled to relief from his death sentence.

II. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND DEATH SENTENCE BECAUSE OF THE TRIAL COURT'S IMPROPER INSTRUCTIONS ON ACCOMPLICE LIABILITY.

253. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

254. During its guilt/innocence deliberations the jury asked the trial court: "If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?" NT 10/31/88 at 166. This jury question was the first time that the possibility of

* * *

III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE, EVEN AFTER THE JURY REPEATEDLY ASKED ABOUT PAROLE ELIGIBILITY; AND THE TRIAL COURT'S PROVISION, INSTEAD, OF INACCURATE AND MISLEADING INFORMATION, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

284. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

285. In Pennsylvania, a defendant convicted of first degree murder must be sentenced either to death or to life imprisonment. 42 Pa. C.S. § 9711; 18 Pa. C.S. § 1102(a)(1). Life imprisonment is statutorily defined as life *without possibility of parole.* 42 Pa. C.S. § 9756(c); 61 Pa. C.S. § 331.21; *Commonwealth v. Yount,* 419 Pa. Super. 613, 622, 615 A.2d 1316, 1320 (1992) (Pennsylvania law "unequivocally bars all parole for first degree murderers whether the sentence is life or death."), *app. denied,* 535 Pa. 634, 631 A.2d 1007 (1993); *Meyers v. Gillis,* 142 F.3d 664, 666-67 (3d Cir. 1998) (suggestion that defendant "would become eligible for parole sometime in the future [for] a crime that carried a mandatory period of life imprisonment as the only authorized sentence" was "grossly misleading"); *Christy v. Horn,* 28 F.Supp.2d 307, 314 n.13 (W.D. Pa. 1998) ("Under Pennsylvania law, a sentence of life imprisonment carries no possibility of parole."). Here, the trial court never provided this crucial sentencing information to the jury, and denied the jury this information even when the jury specifically requested it.

286. Petitioner's jury was never instructed that in Pennsylvania "life imprisonment" means life without possibility of parole. As described more fully below, unless they are instructed to the contrary jurors commonly belief [sic] that a "life" sentence *will* result in eventual parole; several factors in this case reinforced this commonly held belief; Petitioner's jury revealed, through several questions to the court, that it did not understand the meaning of its life sentencing option; the court did nothing to cure the jury's obvious confusion and misunderstanding; and the court's failure to properly instruct the jury under these circumstances violated a number of constitutional provisions.

Factual Background

287. Petitioner was sentenced to death by a jury that was never informed that, if it chose to sentence him to life imprisonment, he would be statutorily ineligible for parole. Instead, the trial court's initial instructions told the jury that it had the choice of sentencing Petitioner to death or "life imprisonment," *see* NT 11/1/88 at 16-17, 46-47; NT 11/2/88 at 53-69. The instructions did *not* define "life imprisonment" – they did not inform the jury that "life imprisonment" actually means "life *without possibility of parole,*" rather than some undefined term of years followed by eventual release. On the parole eligibility issue, then, the instruction amounted to "no instruction at all, . . . le[aving] the jury to speculate whether 'life imprisonment' means life without parole or something else." *Simmons v. South Carolina,* 512 U.S. 154, 166 (1994).

288. The United States Supreme Court has explained that there is a substantial and unacceptable risk

that the jurors will believe that *parole is available* from a "life imprisonment" sentence when – as here – the jury is told only that its sentencing options are death or "life imprisonment" and, without instruction on the meaning of "life imprisonment," is "left to speculate" as to its meaning. *Simmons,* 512 U.S. at 169-70 & n.9 (citing numerous authorities); *see also id.* at 177-78 (O'Connor, J., with Rehnquist, C.J. & Kennedy, J., concurring) ("common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole"); *State v. Henderson,* 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) (noting common misunderstanding "that a life sentence means 'five or six' years or some other erroneously conceived period of time"); Paduano & Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty,* 18 COL. HUM. RTS. L. REV. 211, 211 (1987) ("[T]he typical juror at the sentencing phase of a capital trial perceives the imposition of a sentence of 'life imprisonment' to mean there is a good chance that the capital defendant will in fact be released from prison on parole.") (hereinafter *Deathly Errors*); Bennack, *The Public, the Media and the Judicial System,* 7 STATE CT. J. 4, 10 (1983) (70 percent of Americans in national survey believed that criminals sentenced to "life imprisonment" would not spend rest of life in prison).

289. Similarly, *the trial judge in this case* explicitly recognized what the Supreme Court and numerous studies have found – *jurors commonly believe that a sentence of "life imprisonment" allows parole.* The trial court, however, made no effort to correct this misunderstanding. Instead, when defense counsel complained to the trial court that, "[b]ecause of the misconceptions, *a lot of people think that if you get a life sentence, you're out in five (5) years or three*

(3) years," the court simply threw up its hands and responded, *"I can't stop that."* NT 11/2/88 at 72. As a result, the jury was never instructed on this critical matter.

290. Going hand-in-hand with the widespread mistaken belief that a "life" sentence will lead to parole, jurors commonly fear that the defendant's parole from a "life" sentence will create a danger to the community. The United States Supreme Court has recognized "that a defendant's future dangerousness bears on *all* sentencing determinations made in our criminal justice system." *Simmons,* 512 U.S. at 162 (citing *Jurek v. Texas,* 428 U.S. 262, 275 (1976); *California v. Ramos,* 463 U.S. 992, 1003, n.17 (1983)). Similarly, the Pennsylvania Supreme Court has stated that "the threat of danger the defendant poses to the community" is "[a]n integral part of the jury's determination whether a defendant should be sentenced to death." *Commonwealth v. Chester,* 526 Pa. 578, 602, 587 A.2d 1367, 1379 (1991).

291. Obviously, "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant" and the sentencing jury will naturally "view a defendant who is eligible for parole as a greater threat to society than a defendant who is not." *Simmons,* 512 U.S. at 163. Thus, mistaken beliefs about parole eligibility, together with the fears that such a mistaken belief engenders, "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." *Brown v. Texas,* 118 S. Ct. 355, 356 & n.2 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., respecting denial of certiorari) (poll data shows that information about non-eligibility for parole would have a significant impact on jurors' capital sentencing decisions, making death sentence less likely).

292. These generally acknowledged, common sense principles – (1) that reasonable jurors would not have understood the initial instruction provided in this case to have meant "life imprisonment without parole," and (2) that Petitioner's imagined parole-eligibility would have weighed heavily in the jurors' sentencing decision – unquestionably applied to the jury's sentencing determination in this case. Indeed, the record of this case clearly reflects the sentencing jury's ignorance of the true meaning of "life imprisonment"; its related concern that Petitioner would pose a danger to the community if sentenced to "life"; and the importance it attached to these matters in the sentencing decision.

293. The jury was pervasively exposed to, and focussed on, Petitioner's supposed parole eligibility and future danger to the community during the capital sentencing hearing. During that hearing, the jury learned that: (1) at the time of this homicide Petitioner had been released on parole from his earlier conviction, NT 11/2/88 at 5, 8, 20, 23, 26, 28; (2) there is a lack of rehabilitative services for prisoners and parolees, *id.* at 20, 23; (3) Petitioner has a hard time adjusting to life outside prison when he is on parole, *id.* at 11, 20, 23-24; and (4) Petitioner was arrested for this offense just three months after having been released from prison on parole from his prior offense, *e.g., id.* at 12-13. All of these matters inevitably evoked and reinforced the widespread, "common sense" belief that "parole [is] a mainstay of state and federal sentencing regimes," and that "every term (whether a term of life or a term of years) in practice [is] understood to be shorter than the stated term." *Simmons,* 512 U.S. at 169-70. As a result, this evidence inevitably focussed the

jury on the possibility that Petitioner would pose a serious danger to the community if ever again released on parole.

294. The prosecution's penalty phase evidentiary presentation and argument also injected into the case the specter of parole and the supposed danger Petitioner posed to society if released.

295. The prosecution offered as an aggravating circumstance that Petitioner had "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. C.S. § 9711(d)(9). As the United States Supreme Court has explained, this inevitably made his future dangerousness an issue in the case. *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986) ("Consideration of a defendant's *past conduct as indicative of his probable future behavior* is . . . *inevitable.*").[26] Petitioner's jury, upon hearing of his history of felony convictions – especially a history that it found to be "significant" and involving "violence to the person" – would have assumed that Petitioner was prone to commit crimes of violence in the future.

[26] This "inevitability" – that a jury will infer general criminal tendencies and future danger from a history of prior violent convictions is the reason that use of prior "bad act" evidence and prior criminal history is usually limited by evidentiary rules and must be accompanied, when it is used, by strict cautionary instructions. *See, e.g.,* Fed.R.Evid. 404(b) (evidence of "other crimes, wrongs, or acts" not admissible unless offered for limited, specified purposes); Fed.R.Evid. 609 (use of evidence of conviction of crime for impeachment); *Commonwealth v. Zabala,* 310 Pa. Super. 301, 456 A.2d 622, 631 (1983) (admission of prior crimes evidence must be carefully controlled because it "suggest[s] an accused's propensity for crime"); *Commonwealth v. Stanley,* 265 Pa. Super. 194, 401 A.2d 1166, 1174 (1979) (same), *aff'd,* 498 Pa. 326, 446 A.2d 583 (1982).

296. This is especially so because a jury can properly find the "significant history" aggravating circumstance only "in cases where the prior history of convictions shows the defendant has *pronounced recidivistic tendencies.*" *Commonwealth v. Holcomb,* 500 Pa. 425, 498 A.2d 833, 851 (1985). For all of these reasons, the jury's concern with Petitioner's future dangerousness was *intrinsic* to its consideration and finding of the "significant history" aggravating circumstance.

297. The jury's fear of Petitioner's future dangerousness was further guaranteed by the particular manner in which the prosecutor presented and argued Petitioner's prior convictions.

298. As described in more detail elsewhere in this Petition, the prosecution presented as the centerpiece of its penalty phase case-in-chief the inflammatory testimony of the victim of a prior rape and burglary committed by Petitioner. This evidence was intended to show the jury that the prior offense was brutal, involving the rape, robbery and knife-slashing of an elderly woman that had occurred over the course of one hour. *See* NT 11/1/88 at 64-98.

299. Both the frightening violence of the prior offense and the claimed similarity between it and this case were then highlighted by the prosecutor during his penalty phase summation:

> You heard testimony, that in 1974, the Defendant was convicted of the crime of Rape and Burglary, and you heard some testimony of that case . . . Joe MaCrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point. . . . *[I]sn't it frightening, the similarity between that*

> *case and this case.* I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. *Isn't it frightening the similarities in those crimes.* Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. *Its absolutely frightening to think of the similarities in those two crimes.*

NT 11/2/88 at 50-51.

300. The prosecutor's emphasis on alleged similarities between the prior offenses and this offense served to highlight the implication – intrinsic to the "significant history" aggravating circumstance – that Petitioner has "pronounced recidivist tendencies" that would create significant danger to the community if he was ever released on parole. *Holcomb,* 498 A.2d at 852 (history of convictions most strongly indicates "pronounced recidivist tendencies" "where the defendant shows a willful and persistent refusal to curb a propensity towards *a particular type* of *violent aggression* against others"); *Stanley,* 401 A.2d at 1174 (jury is especially likely to infer recidivist tendency from prior convictions "when the jury is informed that the defendant's prior crime was the same as one of the crimes for which he is currently being tried"). Indeed, it is precisely these supposed recidivist tendencies toward violent crime that the prosecutor stressed made Petitioner's actions "absolutely frightening."

301. The prosecutor further stressed Petitioner's future dangerousness when he argued that Petitioner "learned a lesson" from his prior convictions that made

him even more dangerous. NT 11/2/88 at 51. According to the prosecutor:

> That lesson was, don't leave any witnesses. Don't leave anybody behind who can testify against you. Don't leave any eye witnesses. . . .

NT 11/2/88 at 51.

302. This evidence and argument painted for the jury a picture of Petitioner as a hardened, frightening, recidivist who, if he was ever released, would commit additional violent crimes and would not "leave any witnesses." There is no question that this was an argument for future dangerousness.

303. Given all of the above – *e.g.,* the widely held belief that a "life" sentence can lead to parole; the recognition by the trial judge in this case that these jurors might be harboring such mistaken beliefs; this jury's exposure to extensive evidence and argument regarding Petitioner's prior release on parole, his violent behavior under such conditions and the danger he would pose if ever again released – it is reasonable to assume that Petitioner's possible parole eligibility and the resulting danger to the community if he were sentenced to life imprisonment were among the jury's central concerns. At the very least, there was a "reasonable likelihood" that these matters improperly affected the jury's sentencing decision. *Simmons,* 512 U.S. at 170 (quoting *Boyde v. California,* 494 U.S. 370, 380 (1990)).

304. In most cases, "[t]here is, of course, no extrinsic evidence of what the jury . . . actually thought" about during its deliberations, and a reviewing court must rely upon "common sense" and reasonable inferences to determine if

jury may have "conducted its task improperly." *Mills v. Maryland,* 486 U.S. 367, 381, 383-84 (1988). By itself, the lack of instruction and the prosecutor's sentencing stage evidence and argument made it reasonably likely that the jury considered the possibility of parole and future danger to the community in its sentencing calculus. But this Court need not infer what the jury might have been thinking – the jury made obvious its concern with the possibility of parole, and the importance of that concern to its sentencing decision, by *repeatedly interrupting its deliberations to ask parole – and future dangerousness-related questions.*

305. After approximately two hours of sentencing deliberations, the jury asked the following question:

> If a life sentence is imposed, is there any possibility of the defendant ever being paroled?

NT 11/2/88 at 73. The question unequivocally establishes that *this jury was not aware of the meaning of "life imprisonment"* in Pennsylvania and at least some jurors believed that a life-sentenced prisoner would be parole-eligible. *See Simmons,* 512 U.S. at 160, 170 n.10 ("It almost goes without saying that" when a capital sentencing jury interrupts its deliberations to ask "Does the imposition of a life sentence carry with it the possibility of parole?", the jury does not know that "life" means life without possibility of parole; otherwise, "there would have been no reason for the jury to inquire").

306. Trial courts have a duty to answer such questions posed by a deliberating jury – "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States,* 326 U.S. 607, 612-13 (1946). Here, explicitly faced with such

difficulties, the court did not clear them away. Instead, the jury "was denied a straight answer about petitioner's parole eligibility even when it was requested." *Simmons,* 512 U.S. at 165-66.

307. Rather than correct the jurors' obvious confusion and misunderstanding about the meaning of "life imprisonment" by accurately instructing the jury that it means life without possibility of parole, the trial court responded:

> I'm sorry to say, *I can't answer that question.* That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right . . .

NT 11/2/88 at 73-74.

308. The trial court's response obviously failed to correct the jury's confusion. Since at least some jurors believed parole would be available from a life sentence – hence the question – and since the court did nothing to cure that belief, it is entirely clear that the jury's deliberations were infected by this misunderstanding.

309. Indeed, to the extent that the court's non-response had any effect at all on the jury, it piled more error upon the jury's admitted ignorance about the meaning of "life imprisonment" – the court's response, especially when considered in context with other instructions and

events at the trial and sentencing proceedings, improperly suggested that a life-sentenced prisoner *is* parole-eligible.

310. The jury was initially instructed that its sentencing options were "life imprisonment" or death. Thus, when the court responded to the jury's question by saying "if there were *other alternatives* that you should consider, we would have outlined them in the Charge," NT 11/2/88 at 74, the jury was necessarily left with the impression that life without parole was an "other alternative" to the sentencing options on which it was instructed – death or "life imprisonment." In other words, the "life imprisonment" sentencing option was something *different* from life without parole. *E.g.*, *Fontenot v. State,* 881 P.2d 69, 74 n.2 (Okla. 1994) (life without parole is intermediate sentence between life sentence and death). The court's response thus implied that if the jury sentenced Petitioner to "life imprisonment" rather than death he would be parole-eligible.

311. The jury was already predisposed, by earlier prosecutorial arguments and evidentiary presentation and by the general context of this capital proceeding, to interpret the court's response in this manner. All jurors are aware that a criminal trial includes many procedural and evidentiary practices that are designed to protect the defendant's rights. Throughout the trial and sentencing proceedings, the jurors were aware of sidebar conferences and other proceedings that were designed to keep prejudicial information from them. In the penalty phase itself, after the prosecutor introduced the evidence of Petitioner's prior convictions he told the jury: "You learned some things you didn't know before, some *things that we weren't permitted to tell you in the Trial* but now you know those things." NT 11/2/88 at 45; *see also* NT 11/1/88 at 48-49

(prosecutor: "Now I am permitted to tell you" about Petitioner's prior convictions; "I was not permitted to tell you about that earlier"). Thus, the jurors knew that information had been concealed from them in order to protect Petitioner – including the highly prejudicial evidence of Petitioner's prior criminal record.

312. In this context, the trial judge's response to the jury's question about parole eligibility – *"I'm sorry to say, I can't answer that question."* NT 11/2/88 at 73 – appears to be yet another artifice protecting the defendant by refusing to give the jury information regarding his parole eligibility. Under these circumstances, the jury would reasonably infer that the judge "can't answer" its simple, straightforward question for the same reasons that the jury could not listen in on the sidebar conferences or the prosecutor was not "permitted" to introduce Petitioner's criminal history – because of technical legal rules *protecting the defendant.* The jury would thus naturally assume that the "truth" about life imprisonment is that parole *is* available but that this "truth" is being withheld from them.

313. Moreover, another reasonable interpretation of the judge's remarks is that the judge and jury simply have no control over whether parole is available – the jury could reasonably infer that the judge "can't answer" its question about parole availability because such decisions would be made by others. Thus, again, the clear implication arising from the court's non-response is that *parole is available.*

314. Following the court's misleading and inaccurate response to the jury's question about the availability of parole, the jury further expressed its concern with possible

parole by asking the trial court *more parole-related questions.*

315. After approximately nine hours of deliberations, the jury again interrupted its deliberations and asked the trial court to provide it Commonwealth "Exhibits 1 and 2 from the Sentencing Hearing," NT 11/2/88 at 89 – *i.e.*, the docket entries that the Commonwealth had introduced, through the Lehigh County Clerk of Courts, as part of its evidence showing that Petitioner had been convicted and sentenced for the prior offenses that made up his "significant history" of felony convictions. *See* NT 11/1/88 at 52-54 (introducing Commonwealth Exhibits 1 & 2). The trial court told the jury that "*we can't show them to you.*" NT 11/2/88 at 90.

316. When the court informed the jury that they could not see the docket entries on the prior convictions and sentences, the jury foreman explained that the jury wanted to see the docket entries because it wanted to know "the length of the sentence" on the prior convictions; if that sentence "was commuted in any way"; and if Petitioner "got released on behavioral [sic]." NT 11/2/88 at 94. The court responded that *it could not give them any of that information, id.* at 94-95, and the prosecutor, in front of the jury, said to the judge: "*You can't tell them.*" *Id.* at 95. Again, the jurors were given the impression that *parole-related matters were being withheld from them.*

317. After ten hours of deliberations, the jury was released for an overnight recess. The following morning, after another hour of deliberations, the jury sent out another question:

> Was the Defendant offered any type of rehabilitation either while in prison or after his release from prison?

NT 11/3/88 at 3, 7.

318. The trial court responded:

> THE COURT: Well, I'm sorry to say. I can't answer that. I can only tell you that you're going to make your decision based upon the evidence that was presented and in accordance with the Law with respect to the Sentencing Hearing. First of all, I couldn't even answer it if I wanted to or if I could, I don't know.
>
> THE FOREMAN: Could I change the question to the point that is – *isn't rehabilitation available in prison?*
>
> THE COURT: Well, again, I would like to even answer that, and I can't. *You're going to have to rely upon your own knowledge* of that aspect if indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be frank with you, is not an issue before – before you with respect to the Law that it's a decision – that you must make. I can understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find. All right. Very well, then, the Jury's excused to return to deliberate, very good.

NT 11/3/88 at 7-8.

319. Finally, after approximately fourteen hours of deliberations, the jury returned a death sentence. NT 11/3/88 at 19.

320. These jury questions and this colloquy demonstrate that the jury's deliberations were influenced by the related concerns of parole eligibility; Petitioner's ability or inability to be "rehabilitated" in prison; and Petitioner's possible future dangerousness.

321. The jury's concern with the availability or unavailability of "rehabilitation" shows that the jury was concerned about Petitioner's future dangerousness. If rehabilitation was *not* available in prison, Petitioner would present a future danger because he would not be "rehabilitated" before his release. If rehabilitation *was* available, the jury would still have to come to grips with future dangerousness, since Petitioner had apparently not benefitted from available rehabilitation during his prior, lengthy incarceration. The court's response – that the jury should "rely upon your own knowledge" of the "penology system" – simply urged the jury to rely on the unbridled, uninstructed speculation about parole eligibility that the *Simmons* Court condemned. *See Simmons*, 512 U.S. at 170 (instruction that jury should rely on its own knowledge of parole eligibility "does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment' ").

322. Due process and the Eighth Amendment are violated when a capital sentencing jury is unguided in its consideration of the meaning of life imprisonment, "le[aving] the jury to speculate whether 'life imprisonment' means life without parole or something else." *Simmons*, 512 U.S. at 166. Here, the jury's speculation about the

meaning of life imprisonment was worse than *unguided* – it was *misguided* by instructions implying that "life imprisonment" carries with it the possibility of parole. This result was a death sentence that violated Petitioner's Sixth, Eighth and Fourteenth Amendment rights, for a number of reasons explained more fully below.

The Constitutional Violations

A. The Failure to Provide a Life Without Possibility of Parole Instruction Violated Petitioner's Due Process Rights.

323. The trial court's failure to provide the jury with an instruction that a life sentence in Pennsylvania means "life without possibility of parole" constituted four distinct and independent violations of Petitioner's due process rights: (1) it violated the clear command of *Simmons v. South Carolina*, which required that the jury be instructed that life imprisonment means life without possibility of parole; (2) it violated the due process proscription against being sentenced to death based upon information the defendant had no opportunity to rebut or explain (*Gardner v. Florida*; *Skipper v. South Carolina*); (3) it violated the due process proscription against sentences imposed by a sentencer acting under a material misapprehension of law or fact relating to the sentencing decision (*Townsend v. Burke*, *United States v. Tucker*); and (4) it violated Petitioner's due process liberty interest to sentencing by a jury deciding between the choices of life without possibility of parole and death (*Hicks v. Oklahoma*).

1. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process protections under *Simmons v. South Carolina*.

324. In a capital case, "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156. As described above, Petitioner's future dangerousness unquestionably and "inevitably," *Skipper*, 476 U.S. at 5, was at issue in this case. The jury was never informed of Petitioner's ineligibility for parole and, instead, was misinformed about this issue. Accordingly, Petitioner's due process rights were violated and he is entitled to relief from his death sentence.

2. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process protections against being sentenced to death based upon inaccurate information he had no opportunity to rebut or explain concerning his supposed parole eligibility.

325. Due process prohibits the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *Skipper v. South Carolina*, 476 U.S. 1 (1986). Here, Petitioner was sentenced to death by a jury that was never informed that he would be parole ineligible if sentenced to life; and it is clear that at least some jurors believed

Petitioner would be parole eligible. The jury's improper exposure to Petitioner's supposed parole-eligibility in fixing his sentence at death, without affording him any opportunity to deny or explain that prejudicial misinformation, violated his due process rights.

3. The failure to provide a life without possibility of parole instruction violated Petitioner's due process rights by subjecting him to a sentence imposed on the basis of inaccurate information that was material to the sentencing decision.

326. Due process is violated when a defendant is sentenced on the basis of inaccurate information that is material to the sentencing decision. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Roberts v. United States*, 445 U.S. 552, 556 (1980); *United States v. Levy*, 865 F.2d 551, 559-60 (3d Cir. 1989) (en banc) (vacating sentence imposed because "sentencing on the basis of materially untrue assumptions violates due process"); *United States v. Kerley*, 838 F.2d 932, 940 (7th Cir. 1988) ("a sentence predicated on misinformation cannot stand"); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987) ("It is well established that . . . material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."); *United States v. Ruster*, 712 F.2d 409, 412 (9th Cir. 1983) (due process violated when sentencer "relies on materially false or unreliable information in sentencing a defendant").

327. This proscription applies whether the sentencer is a judge (*e.g.*, *Townsend*) or, as here, a jury (*e.g.*, *Hicks*). *Johnson v. Rosemever*, 117 F.3d 104, 112 (3d Cir. 1997).

328. In particular, a sentence violates due process when it may have been imposed under a misapprehension of law concerning a defendant's eligibility for parole or a material misunderstanding concerning the fact of a defendant's parole ineligibility. *Levy*, 865 F.2d at 560 (sentence reversed when the sentencer may have imposed a harsher sentence because he incorrectly believed the defendant would be eligible for parole); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987) (sentencing judge's incorrect understanding of defendant's minimum statutory parole eligibility date deprived defendant of due process at sentencing); *United States v. Stewart*, 779 F.2d 538, 541 (9th Cir. 1985) (Kennedy, J.) (sentence under pending criminal enterprise statute vacated when sentencer "may have acted on mistaken advice from the Government that sentencing defendant to life imprisonment without possibility of parole would not necessarily preclude his eventual parole release"); *cf. Meyers v. Gillis*, 142 F.3d 664, 666-67 (3d Cir. 1998) (trial counsel's advice that defendant "would become eligible for parole sometime in the future despite pleading guilty to a crime that carried a mandatory period of life imprisonment as the only authorized sentence" was "grossly misleading").

329. Moreover, the defendant is not required to prove "actual reliance [by the sentencer] on the erroneous information" concerning parole eligibility. *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987). Instead, the sentence should be vacated when the sentencer "*may have relied* on misinformation" suggesting that the defendant could be eligible for parole. *Stewart*, 779 F.2d at 541; *see also*

United States v. Levy, 865 F.2d at 560 (3d Cir.) (en banc) (reversal required when there was an "unacceptable risk" that the sentence was "the result of a misconception" that the defendant would be eligible for parole); *King*, 825 F.2d at 724 (sentence set aside when the sentencer's "reliance on an improper factor [the defendant's supposed parole eligibility] was 'quite probable' ").

330. Here, for all of the reasons stated above, it is clear that the sentencing jury actually did rely upon misinformation concerning parole eligibility. At the very least, there is an unmistakable and unacceptable risk that the jury relied upon such misinformation.

331. Because life without possibility of parole is a "radically different third alternative" from sentences of "life" and "death," *Salazar v. State*, 852 P.2d 729, 744 (Okla. 1993) (Johnson, J., specially concurring), this jury's deliberations were based upon a prejudicially inaccurate view of its sentencing options *See also Brown v. Texas*, 118 S. Ct. 355, 356 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., respecting denial of certiorari) (failing to explain to the capital sentencing jury that a defendant if sentenced to life would be ineligible for parole for 35 years "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose").

332. Moreover, even if the jury were not conclusively presumed to have misunderstood its sentencing options, Pennsylvania's requirement that a death-sentence be unanimous and the risk that at least *one* juror *may have* imposed death believing that the alternative sentence was life with parole, establishes that the court's failure to instruct the jury that "life" means "life without possibility

of parole" violated due process. *E.g.*, *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Levy*, 865 F.2d 551, 559-60 (3d Cir. 1989) (en banc); *United States v. Kerley*, 838 F.2d 932, 940 (7th Cir. 1988) (Posner, J.); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987); *United States v. Stewart*, 779 F.2d 538, 541 (9th Cir. 1985) (Kennedy, J.).

4. The failure to provide a life without possibility of parole instruction deprived Petitioner of his due process liberty interest in having his punishment fixed by a jury that would choose between the lawful sentencing options of "life without possibility of parole" and "death."

333. The failure to instruct the jury that its sentencing options were life without possibility of parole and death also violated due process by denying Petitioner his due process liberty interest in having his punishment fixed by a jury that would choose between the legally mandated sentencing options of death and life without possibility of parole.

334. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Supreme Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the defendant's state-created liberty interest in having the jury select his sentence from the full range of alternatives available under state law. The United States Court of Appeals for the Fifth Circuit has succinctly summarized the holding in *Hicks* in terms especially applicable here: to establish a valid *Hicks* claim, the defendant must show "that the sentencing authority

lacked knowledge and understanding of the range of sentencing discretion under state law . . . [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of the less severe sentencing options." *Dupuy v. Butler*, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted).

335. By statute in Pennsylvania, a convicted capital defendant is entitled to have his punishment fixed by the jury in "a separate sentencing hearing *in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment*." 42 Pa. C.S. § 9711(a)(1). As explained above, the term "life imprisonment" as used in Pennsylvania's capital sentencing statute means "life without possibility of parole."

336. The jury in this case had the duty to consider whether the evidence properly introduced in the sentencing proceedings was aggravating or mitigating in light of the available sentencing options. Had the jury been correctly instructed, it then would have had the discretion to return a sentence of life without possibility of parole.

337. If only one juror, after weighing the aggravating and mitigating evidence in this case, decided that the defendant should be sentenced to "life without possibility of parole" instead of death, the court would have been required to impose a life sentence. 42 Pa. C.S. § 9711(c)(1)(iv). There is a substantial possibility in these circumstances that at least one juror would have voted for a sentence of life without parole had the jury been accurately instructed as to its sentencing obligations under Pennsylvania law.

338. Petitioner's liberty interest in the exercise of jury discretion to fix his punishment between life without

possibility of parole and death was arbitrarily denied when accurate and material information concerning the jury's sentencing options – that the life sentence-option carried with it automatic ineligibility for parole – was withheld from the jury, and the jury instead was forced to choose between the undefined alternatives of death and life.

339. This arbitrary denial violated Petitioner's due process rights under the Fourteenth Amendment, because Petitioner's right to have a jury exercise its discretion to fix his punishment between life without possibility of parole and death vested in him a constitutionally protected liberty interest in a sentence resulting from the exercise of that discretion. *Toney v. Gammon*, 79 F.3d 693, 699-700 (8th Cir. 1996) (where court had discretion under MO. REV. STAT. § 558.026.1 to sentence sex offender to either consecutive or concurrent sentences for crimes of a sexual nature committed at the same time, the statute created "a constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State"); *Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995) (NEV. REV. STAT. § 207.010, requiring trial court to make particularized findings under habitual offender statute creates liberty interest in that sentencing procedure); *Fetterly v. Paskett*, 997 F.2d 1295, 1299-1300 (9th Cir. 1993) (IDAHO CODE § 19-2515(c) created liberty interest in capital sentencing procedures requiring jury to balance mitigating circumstances (collectively) against each aggravating circumstance (individually)); *Rust v. Hopkins*, 984 F.2d 1486, 1492-93 (8th Cir. 1993) (NEB. REV. STAT. § 29-2523 created liberty interest in consideration of

aggravating circumstances based on proof beyond a reasonable doubt, and § 29-2525 creates liberty interest in appellate review based upon statutory standards); *see also Stephany v. Wagner*, 835 F.2d 497, 500 (3d Cir. 1987) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (state laws that contain particularized standards and criteria guiding state officials create protected liberty interests)).

340. Having statutorily mandated a capital sentencing choice between life without possibility of parole and death, and having provided the defendant the right to capital sentencing by a jury that must exercise discretion in choosing between the statutory sentencing options, Pennsylvania must follow the dictates of its own law, or violate due process. *Hicks*, 447 U.S. at 346-47; *Wolff v. McDonald*, 418 U.S. 539, 557 (1974); *see Fetterly*, 997 F.2d at 1300 ("There is, of course, nothing in the Constitution of the United States that requires Idaho's legislature to approach [capital sentencing] as it has done. . . . However, the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."); *Foster v. Delo*, 39 F.3d 873, 882 (8th Cir. 1994) ("Where a state creates a right, such as a defendant's right to a review of his sentence, the Fourteenth Amendment of course entitles him to procedures to ensure that the right is not arbitrarily denied.").

B. The Failure to Provide a Life Without Possibility of Parole Instruction Presented the Jury with a False Choice of Sentencing Options, Denied Petitioner the Heightened Procedural Safeguards Required in Capital Cases, and Produced an Arbitrary and Capricious Sentence that Violated His Rights Under the Eighth Amendment.

341. A sentence of death is "cruel and unusual" in violation of the Eighth Amendment if arbitrary and capricious factors come into play at the sentencing proceeding. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

342. The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. *Simmons v. South Carolina*, 512 U.S. at 172 (Souter, J. concurring). Because of the unparalleled severity and irreversibility of the death penalty, the Eighth Amendment imposes a heightened standard for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *see also Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980); *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988).

343. This heightened need for reliability requires the provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing

determination," *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

344. As part of the requirement that capital juries must receive accurate sentencing information, the jury must be properly instructed as to all material elements in its sentencing-stage deliberations, including the meaning of legal terms such as "life imprisonment." *See Walton v. Arizona*, 497 U.S. 639, 647 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."); *see also Simmons*, 512 U.S. at 172 (Souter, J., concurring) ("That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives."); *Russell v. State*, 607 So. 2d 1107, 1118 (Miss. 1992) ("The knowledge that the alternative to death is a life sentence, without the possibility of probation or parole is the type relevant and accurate sentencing information to which our cases speak and which every jury faced with the determination of life or death is entitled to consider."); *cf. Commonwealth v. Peterkin*, 513 A.2d 373, 379, 511 Pa. 299, 311 (1986) (justifying excusing juror for cause when juror understood sentencing option of "death" to mean "a term," used to give life imprisonment[,] evinc[ing] a misunderstanding of the law which could have led him to misapply the court's instructions").

345. It is undisputable that the possibility of parole is a material fact to capital sentencing juries. Accordingly, when the actual sentencing options faced by a capital sentencing jury are life without possibility of parole and

death, but the jury is not informed that life means "life without possibility of parole," the jury is denied "accurate information regarding petitioner's parole ineligibility." *Simmons*, 512 U.S. at 162. As a result, the jury is presented with "a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration," and is left with a "grievous misperception" of its sentencing options. *Id.* at 161-62.

346. Moreover, the sentencing option is not only materially inaccurate, but the absence of a life without parole instruction results in "harsher penalty options," *Fontenot v. State*, 881 P.2d 69, 74 n.2 (Okla. 1994) (reversing death sentence where jury informed of sentencing choices of life or death, but not informed of intermediate option of life without possibility of parole),[27] and "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." *Brown v. Texas*, 118 S. Ct. at 356; *cf. Commonwealth v. Peterkin*, 513 A.2d 373, 379, 511 Pa. 299, 311 (1986) (sustaining challenge to venireman for cause when juror "expressed his view that the death penalty is an academic question since it is not carried out"; juror's response "that he was in favor of the death penalty as a term used to give life imprisonment

[27] *See also Taylor v. State*, 1995 WL 571320, *25 (Miss. Sept. 28, 1995) ("Had the jury in the present case been informed that Taylor, as an habitual offender, would not have the opportunity for parole, they might have opted for life imprisonment rather than imposing the death penalty."); *State v. Henderson*, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) ("We cannot believe that, had the jury known ahead of time that a life sentence actually meant a minimum of twenty-five years and nine months (assuming all meritorious deductions), plus another thirty years before Henderson even would be eligible for parole, it would not have been more likely to impose a life sentence instead of a death sentence.").

evinced a misunderstanding of the law which could have led him to misapply the court's instructions, possibly to the defendant's prejudice").[28]

347. By failing to provide a life without possibility of parole instruction, the trial court "effectively withh[olds] from the jury the life-without-parole alternative, [and] . . . diminish[es] the reliability of the jury's decision that death, rather than that alternative, was the appropriate penalty in this case." *Simmons*, 512 U.S. at 174 (Souter, J., concurring). The resulting sentence "should be vacated as having been 'arbitrarily or capriciously' and 'wantonly and . . . freakishly imposed.'" *Id.* at 173 (quoting *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring); and *Id.* at 310 (Stewart, J., concurring)).[29]

[28] *See also Deathly Errors, supra*, 18 COL. HUM. RTS. L. REV. at 212 ("The option of life to a typical juror means disproportionately little punishment for the convicted capital murderer. A juror, then, laboring under the misperception that a sentence of 'life' is a ticket to 'get out of jail free' on parole, feels constrained to vote for a penalty of death.").

[29] *See also Tate v. State*, 896 P.2d 1182, 1193 (Okla. 1995) (death sentence imposed by a jury that has not been informed that one of its sentencing options is life without possibility of parole "renders the sentencing stage fundamentally unfair"); *Fontenot v. State*, 881 P.2d 69, 74 (Okla. 1994); *Humphrey v. State*, 864 P.2d 343, 344 (Okla. 1993); *Hain v. State*, 852 P.2d 744, 753 (Okla. 1993); *Salazar v. State*, 852 P.2d 729 (Okla. 1993); *Taylor v. State*, 1995 WL 571320, *25 (Miss. Sept. 28, 1995) (overturning death sentence when capital sentencing jury not instructed that "life" sentence for defendant adjudicated as an habitual criminal meant "life without possibility of parole"); *Russell v. State*, 607 So. 2d 1107, 1118 (Miss. 1992); *Ladner v. State*, 584 So. 2d 743, 759 (Miss. 1991); *Mackbee v. State*, 575 So. 2d 16, 38-41 (Miss. 1990); *Berry v. State*, 575 So. 2d 1, 13 (Miss. 1990); *Turner v. State*, 573 So. 2d 657, 674 (Miss. 1990); *State v. Henderson*, 109 N.M. 655, 658-59, 789 P.2d 603, 606-07 (1990) (vacating death sentence on eighth amendment grounds when jury had not been instructed that a person sentenced to life imprisonment in New Mexico would be ineligible for parole for

(Continued on following page)

348. Moreover, a death sentence must be vacated even if the jury instructions are "technically flawless," when questions posed by the jury indicate that jury does not understand the law and the trial court fails to correct that misunderstanding. *McDowell v. Calderon*, 130 F.3d 833, 838 (9th Cir. 1997) (en banc). Given the questions the jury asked in this case, the death sentence would have to be vacated under the Eighth Amendment even if the trial court's initial instructions – that the jury's sentencing options were "life imprisonment" or "death" – had been adequate.

349. Here, "as of the moment of the delivery of the note" inquiring about parole eligibility, the jurors who believed parole might be available "were outside the channel established by state law as required by the Eighth and Fourteenth Amendments." *McDowell*, 130 F.3d at 838. The risk created by this legal derailment was that they would impose the death penalty 'in spite of factors which . . . [might] call for a less severe penalty.'" *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Under these circumstances, the trial court's failure to correct the jurors' expressed "confusion regarding the law" created an unacceptable risk that the sentence was based upon improper grounds, and violated the Eighth Amendment. *McDowell*, 130 F.3d at 838-40.

---

thirty years, and that, in this particular case, the defendant would not be eligible for parole for at least fifty-five years).

C. The Failure to Provide a Life Without Possibility of Parole Instruction Prevented the Jury from Considering Relevant Mitigating Evidence of Petitioner's Parole Ineligibility and that he Did Not Pose a Significant Future Danger to Society.

350. The failure to provide a life without possibility of parole instruction also violated the hallmark requirement of the Eighth Amendment that a capital sentencing jury must be permitted to consider and give effect to all relevant mitigating evidence. *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Sumner v. Schuman*, 483 U.S. 66 (1987); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Osborn v. Shillinger*, 861 F.2d 612, 628 n.16 (10th Cit. 1988) (referring to this doctrine as the clearest principle in modern death penalty jurisprudence").

351. A capital defendant's ineligibility for parole is itself a mitigating factor. *E.g.*, *State v. Henderson*, 109 N.M. 655, 666, 789 P.2d 603, 606-07, 614 (1990) ("Length of incarceration is a mitigating factor.") (Ransom, J., concurring in pertinent part); *Turner v. State*, 645 So.2d 444, 448 (Fla. 1994) (reversing death sentence where jury could have found ample mitigation, including that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole"). Moreover, "there is no question but that . . . inferences [that a life sentenced defendant would

not pose a future danger to society] would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (quoting *Lockett*, 438 U.S. at 604).

352. Therefore, "evidence that the defendant would not pose a danger if spared (but incarcerated) *must be considered potentially mitigating*.'" *Skipper*, 476 U.S. at 4. The parole ineligibility of a life-sentenced defendant "is indisputably relevant" to whether he will pose a future danger to society. *Simmons*, 512 U.S. at 163-64. "Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." *Id.* The failure to inform the jury of Petitioner's ineligibility for parole therefore prevented the jury from considering relevant mitigating evidence concerning Petitioner's parole ineligibility and future nondangerousness in violation of the Eighth Amendment."[30]

[30] The Supreme Courts of several states have vacated death sentences on these grounds. *E.g.*, *Mickens v. Commonwealth*, 249 Va. 423, 424-25, 457 S.E.2d 9, 9-10 (1995) (petitioner contended that Virginia procedural rule barring evidence related to a defendant's parole eligibility prevented jury from considering mitigating evidence of petitioner's parole *ineligibility*; death sentence vacated in light of *Simmons*); *Turner v. State*, 573 So. 2d 657, 674 (Miss.1990) (failure to provide life without possibility of parole instruction unconstitutionally limited "jury's consideration of any relevant evidence that could 'cause it to decline to impose the death sentence" (quoting *McClesky v. Kemp*, 481 U.S. 279, 304 (1987))).

D. The Failure to Provide a Life Without Possibility of Parole Instruction Prevented the Jury from Considering and Giving Full Effect to Other Relevant Mitigating Evidence That Was Present in this Case.

353. How jurors consider particular aggravating and mitigating evidence, and the weight they accord potentially mitigating evidence, is affected by their beliefs concerning a defendant's parole eligibility. *E.g.*, *Mackbee v. State*, 575 So. 2d 16, 41 (Miss. 1990) ("[t]he evidence from capital cases is strong that the possibility of the capital defendant's soon being back on the street is in the forefront of the typical juror's mind while balancing the factors involved in deciding whether a defendant should die"); *see also Deathly Errors*, *supra*, 18 COL. HUM. RTS. L. REV. at 256. As a result, the failure to provide a life without possibility of parole instruction prevented the jury from considering and giving full effect to *other* relevant mitigating evidence that was present in this case, separate and apart from the mitigating evidence that Petitioner would not pose a future danger to society because of his ineligibility for parole.

354. For example, the jury's materially false belief that Petitioner might be parole-eligible skewed its determination as to whether Petitioner's recidivism could be attributed in part to a failure of the criminal justice system to provide him adequate rehabilitation during his prior incarceration and/or adequate support when during his parole from his prior convictions. Indeed, the failure of the "system," which could be considered mitigating by a jury that was aware of its sentencing options, may actually be seen as *aggravating* by jurors who believe the defendant will eventually be released from prison.

355. "Any barrier to [the consideration of mitigating evidence] must . . . fall." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990). By burdening the presentation of mitigating evidence and the consideration of other potentially mitigating evidence already present in the record, the failure to instruct the jury that, in Pennsylvania, "life imprisonment" means "life without possibility of parole" violated the Eighth Amendment.

E. The Imposition of a Death Sentence by a Jury That Had Been Deprived of the Material Sentencing Information That a Life Sentence Means Life Without Possibility of Parole Offended the Evolving Standards of Decency That Underlie the Eighth Amendment.

356. A sentencing process that offends "the evolving standards of decency that mark the progress of a maturing society," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)), violates the Eighth Amendment. Petitioner's death sentence, which was imposed by a jury that was not informed that "life imprisonment" means "life without possibility of parole" (and therefore by a jury that had been denied accurate and material information concerning its sentencing options), was a product of such a process.

357. The evolving standards of decency that give content to the Eighth Amendment are measured by objective indicia of community values, including legislative judgments, sentences imposed by juries, public opinion, and international practices and opinion. *See, e.g. Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782

(1982); *Coker v. Georgia*, 433 U.S. 584 (1977). The imposition of a death sentence by a jury that has been presented a materially false and harsher sentencing choice offends every one of these indicia of community values.

358. The Supreme Court has placed great weight upon legislative judgments as a primary indicator of community values. *Gregg v. Georgia*, 428 U.S. 153, 174-75 & n.19 (1976). The judgments of these legislative bodies overwhelmingly reject Pennsylvania's approach. *O'Dell v. Netherland*, 117 S. Ct. 1969, 1981 (1997) (Stevens, J., with Souter, Breyer & Ginsburg. JJ., dissenting) ("The prevailing rule in the States that provided a life-without-parole sentencing alternative required an instruction explaining that alternative to the jury.").

359. In fact, at the time of Petitioner's trial only two legislatures[31] provided capital sentencing juries the life without parole sentencing option but refused to inform those juries that a life sentence meant life without parole, and Pennsylvania was *the only jurisdiction in the country* to forbid providing such an instruction. In these circumstances, legislative judgments evidence a clear national consensus against withholding from a capital sentencing

[31] Those states were South Carolina and Virginia. *See* S.C. CODE ANN. §§ 16-3-20(A), 24-21-640 (1991 Supp.); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); VA. CODE § 18.2-10, -31; VA. CODE ANN. § 53.1-151(B); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S. Ct. 88 (1991); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988). The Pennsylvania legislature does not require the withholding of accurate information concerning parole. That is a court-made rule, initially designed to protect defendants against harsher punishment resulting from jury speculation about possible early release from prison – a rationale that is inapplicable when, as here, the defendant is statutorily ineligible for parole.

jury accurate information that the life-sentencing option is life without possibility of parole. *See Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) ("[t]he upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman"; consequently, legislative judgment "obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman"); *see also Enmund v. Florida*, 458 U.S. 782, 792 (1982) (where "only a small minority of jurisdictions – eight – allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed," legislative judgment "weighs on the side of rejecting capital punishment for the crime at issue"); *Beck v. Alabama*, 447 U.S. 625, 635 (1980) (consensus concerning death penalty procedures established where "Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law."); *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O'Connor, J., concurring) ("Where such a large majority of the state legislatures [32] have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist."); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (finding consensus where "no State in the Union permits the execution of the insane").

360. At the time of *Simmons*, 24 of 26 other comparable states that provided the jury an option between life without possibility of parole and death informed the

sentencing jury of the defendant's parole ineligibility, either by instructing the jury to choose between the sentencing alternatives of death and life without parole,[32] or by giving the jury the power to specify whether the defendant should or should not be eligible for parole.[33] *See Simmons*, 512 U.S. at 167 n.7. Since that time, New York and the federal government have added death sentences in which an alternative sentence is life without parole, and juries in both of these jurisdictions are also informed that the defendant is ineligible for parole.[34] This "nearly universal acceptance" that juries should be advised when

[32] ALA. CODE § 13A-5-46(e) (1982); ARK. CODE ANN. § 5-4-603(b) (Supp. 1993); Cal. Pen. Code §190.3 (West 1988); Conn. Gen. Stat. § 53a-46a(f) (West 1985); Del. Code. Ann. tit. 11, 4209(a) (1987); 1993 Fla. Sess. Law Serv. 93-406, S.B. 26-B, § 16; Fla. Stat. 775.0823(1) (effective 1/1/94), Fla. Stat. 921.142 (West 1992) & Standard Jury Instructions-Criminal Cases, 603 So.2d 1175, 1205 (Fla. 1992); La. Code Crim. Proc. Ann. art. 905.6 (West Supp. 1993); Mo. Ann. Stat. § 565.030.4 (Vernon Supp. 1993); N.H. Rev. Stat. Ann. § 630:5 (IV) (Supp. 1992); Wash Rev. Code Ann. § 10.95.030(1), 95.050 (West 1990). Case law in three other states requires that capital sentencing juries be informed whenever a life sentence means the defendant will be ineligible for parole. *See* Colo. Rev. Stat. § 16-11-103(1)(b) (Supp. 1993); Ill. Rev. Stat. ch. 38, ¶ 1005-8-1 (Smith-Hurd Supp. 1992); Miss. Code Ann. § 47-7-3(1)(a) (Supp. 1992). Two of the remaining life-without-parole jurisdictions – South Dakota and Wyoming – have not considered the question of whether jurors should be instructed concerning the unavailability of parole. *See* S.D. Codified Laws Ann. § 24-15-4 (1988); Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (Supp. 1992).

[33] GA. CODE § 17-10-31.1(a) (Sapp. 1993); Ind. Code § 35-50-2-9 (Supp. 1993); Md. Ann. Code art. 27. § 413(c)(3) (1987); Nev. Stat. 182; Nev. Rev. Stat. Ann. § 175.554(2)(c)(2), - (4) (1992); N.Y. Correct. Ch. 43, art. 22-B, Historical & statutory notes (McKinney 1995); Okla. Stat. Ann. tit. 21, 701.10(A) (West 1993); Or. Rev. Stat. § 163.105 (Supp. 1992); Tenn. Code Ann. § 39-13-204(a), -(f)(2) (Supp. 1993); Utah Code Ann. § 76-3-207(4) (Supp. 1993).

[34] N.Y. CRIM. PRO. LAW § 400.27 (McKinney 1996); 18 U.S.C. § 3593 (1996).

"life" means "life without parole," unquestionably "establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. 625, 636-37 (1980).

361. Thus, legislative judgments provide powerful evidence that Pennsylvania's practice of withholding material information concerning the "life without possibility of parole" sentencing option offends the evolving standards of decency that prevail in this Nation, and therefore violate the Eighth Amendment.

362. The sentencing practices employed in this case also offend every other indicia of community values that have been employed by this Court to assess the constitutionality of a penal sanction under the Eighth Amendment. Clearly, the practice can draw no support from juries, whose "cho[ic]e between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) ("[t]he jury . . . is a significant and reliable index of contemporary values").

363. The United States Supreme Court has made clear that, "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system – a link without with [sic] the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon*, 39I U.S. at 519 n.15 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). Pennsylvania's refusal to accurately inform jurors as to the nature of their sentencing options severs that vital link between contemporary

community values and the penal system, and inherently distorts the community's expression of its contemporary values. In so doing, it offends the Eighth Amendment.

364. Similarly, this practice draws no support from public opinion, or international law and practices, which have also informed the Supreme Court's judgment.

365. General public opinion surveys provide evidence that the public does not support Pennsylvania's capital sentencing scheme. Polling data presented to the United States Supreme Court in *Simmons* reveals that only 7.1% of eligible jurors believed that a person who was sentenced to life would actually spend his entire life in prison – and therefore that 92.9% of respondents were unaware of the jury's actual sentencing options. Petitioner's Brief, *Simmons v. South Carolina*, 1993 WL 657673 at *154a, Table 2. Yet, if they were faced with a decision between sentencing a defendant to life or death, 86.8% of the jurors polled said it would be important to them to know "how much time the person would have to spend in prison before they would have a chance to be released, if you sentenced them to life imprisonment." *Id.* at *155a (Table 3). *Cf. Woodson v. North Carolina*, 428 U.S. 280, 298 n.34 (1976) (public opinion surveys indicating that public does not support mandatory death penalty provides evidence that mandatory death sentences violate the Eighth Amendment).

366. Additionally, Pennsylvania practice is squarely at odds with the long-standing positions of the American Law Institute that capital sentencing juries should be informed "of the nature of the sentence of imprisonment that may be imposed, *including its implication with respect to possible release upon parole*, if the jury verdict is against the sentence of death." ALI MODEL PENAL CODE

§ 210.6 (Prop. Off. Draft 1962); *cf. Thompson v. Oklahoma*, 487 U.S. 815, 830 & nn. 32 & 33 (1987) (formal opposition of American Bar Association and American Law Institute to execution of juvenile offenders under the age of sixteen provided evidence that such executions violate the Eighth Amendment).[35]

367. Thus, public opinion demonstrates that Pennsylvania's practice of withholding from jurors material information concerning the "life without possibility of parole" sentencing option, and imposing sentences of death by a jury that is presented a materially false choice as to its sentencing options offends the evolving standards of decency that underlie the Eighth Amendment.

368. Finally, Pennsylvania's death-penalty practices can draw no support from international law and practices. *E.g.*, *Thompson*, 487 U.S. at 830-31 & nn.31, 34 (international opinion and practices opposing execution of juveniles, expressed in statutes and treaties of Anglo-American and Western European nations, provided evidence that death penalty for juvenile offender aged fifteen or younger violates the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1976) (United Nations study indicating

[35] It is also noteworthy that three prominent professional associations, the American Bar Association, the Pennsylvania Bar Association, and the Philadelphia Bar Association have all adopted resolutions calling for a moratorium on capital punishment. While not specifically referring to Pennsylvania's practice of failing to provide a life without parole instruction, the Pennsylvania Bar Association resolution expressed its "serious doubts about whether, under current law and practice, the death penalty can be imposed in the courts of this Commonwealth in a manner which is fair and impartial, and not arbitrary and discriminatory." Similarly, the Philadelphia Bar Association resolution called for "a moratorium on executions until such time as the fair and impartial administration of the death penalty can be ensured."

that only three of 60 nations surveyed retained death penalty for rape unaccompanied by killing provided evidence that death penalty for non-homicidal rape violated the Eighth Amendment). Although the death penalty is not *per se* violative of international law, the United States is now alone among the Western democracies in permitting the death penalty for domestic offenses. No Commonwealth-country, Anglo-American, Western, European, or developed democracy permits death sentences to be imposed for domestic offenses, and it is now a condition of membership in the European Economic Community that member states abolish the death penalty. Certainly none of these nations permits the imposition of death by a jury from which a material sentencing option has been withheld. Additionally, not one international or regional human rights treaty envisions that death sentences would be imposed by a jury that has based its judgment on a materially inaccurate and harsher view of its sentencing options.[36]

[36] 36 *E.g.*, Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948) [*hereinafter* Universal Declaration]; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXX), December 16, 1966, 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976 [*hereinafter* ICCPR]; Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951, Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324, *entered into force* Dec. 13, 1951, Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324, *entered into force* Feb. 27, 1970 [*hereinafter*] OAS Charter]; American Convention on Human Rights, Art. 4; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953; *as amended by* Protocol No. 3 *entered into force* Sept. 21, 1970, and Protocol No. 5, *entered into force* Dec. 21, 1971 [*hereinafter* European Convention];

(Continued on following page)

F. The Failure to Provide a Life Without Possibility of Parole Instruction Resulted in a Capital Sentencing Hearing in Front of a Jury Uncommonly Willing to Condemn Petitioner to Die, in Violation of His Rights to an Impartial Jury Under the Sixth Amendment.

369. The state and federal constitutional right to an impartial jury guarantees that a capital defendant not be sentenced before a jury "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

370. The trial court's failure to provide a life without possibility of parole instruction, especially after such information had been specifically requested by the jury, resulted in a sentencing hearing before a jury that: (1) erroneously believed that Petitioner could be released on parole, leading them to incorrectly assume that he would pose a danger to society in the future, adding additional weight to any aggravating evidence introduced by the Commonwealth, and making a death sentence more likely; (2) was prevented from considering and giving effect to relevant mitigating evidence that, by virtue of Petitioner's ineligibility for parole, he would not pose a future danger to society, making a life sentence less likely; (3) was prevented by the absence of a "life without parole "jury instruction from giving full weight to evidence present in the record that might have justified a sentence of life without possibility of parole (but which might not justify a

---

African [Benjul] Charter on Human and People's Rights, *adopted* June 27, 1981, OAU Doc. CAR/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [*hereinafter* African Charter].

life sentence if parole were a possibility), making a death sentence more likely; and (4) was provided a materially false sentencing instruction that "would result in harsher penalty options," *Fontenot v. State*, 881 P.2d 69, 74 n.2 (Okla. 1994), and "unquestionably tip[ped] the scales in favor of a death sentence that a fully informed jury might not impose." *Brown v. Texas*, 118 S. Ct. 355, 356 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., respecting denial of certiorari).

371. These errors, independently and collectively, caused Petitioner to be sentenced by a jury that was "oriented impermissibly toward the death penalty even before it began its deliberations," *State v. Henderson*, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) (reversing death sentence when information concerning length of defendant's parole ineligibility withheld from jury), and therefore uncommonly willing to condemn him to die, in violation of the Sixth Amendment.

G. Conclusion.

372. The errors described above resulted in a death sentence that violated the Sixth, Eighth, and Fourteenth Amendments. To the extent that counsel failed to properly inform the jury about Petitioner's ineligibility for parole, to object to the errors, to request a life without parole instruction, and to raise the issues appropriately in the trial court and on appeal, they were ineffective.

IV. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (D)(8) AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED.

373. All other allegations, facts and claims contained in this Petition, its attachments and the other submissions made in this litigation are incorporated as if fully set forth herein.

374. The death sentence in this case was based in part on a jury finding of aggravating circumstance 42 Pa.C.S. § 9711(d)(8) – "The offense was committed by means of torture." The jury instruction "defining" this aggravating circumstance was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments.

375. The Pennsylvania Supreme Court has repeatedly recognized and held that the bare language of the (d)(8) "torture" aggravating circumstance does not "channel the sentencer's discretion by clear and objective standards." *Commonwealth v. Nelson*, 514 Pa. 262, 523 A.2d 728, 737 (1987) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)); *accord Commonwealth v. Billa*,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD ROMPILLA, PETITIONER	CIVIL ACTION
v	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, PHILIP L. JOHNSON, Superintendent of the State Correctional Institution at Greene, And JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview, RESPONDENT:	No.: 99-737 JUDGE BUCKWALTER

COMMONWEALTH'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND CONSOLIDATED PRELIMINARY MEMORANDUM OF LAW

AND NOW, comes JAMES B. MARTIN, ESQUIRE, District Attorney of Lehigh County, by and through MICHAEL P. MCINTYRE, ESQUIRE, First Assistant District Attorney, and files this response to the petition of Ronald Rompilla for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 based upon the following:

1-7. Admitted.

8. Denied as a conclusion of law.

I. TRIAL COUNSEL WERE NOT INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO PRESENT MITIGATING EVIDENCE WHICH WAS NOT REVEALED TO THEM BY ROMPILLA OR HIS FAMILY AFTER REASONABLE EFFORTS BY COUNSEL TO OBTAIN SAME.

9. No response necessary.

10-12. These allegations are conclusion of law for which no response is necessary.

13-166. Admitted in part, denied in part. All of these allegations are the petitioner's versions of the facts as represented by the hearing and deposition testimony presented at the hearing held by the trial judge on the petitioner's State Post Conviction Relief Act Petition.

Initially, many of the assertions contained in Rompilla's present petition are just not true. Rompilla's references to the alleged testimony of his siblings, Barbara Harris, Randi Rompilla, and Nick Rompilla, Jr. at the PCRA hearing is greatly exaggerated and, in some cases, just plain false. In addition, their testimony concerning Rompilla's allegedly abusive childhood at the hands of his father, was seriously undermined by cross-examination, contradicted by the fact that none of this information was ever given to Rompilla's trial counsel as testified to by them, and contradicted by the information given by Rompilla to one of his three psychological experts, Dr. Paul Gross. It is interesting to point out that of the three family members called as witnesses at the PCRA hearing, only one of them, Nick, had testified at Rompilla's trial in the penalty phase. Three others, his brother Robert, Nick's wife, Darlene, and Rompilla's own son, who had testified

at the trial in the penalty phase, were not called as witnesses by Rompilla at his PCRA hearing.

The Commonwealth is not going to go over piece by piece each inaccurate, misleading and false assertion set forth by Rompilla in his petition, but will set forth some examples of this constant misstating of the facts.

Initially, it is crystal clear that Rompilla never mentioned a thing to either his two trial counsel (Maria Dantos, Esq. and Frederick Charles, Esq.) or their investigator (John Whispel, now deceased) concerning any facts on which they could reasonably conclude that he had had an abusive childhood. (See N.T., 3/29/96, p. 22, N.T. 3/28/96, p. 46). The same is true for the present allegations from Mr. Rompilla that both he and his mother were alcoholics, that he had some type of head injury, and that he had blackouts. In fact, the testimony of Rompilla's counsel was that he was, basically, uncooperative concerning penalty phase information stating to his counsel that, "Your conversations about the possibility of the death penalty bore me.[1]" His lack of cooperation reached such heights that his trial counsel felt compelled, immediately prior to the trial, to send him a fourteen-page letter which was marked as exhibit D-2 at the hearing of March 28, 1996, and which clearly documented his lack of cooperation.

It also has to be clear that the failure on the part of the defense team, two attorneys and one investigator, to obtain this information from either Rompilla or his family

[1] Rompilla's lack of cooperation continued right into the penalty phase when he informed trial counsel that he did not want any witnesses called during said phase. (N.T., Vol. VI, p.128).

members was not due to a lack of trying on their part. They spent hours and hours with Rompilla and his family in addition to having Rompilla examined and tested by three separate psychological experts. A letter from Rompilla's wife, Sandy Whitby, was marked as exhibit C-2 at the hearing of March 29, 1996, and stands as a written testimonial to the efforts of Rompilla's defense team to seek to obtain any records in support of mitigating factors in regard to Rompilla's mental health. This report was marked as exhibit no. D-1 at the hearing of March 28, 1996.

Of course, the trial court, in its opinion, makes it clear that it rejected the testimony of Rompilla's siblings as presented at the PCRA hearings on the specific issue of their alleged communication with Rompilla's trial counsel during the trial. This rejection of the testimony from Rompilla's family at the PCRA hearing is not surprising based on the contradictory testimony of Rompilla's trial counsel, as well as the undermining of this Rompilla family testimony on cross-examination. For example, on direct examination Barbara Harris testified that her mother was an alcoholic who drank alcohol constantly while pregnant with all the younger children, including Rompilla. One fact revealed on cross-examination was that one of such younger children, Nick, was born when Mrs. Harris was only one-year old. In addition, Rompilla himself was born when Mrs. Harris was only six-years old. Further cross-examination indicated that there was no way that a small child of such tender years would have any personal information concerning the use of alcohol by her mother at those times as testified to on direct examination. (N.T., 3/29/96, p. 211).

In another example, Rompilla's brother Nick testified on direct examination that their father used a cage as punishment for both himself and Rompilla. Cross-examination revealed that Nick had never seen Rompilla being placed in the cage by their father and was completely unaware of whether or not Rompilla had seen Nick being placed into the cage, which Nick testified happened on *one* occasion when Rompilla would have been either one or two years old. (N.T., 3/29/96, p. 193, 194). Finally, while Rompilla's petition is full of assertions concerning his beating at the hands of his abusive father, his brother Nick testified that he had basically seen his father slap Rompilla on about two occasions, indicating by "slap" that his father hit him with an open hand when Rompilla had done something wrong. (N.T., 3/29/96, p. 195, 196).

While the Commonwealth does not want to go into other examples concerning Rompilla's misstatement of the facts, suffice it to say that the Commonwealth respectfully requests Your Honorable Court to take the assertions set forth in Rompilla's petition with a "grain of salt" and to read the Notes of Testimony and, particularly, the cross-examination of the witnesses making the assertions before accepting same.

In the face of this background, Rompilla's present counsel have the temerity to challenge the performance of his trial counsel by arguing that said counsel should have obtained three separate records; namely, Rompilla's grade-school records, his hospital record from a local hospital when he was two years old, and a Department of Corrections

record[2] which shows the result of a psychological test conducted while Rompilla was in prison in 1976, twelve years before the murder in question. The Pennsylvania Courts found that these records were not entirely helpful to Rompilla and further found that his trial counsel had given the three experts whatever information they had requested. It must be remembered that at the time of the commission of the crime for which Rompilla has now been convicted and sentenced to death, he was a *forty* year old man, and had been incarcerated in the state penal system for the last fourteen years; that is, from age twenty-six, having been out of prison for approximately only one month prior to his arrest on the charges that resulted in his present conviction.

Rompilla's present claim of ineffective assistance of counsel was adequately answered by Rompilla's trial counsel, Attorney Fred Charles, at the PCRA hearing when counsel, over and over, explained why it would not have been reasonable for him to have looked for any of the three records in question in light of the information received from Rompilla and his family and, more importantly, in light of the fact that trial counsel hired three extremely reputable and experienced psychological experts to elicit both from Rompilla directly and from testing of Rompilla all necessary information which is obtained in capital cases for the very purpose of determining whether

[2] In fact, the Department of Corrections record also indicated an IQ of 93 which showed that Rompilla, in 1976, tested far above the parameter for mental retardation. There was also other information on the Department of Corrections records which was harmful to the defense. (N.T., 3/29/96, p. 103).

or not there are any mitigating factors. (N.T., 3/29/96, pp. 10-14, 16, 21-23, 24-29).

It must be remembered exactly what information was contained in the three separate records which now form the basis of Rompilla's bone of contention. Rompilla's grade-school records (when he was ten and eleven years of age) showed IQ scores, the Department of Corrections MMPI test of 1976 showed various psychological testing results, and the hospital record from when Rompilla was two years old show that he was hospitalized for a fever. While the defense attempts to make much of the results of these records through its present psychological experts, Dr. Crown and Dr. Armstrong, the import of these records was completely minimized by the testimony of Dr. Frank Dattilio, the Commonwealth's present psychological expert. In addition, it cannot be forgotten that both an IQ and an MMPI test, as well as other psychological testing, was done by Dr. Gerald Cooke, on behalf of Rompilla's trial counsel, following his examination of the defendant between the time of his commission of the crime and his trial.

In short, while Rompilla's present counsel argues for the importance of records which are respectively thirty, twelve, and thirty-eight years old, his trial counsel had the same tests taken in 1988. With respect to the alleged mitigation evidence brought forth by Rompilla's siblings at the PCRA hearing, the trial court and Pennsylvania Supreme Court were correct in resolving the issues raised by this evidence against Rompilla. The trial court, affirmed by the Pennsylvania Supreme Court, accepted as credible Rompilla's trial counsel's testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could

be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-119, 133, 143; N.T. 3/29/96 at 111.

The same is true for Rompilla's present claim of his alleged problems with alcohol. No evidence of this was ever furnished to trial counsel by either Rompilla or his siblings and, in fact, Rompilla had denied to one of the psychiatric experts, Paul Gross, that he had any alcohol problems.

Although not reached by the Pennsylvania Supreme Court, because it had decided that Rompilla had failed to satisfy the second "prong" of an ineffective assistance claim, the Commonwealth also alleges that Rompilla failed to satisfy the third or prejudice "prong" of such a claim by failing to show that he was prejudiced by his trial counsels' not having presented any of this mitigation evidence. The PCRA trial court had also found that Rompilla had failed to show prejudice. It is respectfully submitted that there was no way that Rompilla could show that any of this mitigation evidence would have changed either the opinion of the three experts obtained by trial counsel or the jury verdict. It must be remembered that the opinion of all three of these experts, after examining and testing Rompilla, was that there was nothing that they could offer in mitigation and that the test results which they have obtained would have hurt the defense. (N.T., 3/28/96, p. 122).

In order to show prejudice, a petitioner must show that, but for the act or omission in question, the outcome of the proceeding would have been different, *Commonwealth v. Douglas,* 537 Pa. 588, 645 A.2d 226 (1994); *Commonwealth v. Fahy,* 537 Pa. 533, 645 A.2d 199 (1994); *Commonwealth v. Buehl,* 540 Pa. 493, 658 A.2d 771 (1995);

and also *Commonwealth v. Travaglia,* 541 Pa. 108, 661 A.2d 352 (1995), *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313 (1997). *United States v. Day,* 969 F.2d 39 (1992) makes it clear that Rompilla had the burden of proving prejudice to a reasonable probability that the outcome of the jury verdict would have been different had the mitigation evidence been presented.

In this case, the general weight of the psychological evidence, even if it had included the records which were not obtained, was detrimental to Rompilla since he clearly tested as a sociopath and, as such, would have been seen as a danger to society, all but inviting the jury to request the death penalty. Rompilla's attempts, many years after the trial, to claim that more information should have been provided to the experts hired to examine and test Rompilla cannot carry his burden of showing that, but for the failure to obtain these records, or present this testimony, the outcome of the proceedings would have been different. In fact, the Commonwealth believes that it was actually good strategy not to present the type of mitigation evidence which Rompilla now claims should have been presented since said evidence was contradictory to Rompilla's continued position that the jury had convicted an innocent man. The presentation of evidence which, basically, represented an explanation of why Rompilla had grown into a cold blooded murderer was completely inconsistent with his position that he was innocent and would have only reinforced the jury's certainty in their verdict.

167-171. Denied as incorrect conclusions of law. On the contrary, both the trial court and the Pennsylvania Supreme Court found that there are three, not two, "prongs" that the petitioner must satisfy in order to show ineffective assistance of counsel. They are: 1) the underlying claim is

of arguable merit; 2) counsel had no reasonable basis for the act or omission in question; and 3) but for counsel's act or omission, the outcome of the proceeding would have been different. *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313 (1997). The Commonwealth respectfully submits that this is the same standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984) and *United States v. Day,* 969 F.2d 39 (1992).

The trial court and the Pennsylvania Supreme Court found that Rompilla failed to prove that his trial counsel did not have a reasonable basis for not offering mitigation evidence. The Pennsylvania Courts have found that trial counsel, in fact, acted reasonably in employing two recognized experts in the field of psychiatry and psychology who administered tests, evaluated Rompilla and reported that there was nothing that could be used as mitigation evidence. Rather, both experts told Rompilla's trial counsel that he was a sociopath. Amazingly, Rompilla's trial counsel did not stop with the first two experts, but obtained an evaluation by a third expert, a psychiatrist, Dr. Paul Gross, who, after evaluating Rompilla, found nothing that would be beneficial in the penalty phase.

172-200. The Commonwealth incorporates its answers with paragraphs 13 through 166.

201-204. These allegations are conclusions of law to which no response is necessary.

205-219. The Commonwealth incorporates its answers to paragraphs 13 through 166.

220-222. These allegations are conclusions of law to which no response is necessary.

223-249. The Commonwealth incorporates its answers to paragraphs 13 through 166.

250-252. These allegations are conclusions of law to which no response is necessary.

II. THE TRIAL COURT'S REMARKS TO THE JURY ON ACCOMPLICE LIABILITY WERE NOT TANTAMOUNT TO AN INSTRUCTION ON SAME AND WERE COMPLETELY HARMLESS.

253. No response necessary.

254. Admitted in part. The last sentence is a conclusion of law to which no response is necessary.

255. It is denied that there was any forensic evidence at all that suggested someone other than Rompilla committed the murder in question. None of the examples presented by Rompilla support its erroneous conclusion.

The cases cited by Rompilla in his petition completely miss the point and are irrelevant because an accomplice theory of guilt was not given to the jury by the trial judge.

III. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE WAS NOT ERROR UNDER CASE LAW EXISTING AT THE TIME OF ROMPILLA'S TRIAL SINCE THE COMMONWEALTH DID NOT MAKE ROMPILLA'S FUTURE DANGEROUSNESS AN ISSUE.

284. No response necessary.

285. This allegation is a conclusion of law to which no response is necessary, although the Commonwealth

agrees that the cases cited do stand for the proposition cited and that the case law is as set forth by Rompilla and as developed in the years *after* his trial.

286-322. Admitted in part, denied in part. It is admitted that during jury deliberations in the penalty phase the jury asked the question: "If a life sentence is imposed, is there any possibility of the defendant ever being paroled?" It is also admitted that the trial court responded to that question in the following way:

> "I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?"

All of the other factual material, implications, and conclusions, including the quotes from various publications, are denied.

323-372. These are conclusions of law to which no response is necessary. The Commonwealth respectfully submits that this issue was handled correctly by the trial court and the Pennsylvania Supreme Court. Rompilla's argument that the jury should have been told that a life sentence means life without parole under *Simmons v. South Carolina,* 512 U.S. 154 (1994) must fail because *Simmons* was not the law at the time of Rompilla's trial and, even if it were the trial court instructions still would not be erroneous because Rompilla's future dangerousness was not at issue see *Commonwealth v. Clark,* 551 Pa. 258,

710 A.2d 31, 35-36 (1998). Under the state of the law in Pennsylvania at the time of the Supreme Court's decision, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark, supra.* Rompilla's argument that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he had a significant history of felony convictions involving the use or threat of force also fails because the Pennsylvania Supreme Court rejected this argument in *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44, 47 (1998). Clearly, the aggravating circumstance argued by the Commonwealth only addressed Rompilla's past conduct not his future dangerousness.

Aside from the fact that *Simmons* was not decided until 1994, the holding in *Simmons* clearly does not govern the *facts* of this particular case. In *Simmons,* the prosecution in its closing argument argued that the defendant's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. The prosecutor urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." There was no such argument in Rompilla's trial. The prosecution merely argued that Rompilla had a significant history of felony convictions which was proper argument as an aggravating factor under Pennsylvania law.

Rompilla argues that the jury did not abide by the trial court's instruction that it must not consider the possibility of parole in its deliberations. Rompilla points to the fact that, subsequently, the jury requested exhibits that were docket entries relating to Rompilla's prior conviction for burglary and rape. Such a request is not

evidence that the jury did not abide by the trial court's instruction since the exhibits requested would shed no light on whether or not a defendant sentenced to life imprisonment would ever have the possibility of being paroled. Also, it must be presumed that the jury followed the trial court's instructions. *Commonwealth v. Travaglia,* 541 Pa. 108, 661 A.2d 352 (1995); *Commonwealth v. Stoltzfus,* 462 Pa. 43; 337 A.2d 873 (1975).

While Rompilla argues strenuously that his future dangerousness was at issue in a general sense, the issue is whether or not the prosecutor made any comment concerning his future dangerousness as did the prosecutor in *Simmons.* It is respectfully submitted that the holding in *Simmons,* even if applicable to this case decided in 1988, is limited to the facts of that case; namely, cases in which the prosecutor urged a verdict of death on the basis of the future dangerousness of the defendant.

Finally Rompilla's arguments concerning what inferences can be drawn from subsequent questions by the jury in regard to the length of Rompilla's sentence and the extent of his rehabilitation on his prior convictions was not an expression of its concern over his possible future dangerousness. These questions from the jury relate more to the issues raised by the defense witnesses during the penalty phase, who had complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole after his 1974 rape and burglary convictions. In fact, that apparent concern of the jury resulted in the finding by the jury of a mitigating factor to the effect that "the possibility of no rehabilitation during incarceration and after release". (N.T., 11/3/88, p. 21). In short, it is clear that the jury's question and finding of this mitigating circumstance was directly related, not to any thoughts of

the defendant's future dangerousness, but to the testimony of the defense witnesses in the penalty phase.

IV. THE OBTAINING OF THE (D)(8) AGGRAVATING CIRCUMSTANCE WAS NOT UNCONSTITUTIONAL.

373. No response necessary.

374. Admitted that the aggravating circumstance that the offense was committed by means of torture was one of the three aggravating factors found by the jury.

* * *

---

(6)

No. 04-5462

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME III, PAGES 456 TO 652

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Relevant District Court Docket Entries 1

Notes of Testimony (11/1/88, penalty-phase)..... 2

Notes of Testimony (11/2/88, penalty-phase)..... 120

Notes of Testimony (11/3/88, penalty-phase)..... 211

Pennsylvania Supreme Court direct appeal opinion, *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) 241

Court of Common Pleas post-conviction opinion 257

Volume II

Pennsylvania Supreme Court post-conviction opinion, *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998)..... 269

Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 5) 288

Commonwealth's Response to Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 9)..... 441

Volume III

Relevant District Court Exhibits (District Court docket entry 17):

Notes of Testimony (3/28/96) 456

Volume IV

Notes of Testimony (3/29/96) 653

Deposition of Dr. Barry Crown 824

TABLE OF CONTENTS – Continued

Page

Volume V

Deposition of Dr. Carol Armstrong 939
Deposition of Dr. Paul Gross 1015
Deposition of Dr. Gerald Cooke 1057
Deposition of Dr. Robert Sadoff.....1102
Deposition of Dr. Frank Dattilio.....1162

Lodging

Sacred Heart Hospital Records on Ronald Rompilla ... *L1
School Records on Ronald Rompilla..... L11
Pennsylvania Department of Corrections Records (Initial Transfer Petition and Initial Classification Summary) L31
Juvenile Court records on Ronald Rompilla L41
Juvenile Court records on Nick Rompilla L49
Police reports provided to trial counsel through discovery L111
Reports and Commutation Recommendation prepared by Dr. Kate Erwin (1995) L121

Volume VI

District Court Opinion 1280
Third Circuit Panel opinion and dissent 1325
Third Circuit *en banc* ruling and dissent 1448

* Items paginated with L numbers are bound in a separate volume.

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	No. 88-682
vs	:	
RONALD ROMPILLA, Defendant	:	

NOTES OF TESTIMONY

BEFORE THE
HONORABLE THOMAS A. WALLITSCH, J.
Thursday, March 28, 1996
9:00 a.m.
Courtroom No. 5C
Lehigh County Courthouse
Allentown, Pennsylvania

APPEARANCES:

JACQUELINE PARADIS, ESQUIRE
For the Commonwealth

MICHAEL WISEMAN, ESQUIRE
and
BILLY H. NOLAS, ESQUIRE
For the Defendant

COURT REPORTER:

MOIRA E. EVANS, RPR

[2] INDEX TO WITNESSES

Commonwealth's Witnesses Page

MARIA DANTOS, ESQUIRE

Direct Examination by – MR. WISEMAN 11, 105
Cross-Examination by – MS. PARADIS 115

Redirect Examination by – MR. WISEMAN 144

RALPH TODD

Direct Examination by – MR. WISEMAN 96
Cross-Examination by – MS. PARADIS 98

BERNADETTE DeJOSEPH

Direct Examination by – MR. WISEMAN 102
Cross-Examination by – MR. [sic] PARADIS 104

ALBERT NELTHROPP, ESQUIRE

Direct Examination by – MR. WISEMAN 157
Cross-Examination by – MS. PARADIS 201

FREDERICK CHARLES, ESQUIRE

Direct Examination by – MR. WISEMAN 207

[3] INDEX TO EXHIBITS

Commonwealth Exhibits	Marked	Admitted
C – 1 – Letter of 10/14/88	139	

* * *

Defense Exhibits	Marked	Admitted
D – 1 – Letter	20	
D – 2 – Letter of 9/19/88	20	
D – 3 – Letter of 6/20/88	20	
D – 4 – Cumulative record for Allentown School District	28	
D – 5 – Birth certificate record	28	
D – 6 – Emergency care unit record	41	

D – 7 – Initial transfer petition	61	
D – 8 – Cumulative record for Allentown School District	97	101
D – 9 – Emergency care unit record	103	
D – 10 – Letter 1/2/89	157	
D – 11 – Capital Appeal Docket	189	

[4] (Whereupon, the proceedings begin.)

THE COURT: All right.

MR. WISEMAN: Good morning, Your Honor.

THE COURT: Morning. All right. We had a motion to quash a subpoena which was filed, and yesterday we argued that matter on the record. I'm going to permit the introduction of those two reports, which is what was sought, rather than compel any personal attendance. That's what was requested. I'll permit that. And they were the two I think Exhibits E and F in the petition, yes? Am I correct on that?

MR. WISEMAN: That's right, Your Honor.

THE COURT: Very good. All right. All right then, ready to proceed?

MR. WISEMAN: Just one clarification. Are the reports being offered for both the facts and opinions contained in them?

THE COURT: Yes.

MS. PARADIS: To the extent there are any opinions in there. There's not a lot in there. But I hadn't

had the benefit of looking at it at that time. And now – excuse me, Your Honor.

THE COURT: Have you seen it, Ms, [5] Paradis?

MS. PARADIS: What?

THE COURT: The two –

MS. PARADIS: The reports?

THE COURT: From Dr. Irwin.

MS. PARADIS: Yes, I have, Your Honor, and I don't know what Mr. Reichley discussed with you yesterday, however, if the Court is going to consider these without testimony or without any kind of cross-examination of this doctor, I would certainly like to point out that it appears that these two documents were prepared based on interviews with the defendant.

I would argue that they were self-serving, that these opinions were improper, things of that nature. But I'm sure Mr. McIntyre will do that at the appropriate time when he is making the argument in the case in toto.

THE COURT: I don't think Mr. Reichley had the benefit of seeing those at the time.

MS. PARADIS: Okay.

THE COURT: All right. Very good. All right then, ready to proceed?

MR. WISEMAN: We are ready to [6] proceed, Your Honor. We have three witnesses subpoenaed. All three are attorneys. I'm prepared to call the first one, Ms. Dantos. I imagine the other two would like to be excused. That's fine with us subject to being on call –

THE COURT: That's fine.

MR. WISEMAN: – later in the morning or afternoon.

THE COURT: With regard to timing on that you'd like to call Ms. Dantos first?

MR. WISEMAN: That's right.

THE COURT: And then I don't know how long you anticipate if you have other witnesses that you can set the other lawyers for later on?

MR. WISEMAN: I can tell Your Honor my intention. I'd like to start with Ms. Dantos, then go to Mr. Nelthropp and then finish up, if we get to him today, with Mr. Charles.

THE COURT: All right. You want to do all of the attorneys before you do anything else, is that what you're saying?

MR. WISEMAN: Yes, Your Honor.

THE COURT: Well, then why don't we have Ms. Dantos and have Mr. Nelthropp be excused to 10:30 and Mr. Charles until 11:30.

[7] MR. WISEMAN: That's fine with me.

THE COURT: All right. Fine. Thank you.

MR. WISEMAN: Your Honor, can I ask to have all witnesses, fact witnesses, sequestered please from the courtroom.

THE COURT: What fact witnesses?

MR. WISEMAN: I don't know if there are any of the fact witnesses in the courtroom, but I would ask that if the Commonwealth has any, that they be excused.

THE COURT: Ms. Paradis?

MS. PARADIS: Your Honor, I have no fact witnesses.

THE COURT: All right. Fine.

MS. PARADIS: Your Honor, I would like to make an inquiry before we begin. Attached to the petition is an Exhibit Number G or Letter G, excuse me, it's called initial transfer petition. I would just like to make inquiry of the Court whether that is, in fact, part of the court file?

THE COURT: Is it part of the court file? It is part of the petition.

MS. PARADIS: It's part of the petition, but is it part of the Court file which you [8] would have kept separately?

THE COURT: I don't know. I don't have the Court file here.

MS. PARADIS: You don't have the Court file?

THE COURT: We can check that out, however, Ms. Paradis.

MR. WISEMAN: Your Honor, I could shed some light on it. I personally retrieved that from the Court file in regard to Mr. Rompilla's prior conviction.

THE COURT: So it is.

MR. WISEMAN: It was on microfilm.

MS. PARADIS: Which court file?

MR. WISEMAN: The old court file, the court file from Mr. Rompilla's prior conviction from –

MS. PARADIS: 1978.

MR. WISEMAN: 1974 I believe.

MS. PARADIS: Okay. There's a reference to 1978.

MR. WISEMAN: Well, just so the record is clear.

MS. PARADIS: From the Lehigh County Court of Common Pleas.

[9] MR. WISEMAN: Yes. The indictment on the document it has a box that says indictment, term of court CCP-148714E1460074. I take it that's the docket number of the prior conviction.

MS. PARADIS: Thank you.

THE COURT: All right then, you may proceed.

MR. WISEMAN: Yes, I think Mr. Charles is waiting for some instruction from the Court.

THE COURT: Mr. Charles, what is intended is to have Ms. Dantos testify first then Mr. Nelthropp. So I've said you can be excused until say 11:30 and maybe what we can do when we see how far we get at the break we can call you. Ms. Dantos perhaps can call you.

MR. CHARLES: Am I sequestered by any chance?

MR. WISEMAN: Yes, I made that.

THE COURT: He had made that request that that be done, and I'll permit that.

MR. CHARLES: I have documents that I'm going to provide to Mr. Wiseman. Would it be fine to just leave this and go or –

THE COURT: Fine. That will be [10] fine.

MR. WISEMAN: Ms. Dantos, please.

MS. PARADIS: I hate to keep interrupting. I apologize, Your Honor, but it has come to my attention through counsel yesterday, they have materials in their possession that they would consider either work product or confidential information which I was not allowed to interview them about.

And I would like to know at this time whether Mr. Rompilla or his counsel on his behalf would be willing to waive the privilege, because they certainly are germane to the issues we're exploring today.

MR. WISEMAN: Your Honor, I addressed this with Mr. McIntyre in regard to some prior documents that I had provided him at that time. Mr. McIntyre agreed to a condition to my voluntary release of those documents.

The condition was that certainly they are relevant and germane to the proceedings and can be used by either side in the proceedings, but should the Commonwealth seek to use them at a subsequent proceeding, that we have not waived our right to make an objection and would have to seek a new order if one were prepared to use them. So I would [11] certainly be happy to do so.

MS. PARADIS: So for purposes of this hearing these are open?

MR. WISEMAN: Certainly.

MS. PARADIS: For waiver no confidentiality?

MR. WISEMAN: Subject to the condition I just set forth.

MS. PARADIS: Wouldn't be used in subsequent proceedings.

THE COURT: Fine. You're satisfied with that, Ms. Paradis?

MS. PARADIS: Yes.

* * *

MARIA DANTOS, ESQUIRE, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Good morning, Ms. Dantos.

A Good morning.

Q What's your occupation?

A I'm an attorney.

Q And by whom are you employed?

A Lehigh County District Attorney's Office.

[12] Q And for how long have you been a Lehigh County district attorney?

A Since September of 1989.

Q And when did you graduate from law school?

A May of 1985.

Q Could you briefly outline what your legal employment has been from the time you graduated until you took your job at the Lehigh County District Attorney's office?

A Sure. Right after law school and after passing the bar I was employed by the Lehigh County Office of the Public Defender as an assistant public defender. I was on a full-time basis there until I believe it was June of 1989, then I went part time and worked also part time in a private law firm, Kasick and Madey. And in September of 1990 is when I moved to the district attorney's office.

Q You know the defendant, Ronald Rompilla?

A Yes, I do.

Q How is it that you know him, you represented him?

A Yes, sir.

Q And that would be in connection with a murder in the first degree case that was prosecuted in this court?

[13] A That's correct.

Q Do you recall the time – strike that. Do you recall what the date, roughly the date of his arrest on that incident was?

A January of 1988.

Q So at that time you were a public defender, a full-time public defender?

A That's correct.

Q You had been out of law school roughly two and a half years?

A That's correct.

Q Now, were you the only public defender to represent Mr. Rompilla in this case?

A Chief public defender Frederick Charles was lead counsel in that case.

Q Now, are you familiar with how many years Mr. Charles had been an attorney at the time of this prosecution?

A No.

Q Would it be fair to say that he was somewhat more experienced than you were?

A Definitely.

Q Was he lead counsel – withdrawn.

Did you have any division of duties as far as the different phases of a capital [14] case, guilt phase and penalty phase?

A Yes, we did.

Q What was your role?

A My role was to handle the penalty phase of the trial and also to assist Attorney Charles in the guilt phase of the trial. And I did, as I recall, the majority of the client contact.

Q Did Mr. Charles play any role in the penalty phase of the trial – withdrawn,

In the – in the time leading up to the penalty phase of trial?

A Yes, he did.

Q Were you responsible for making decisions in the case in regard to the penalty phase?

A I would say not. Both of us worked on all phases of the trial. Although I conducted the penalty phase in terms of making the argument and presenting witnesses, Attorney Charles as my supervisor and as lead counsel was involved in all of the decisions and the discussions about how to proceed.

Q By the way, do you have any notes in your possession regarding your representation of Mr. Rompilla?

A No, I do not.

Q And by possession I mean either with you [15] today or at some other location?

A No, I do not.

Q Did you make any notes or memoranda in regard to the present proceedings?

A No, I did not.

Q Did you review the Post Conviction Relief Act petition filed on Mr. Rompilla's behalf?

A Yes, I've looked at it.

Q When did you look at it?

A I looked at it within the last week, and as recently as yesterday.

Q Did you make any notes or markings on that, on your copy of the petition?

A No, I did not. I don't have a copy. I reviewed the copy that's within the district attorney's possession.

Q Did you have any discussions about these – these proceedings with any member of the district attorney's staff?

A Yes.

Q Who did you talk to?

A I spoke briefly with Attorney Michael McIntyre, although he's currently tied up in a trial, so yesterday I had some discussions with Jackie Paradis.

[16] Q Did you discuss at all the substance of your testimony?

A She asked me some questions that were raised in your petition, which I answered.

Q Prior to discussion with Mr. McIntyre, recent discussion with Mr. McIntyre – with Ms. Paradis, have you ever – had you ever discussed your discussions with Mr. Rompilla with anybody else at the district attorney's office?

A Yes.

Q Did you discuss – with whom did you have these discussions?

A With various members of the DA's office when issues would arise in our office, just in general terms.

Q Now, in your preparation for the penalty phase of this trial, did you become familiar with the mitigating factors contained within Pennsylvania's death penalty statute?

A Yes.

Q And do you recall whether you were familiar with any mental health mitigating factors?

A In this particular case or in the statute?

Q In general,

A Yes.

[17] Q And can you just tell us if you recall what your understanding of those mental health mitigating factors was at the time?

A I don't recall. I know that we delved into it at the time, but if there was mental infirmity present with a particular defendant, that it could somehow mitigate the sentence.

Q What's your understanding – what was your understanding at the time of what a mental infirmity was or is for purposes of the death penalty case?

A Any sort of disorder that would render him somewhat less culpable.

Q Now, when you say less culpable, do you mean by that having a lesser degree of criminal responsibility?

A Yes.

Q By the way, you mentioned – I asked you about the discussions you had in the district attorney's office.

When issues would arise, you would discuss them with Mr. Rompilla? Do you have any recollection of what types of issues would start that discussion?

A When there were other capital cases in the office or discussions about my experience and what I learned from the case and my opinion as to how to [18] approach the subject in general.

Q At the time of your representation of Mr. Rompilla – withdrawn.

At the time of representation of Mr. Rompilla, had you ever participated in defense of any other capital cases?

A No, sir.

Q So this was your first capital case?

A First and last.

Q Okay. Prior to Mr. Rompilla's case, had you any involvement in any other homicide matters?

A Yes.

Q Any first degree homicide cases?

A No.

Q Second?

A Potentially first degree cases that pled.

Q Okay. Did you ever have a trial on a first degree case?

A No, sir.

Q Did you ever try a second degree homicide case?

A No, sir.

Q Third degree?

A No homicide cases.

Q No homicide trials?

[19] A That's correct.

Q Did you have any appellate responsibilities in the public defender's office?

A No – well, let me backtrack. We had appellate counsel in the public defender's office, but initially post-trial motions were filed by trial counsel and briefed at this level and subsequently taken over by appellate counsel.

Q Now, you had some contact with mental health professionals in regard to Mr. Rompilla's case?

A Yes.

Q And were you responsible on the defense team for making those contacts?

A Both Fred and I would discuss who to contact. I think the discussion of who to contact was probably made by Attorney Charles, but, yes, I believe I made the contact with the individuals.

Q Do you have a recollection as to when you first contacted a mental health professional in regards to Mr. Rompilla's case?

A No.

Q Do you remember who the mental health professionals were that you did contact?

A Yes.

Q Can you tell the Court who they were?

[20] A Dr. Cooke, Dr. Sadoff, and Dr. Gross.

Q And do you have a recollection independently of what order in which you contacted them?

A No.

Q Do you have any recollection that there was any gap between the times that you contacted the three mental health people, or did you just basically contact them all at the same time?

A I don't recall.

Q Do you recall presenting any of the mental health people that you contacted in regard to this case with a theory of mitigation?

A I believe that I explained to them the purpose for my contacting them, and the purpose was to initially see if there was any issue of mental infirmity or mental insanity for the guilt phase and subsequently to possibly use in mitigation any mental infirmity if it – the jury came back first degree.

Q Did you give them anymore of a specific sense of the things you were interested in having them explore?

A I don't recall that.

MR. WISEMAN: Your Honor, I'm going to ask to have marked three documents.

* * *

[21] (Whereupon, Defendant's Exhibits Numbers 1, 2 and 3, were marked for identification.)

MR. WISEMAN: Would, Your Honor, like copies?

THE COURT: Yes.

Q I'm going to place in from of you, Ms. Dantos, what's been marked as Defendant 1, and I'll be referring to that. Just a couple of questions before we discuss that exhibit.

A Okay.

Q Dr. Gross saw Mr. Rompilla on one occasion, is that right?

A As far as I know, that's correct.

Q And he wrote one report?

A Yes.

Q And does Defendant's Exhibit 1 appear to be a report that he wrote in regard to his evaluation of Mr. Rompilla?

A Yes, although it has attached to it I believe notes.

Q They appear to be Dr. Gross's notes?

A That's correct.

Q Now, I direct your attention to the top paragraph of the report which is addressed to you by the way.

[22] A Yes, it is.

Q And it says, just to quote you on one of the sentences, I've had the opportunity to evaluate Ronald Rompilla, a divorced, 40-year-old man, per your request. The

purpose of this evaluation is to determine Mr. Rompilla's mental state during the time of the alleged charges, unquote. Did you see that section there?

A Yes, I do.

Q Is that a fair statement by Dr. Gross as to what your request was of him in regards to Mr. Rompilla at the time of his evaluation?

A As best I can recollect.

Q It then goes on to say that the report is based on, quote, an evaluation, unquote, conducted on June 4th, 1988?

A Yes, it does.

Q I'm going to hand you Exhibits 2 and 3.

A Um-hum.

MR. WISEMAN: Just so the record is clear, Exhibit 2 is a letter of Dr. Sadoff, and Exhibit 3 is a letter of Dr. Cook.

Q Now, Exhibit 2 is a letter, is it not, from Dr. Robert Sadoff, again addressed to you regarding an examination that he did of Mr. Rompilla in September [23] of '88?

A That's correct.

Q Do you know of any other examination or evaluation that Dr. Sadoff did in regard to Mr. Rompilla other than that one?

A I do not.

Q And did he issue any other written reports or memoranda regarding his evaluation?

A No, he did not.

Q Exhibit 3 is also a letter written in this case by Dr. Cooke again addressed to you dated June 20th, '88, is that right?

A That's correct.

Q And it also refers to a quote, unquote, psychological eva' iation of Mr. Rompilla that Dr. Cooke conducted?

A Yes.

Q Aside from that evaluation, evaluation referred to in that report, do you have – do you know of any other evaluation that Dr. Cooke did in regard to Mr. Rompilla?

A I do not.

Q Is there any written report or memorandum regarding information findings, other than what's included in that exhibit?

[24] A Not that I know of.

Q Now, did you ask Dr. Cooke essentially to do the same evaluation, some type of evaluation that you asked Dr. Sadoff to conduct?

A I believe I did.

Q And would that also be true of doctor – I'm sorry. I misspoke.

Is the evaluation you asked Dr. Cooke to do essentially the same evaluation that you had asked Dr. Gross to do?

A As best I can recollect.

Q And would the same be true of Dr. Sadoff's evaluation?

A I believe so.

Q So would it be fair to say that all three of the mental health professionals employed by the defense in this case were asked by you and/or Mr. Charles to look into Mr. Rompilla's mental state at the time of the commission of the offense?

A Yes.

Q But I believe also included in that request would have been, you know, his current state, and I believe they did, in fact, evaluate that his current competency to proceed?

A That's correct.

[25] Q So all three evaluated competency to proceed at the time of the offense?

A As best I can recollect.

Q Did your mitigation theory change at all after you read the reports of Dr. Cooke and the – I'm sorry, the letter of Dr. Cooke, the letter of Dr. Sadoff or the report of Dr. Gross?

A Did it change? Well, I believe that we, after reviewing Dr. Gross's letter and speaking with all three of these individuals, determined that that was not something that the mental infirmity, or any type of mental state, was not something that we could present in terms of mitigation on behalf of Mr. Rompilla.

Q And prior to their conducting their evaluations you had no opinion as to whether such a mitigation defense was available?

A Well, naturally we would have wanted to proceed under that theory. Had there been some evidence of that, we would have.

Q Do you recall what you gave to each of the three mental health people prior to their evaluation of Mr. Rompilla?

A No, I do not.

Q Do you know if you gave them police reports [26] about the case?

A I believe they were provided with some information, but to be honest, I couldn't tell you now what that information was.

Q Did you do, by you I mean your office, either you or Mr. Charles or any investigator or attorney working at your behest, did you do any investigation into Mr. Rompilla's schooling prior to having the mental health evaluators evaluate?

A Outside of questions to the family and general questions to Mr. Rompilla himself, I would have to say no.

Q What questions did you ask Mr. Rompilla about his schooling?

A Mr. Rompilla and I had a lot of discussions about himself, about who he was and his life.

Q If we could just – if you can focus on school though first if you remember?

A I can't tell you what specific questions I asked him. I can tell you that we had discussions about himself and his past, but I can't tell you that I specifically asked him who his teachers were in school or anything of that nature.

Q Did you ask him anything about his performance in school?

[27] A I don't recall.

Q Well, let me ask it to you this way then, knowing what you know about the preparation of a penalty phase in a capital case, would it be appropriate to ask a person about their school record?

A I believe so.

Q And would it be appropriate to ask your client in that setting whether they achieved well in school or did poorly in school?

A I believe so.

Q Why would that be important?

A Because I think you would want to know as much about a person's past and how they performed and that that indicated about what was going on with them emotionally and psychologically at the time.

Q So for example if someone did poorly in school, that might be an indication of an underlying mental defect?

MS. PARADIS: Objection. Leading question.

THE COURT: It is. I'll permit it.

A I don't know that I'm qualified to answer whether someone doing poorly in school is indicative of mental defect or indicative of anything in particular. [28] But I would think that it would indicate that there was something going on with the person.

Q And that's something that you would want to provide to your mental health professionals for their evaluation?

A Yes.

Q Did you ever obtain Mr. Rompilla's school records?

A I don't recall obtaining them, no.

Q I'm confused by the answer. Maybe it's me. You didn't get them, or you don't remember?

A I don't remember getting them, so I can – I mean I'm answering you as honestly as I can. I don't remember ever seeing any, so I would assume that we didn't get any. That's the best I can do.

Q Now, just to give the Court a sense of your understanding of counsel's role in a penalty phase, if you did get Mr. Rompilla's school records, and they showed him to be in the mentally retarded range on an IQ test, isn't that something that you would feel would be an important thing to give to your experts?

A Yes.

Q Is that something that you would feel would be an important thing to present to the jury?

A Yes.

[29] MR. WISEMAN: If I could have marked two more exhibits.

* * *

(Whereupon, Defendant's Exhibit Numbers 4 and 5, were marked for identification.)

Q I'm going to show you, Ms. Dantos, what's now been marked as Exhibits 4 and 5. I'll be asking you some questions about those documents. Are you familiar generally with IQ testing?

A No. No.

Q I'd like to direct your attention on Exhibit 4 to the middle of the page.

A Um-hum.

Q There's an entry that says 10/59, and then there's a space that says WISC.

A I see it.

MS. PARADIS: Objection. There's been no – first of all, we don't know that this witness is familiar with what these documents are, and certainly she doesn't have the expertise to evaluate these documents. What they appear to be are the defendant's birth certificate and school records of which she was not privy. And I don't see how she can interpret these documents.

THE COURT: Well, she hasn't been [30] asked that yet.

MS. PARADIS: The question is about interpreting the middle of the page.

THE COURT: Did she?

MR. WISEMAN: Why I was asking that –

THE COURT: Did she see something on there? I don't know where it's going, Ms. Paradis, but let's see.

Q So I was pointing your attention to the column that says WISC.

A I see it.

Q If you go along further skipping a column 11-6 you see an entry that says V 61, P 57.

A Yes.

Q Next to FS 64.

A Yes.

Q Do you recall ever having seen this document at the time you were representing Mr. Rompilla?

A No.

MR. WISEMAN: Now, Your Honor, just so the Court knows where I'm going, I will be bringing in expert testimony as to the interpretation of these results, but I do want to be permitted to ask the witness some questions about them, assuming I'm [31] able to connect it up later with my expert. Obviously if I can't, then –

THE COURT: Well, let's see where it's going. Ms. Dantos already said she's not familiar with the IQ testing I believe.

Q All right. Ms. Dantos, assume if you would that you presented the entries I just read to you to your mental health expert, and your mental health expert told you

WISC is the IQ test that was used back in the 1950's and 60's, and that the IQ that Mr. Rompilla achieved on that test was a 64, and further assume that 70 is the cutoff for mental retardation.

I'm sorry. I misspoke. Seventy-five is the cutoff for mental retardation. Assume that your expert told you all that. Is this type of score something that you'd want to present to your mental health expert?

A Yes.

Q And is it something that you think would be important to let a capital jury know about your client?

A Yes.

Q That he's mentally retarded on an IQ test?

A Yes.

Q By the way, do you remember roughly [32] Mr. Rompilla's birth date or – I don't want to quiz you.

If I told you he was born 1948, I think that's on top of the report, that sounds about right to you?

A Yes.

Q So at the time that he achieved the score of 64 he was about 9 or 10 years old or 11 years old I guess?

A Eleven.

Q Eleven years old?

A Yes.

Q The entry right below that one is 6/61 stan., says stan, S-T-A-N period A-C-H period. Assume if you would,

again subject to, Your Honor, my expert's confirming this, assume, Ms. Dantos, that it's a shorthand way of writing Stanford Achievement Test?

A Okay.

Q Assume also that the R refers to his reading level, and that number 3.3 means that in 1961 Mr. Rompilla was 13 years, he was reading at the third grade level. Is that something that you would want to provide to your mental health expert in the context of a capital case?

A I believe so.

[33] Q And if he was spelling – assume that 4.1 means that he is spelling at a fourth grade level. Is that something that you'd want to present to a mental health expert?

A Yes.

Q And present to a jury as well?

A I believe so.

Q And the last entry there, A for arithmetic, says 3.5. Is that something that he's doing arithmetic at a third grade level when he's 13 years old, is that something that you think would be important to present to your expert and to the jury?

A I believe so.

Q Now, if you look down towards the bottom of that page you'll see an entry, and the entry says elementary school. And then you'll see year '53 to '54 all the way down to '60 to '61, do you see that?

A Yes.

Q And next column says grade K or kindergarten, 1, 2, 3 and then it stops. Do you see that?

A Yes, I do.

Q Following that is SP. You see that?

A Yes, I do.

Q Assume if you would that SP means special education. That was the grade or class he was in from [34] 1957 until he was through elementary school. Would the fact that your client was in special education classes be a fact that you'd want to present to your mental health expert in a capital case?

A Yes.

Q Now, if you turn to page two of that document and look towards the bottom left you'll see the entry that says 12/61.

A Yes.

Q And again we see the entry WISC.

A Yes.

Q And we see what the IQ, looking over to the right, says FS 69. Assuming again that that is a full scale IQ of 69, which is below the mentally retarded range, is that something that you'd want to obviously give your, and you said with your prior answers, present to a mental health expert, to a judge?

A Yes.

Q If we could just flip back to the first page, the first entry on the IQ section is dated '54 and has test SRA and

to the right column under IQ it says 6 and it appears the second digit is not legible, is that right?

A That's correct.

Q All right. Assuming Mr. Rompilla didn't have [35] an IQ of 6 he had an IQ of 60 something apparently on that test according to this record?

A As best I can read.

Q That's what it says?

A That's what it says.

Q And then on the column, the line below that, 4/57 being the date, again the WISC test has him on the verbal – excuse me. Has him within an IQ of 75, is that right?

A Yes.

Q Okay. Now, if you look to the left you'll see a V?

A Yes.

Q And again, do you see P in that column?

A I do not.

Q Now, again, those IQ tests which are in the 60's and again in the mid-70's that's something you'd want to have told your mental health expert about if you'd known it?

A Yes.

Q Did Mr. Charles ever discuss with you these IQ tests?

A Not that I recall.

Q Do you have any reason to think that he knew about them and might have mentioned them to you at any [36] time?

A No.

Q Now, why would you want to present evidence that your client was in special ed. to your mental health expert, and by that I mean, what's in your view the significance of special education, what's its meaning in this context?

A That the – that the individual is not functioning in a level appropriate for his age.

Q And that may be because he has a mental infirmity of some sort conceivably?

A Conceivably. But I can't – I don't know. I don't know.

Q. I understand that you don't know. My question is, is that the reason you give it to mental health?

A So they can find out.

Q They can find out for you?

A Right.

Q It's a red flag that there may be something going on with your client's mental health?

A It's an indication that there is something to look into.

MR. WISEMAN: Your Honor, just so the Court understands, the next exhibit was also part [37] of the school records that were provided to us by the Allentown School District that came into separate production, and I've just marked them separately.

MS. PARADIS: Your Honor, at this point, again, I don't know what agreements have been made with Mr. McIntyre, but I would object to the introduction of the records in this fashion. And I'm going to reiterate my objection that I don't believe this witness is appropriate to be analyzing these records and making discussions on what they mean and what they don't mean. I don't believe that the records have been properly introduced for one thing.

THE COURT: They are not even being offered yet. I'm not sure where –

MS. PARADIS: Your Honor, Mr. Wiseman indicated that he'd like to offer this particular record at this time.

MR. WISEMAN: I don't believe I did offer it. I'm going to be offering it, Your Honor. There's two different issues here. One is relevance to examining this witness on these records, and we can take the first issue which is the way we get them. But these were gotten from the Allentown School District.

If the district attorney wants us [38] to, we can go and serve a subpoena on them. They will bring the same record to court, and obviously it's admissible as a business record. I don't think we need to do that. If we need to, we'll certainly do that.

As to why this point – it's proper to examine this witness on these records, and obviously our claim is that Mr. Rompilla received a defective assistance of counsel and among otherwise the effectiveness related to failure to investigate mark and present evidence.

Related to mitigation, obviously as the witness said it's our position that these are mitigating facts that should have been before the jury, and they weren't. So certainly it's relevant to examine whether she did or not and what her reasons may have been.

THE COURT: I'm really not sure what the objection is at this point in time.

MS. PARADIS: My objection was to the form in which these document [sic] are coming in to evidence. And again –

THE COURT: What do you mean?

MS. PARADIS: They – the proffer was, and perhaps I didn't hear correctly, but I believe Mr. Wiseman said at that time I'd like to offer the [39] record of the school district. Well, usually that requires a witness to introduce it.

THE COURT: Would you like him to subpoena the –

MS. PARADIS: As I said, I don't know what agreements have been made with Mr. McIntyre. That would be my objection.

MR. WISEMAN: I've made no agreement with Mr. McIntyre about objections. The only question is from our perspective the authentication of records. And if that's the objection, the Court will subpoena the school district.

THE COURT: If that's the objection, then you'll have to do that I guess.

MR. WISEMAN: Is that the objection?

MS. PARADIS: That and I reiterated my objection about having this witness interpret results that certainly she doesn't – she indicated she doesn't know anything about the test.

THE COURT: She hasn't been asked to interpret these.

MS. PARADIS: Okay.

BY MR. WISEMAN:

Q Now, Ms. Dantos, we have just covered all the [40] school records and IQ testing. In preparing for a capital case and particularly in the penalty phase, is your client's relevant medical history something you'd want to look into?

A With regard to what, looking for what?

Q Well, in your view, are there things that can happen to a person medically that could effect their mental health, is that within the realm of possibility in your understanding of mental health?

A I suppose it is. I suppose it is.

Q And, again, that's something that you'd want to conceivably look into to provide your mental health experts?

A If there were such a thing, I suppose that's correct.

Q Did you ever gather up any medical records on Mr. Rompilla?

A Not that I recall.

Q Do you recall if Mr. Charles ever did this or anyone else affiliated with your office?

A Not that I recall.

Q If I were to tell you that at age two Mr. Rompilla was admitted to the hospital with a 105 fever, is that something you think you would want to have your mental health expert look at?

[41] A Yes.

Q Is something that in your view conceivably could have affected his mental development or his organic development?

A I suppose it would depend. I mean fevers in children I don't think are unusual, but I suppose it would depend on the other circumstances surrounding that.

Q It's something you don't feel qualified to –

A Absolutely not.

Q – have an opinion?

A That's right.

Q Again, it's something you would want to present to your mental health person?

A I suppose you could have someone else evaluate it.

* * *

(Whereupon, Defendant's Exhibit Number 6, was marked for identification.)

Q I'm going to show you what's been marked as Exhibit 6, which is a packet of medical records.

MR. WISEMAN: Your Honor, if the district attorney – I guess I'd like to know if the district attorney is going to have the same objection, and again we'll need a subpoena from the hospital as [42] well if she's going to have the same objection.

These records are obtained from Sacred Heart Hospital. They include the entry regarding the drawing of blood at the time of Mr. Rompilla's arrest in this case. And the other entry is from when he was two years old.

THE COURT: You probably haven't had the opportunity to look at them.

MS. PARADIS: I have not had the opportunity, and I am doing that right now.

THE COURT: Take your time. The objection is to authenticity?

MS. PARADIS: Again, I have difficulty – first of all, I have difficulty reading these. I really can't even tell you what's on them for the most part. I can read bits and pieces of it. I believe that we would be put to the task on this. So I'm going to object. This is his hearing, and I believe it's appropriate for him to bring in the original record. I can't make head or tail out of this.

MR. WISEMAN: We'll do that, Your Honor. In the mean time if I could, subject to that authentication, if I could ask Ms. Dantos a couple of questions. I believe the exhibit is open to the page I [43] was interested in.

Q Ms. Dantos, if you look at – it's kind of hard to point out – the entry for final diagnosis. It appears to say diarrhea due to undetermined cause?

A That's what it appears to say.

Q If you look further down the page you'll see a notation that says P105?

A Yes.

Q And assuming that that refers in medical terms to temperature of 105?

A Yes.

Q It would appear this is a record of a hospital admission for Mr. Rompilla with a 105 fever?

A Yes.

Q And if you look at the very top of the document it says age two?

A Yes.

Q Now, again, if this is something that you would have had back at the time of the trial proceedings, you would have given this to your expert for evaluation?

A I'm not so sure. Now that I have read as much as I can read of it, and it seems to be that he had diarrhea with a fever that was treated, he responded and was released.

[44] Q A fever of 105 though, right?

A For a child, yes.

Q That's a high fever for anybody, isn't it?

A Well, not in a child.

Q So your position is you would not give that to a mental health expert for an evaluation?

A Probably not.

Q You wouldn't even hand it over to him?

A I might. I might. But, you know, you're asking me if my opinion is, is a 105 fever with diarrhea something that could create some sort of mental infirmity or defect, and in my opinion, which is not obviously to any degree of medical certainty, I'd have to say no.

Q All right. I'm just trying to understand what is your view of this issue. Do I understand you to be saying that you wouldn't give it to your mental health expert or you would?

A No. If I had it I probably would turn it over. But if you're asking me if it – if I believe that this is indicative of something serious, I would have to say probably not.

Q Would you have had a tactical or strategic reason for not turning it over?

A No, sir.

[45] Q So if you had it, you'd give it to him and see what the doctor has to say about it?

A That's probably true.

Q You mentioned that you discussed some things about Mr. Rompilla with his family?

A Yes.

Q In fact, you put three of his family members on the stand during the penalty phase?

A Four I believe.

Q Is it four? You're right. Four. That's right. And it would have been his brother, Nick?

A His brother, Nick; his sister-in-law, Darlene; his brother, Bobby and his son, Aaron.

Q Now, do you recall – do you recall did you talk to other family members other than those four?

A I spoke with his ex-wife who was present during a lot of the trial. And I don't recall who else I spoke to, to be honest with you. And I don't have my notes.

Q Do you have a specific recollection of discussing any of the mitigation – withdrawn.

Discussing with any of the family members aspects of Mr. Rompilla's childhood?

A Yes.

Q Do you recall what aspects you discussed?

[46] A I asked them in numerous meetings to tell me about Ron and to – we discussed his upbringing and his childhood. And you have to understand that they were coming from the position that Ronald was innocent. And, therefore, they weren't looking for reasons for why he might have done this. And although I asked the questions, they did not tell me anything noteworthy about his childhood, about his family dynamics.

The responses that I got from his family were that they loved each other, and they were supportive.

Q Now, Ronald Rompilla's oldest sibling is a woman named Barbara Harris. Do you recall that?

A I recall the name, yes.

Q Do you recall having a discussion with her about Ronald? She wasn't one of the people that you just talked to?

A I don't know if I spoke with her or not. I would assume that I had.

Q Obviously talking to his young son you couldn't have talked about obviously his upbringing, right?

A His son's upbringing?

Q About Mr. Rompilla's.

A Obviously.

[47] Q Right. Silly question. To some degree that would be true, though, with his younger siblings, isn't that right? Robert, for example, Robert is somewhat younger than Ronald?

A Yes, as I recall. But I did talk to them about that, and, you know, the overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody.

And they were coming from a point of since his release that they were trying to get back to the family unit and get to know each other and try to make it work as a family. But there wasn't a lot that they knew. And, in fact, Nick, who was probably one of the more interested in what was going on in this case, himself was out of the home at a very young age.

Q This is Nick, the brother?

A Yes.

Q Because Ronald's father is also Nick?

A Nick the brother.

Q Just for clarification purposes, let me just back up for a second. When you say since his release, so the record is clear on the time frames here, approximately – Mr. Rompilla was incarcerated in the [48] mid-70's until approximately three months before his arrest on this case?

A Yes.

Q So he was in jail for roughly –

A Fourteen years.

Q Fourteen years. And you were aware also that he spent quite a bit of time in jail as a juvenile as a youngster as such?

A Yes.

Q Now, did you ever have a discussion with the Rompilla family, of the people you spoke to that is, about leaving aside feelings about he didn't do the crime, he may be not guilty or looking for an acquittal and discuss with them nonetheless the importance of mitigation?

A Yes. Definitely.

Q Was your awareness – what was your awareness of mitigation or potential mitigating evidence in the context of a client who maintained their innocence?

A I don't understand your question.

Q Does mitigation have a role in a capital case even if your client is telling you they are innocent?

A Yes.

Q So the fact that Mr. Rompilla was telling you he was innocent, and I take it he was telling you that?

[49] A Yes.

Q And the fact that his family was telling you that, didn't prevent you, or stop you or dissuade you from pursuing litigation, you recognized your duty to do that?

A Of course.

Q And so you had no strategic reason not to look into mitigation?

A I looked into mitigation.

Q And to the extent that you looked into it, you had no strategic reason not to look further or into other areas?

A Right.

Q Such as the areas we've covered so far?

A Right.

Q Did you ever ask anyone in the family that Ronald's mother, Mr. Rompilla's mother, drank during her pregnancy?

A Did I ask them that specific question, no.

Q Yes?

A No.

Q Did you ask anyone in the family if either of Ronald's parents were alcoholics?

A I believe I discussed alcohol and other substances in the family, and there was nothing.

[50] Q People just flat out denied that anyone had a drinking problem in the family?

A I can't tell you whether or not they flat out denied it. I can tell you that there was nothing exceptional presented to me about drinking within the family, no.

Q Did you visit the family home at the time, check it out, look around?

A I don't believe so, no. No.

Q Did you ask anybody in the family the specific question as to whether Ronald or any of his siblings were ever beaten by his mom or dad?

A I don't know that I asked that specific question. Again, I know we discussed the family dynamics and what his family relationship was with his parents. And it was never indicated that there was any sort of abuse within the family.

Q How did you ask that question? When you say you discussed the family dynamic, I'm not sure what you mean by that. How did you –

A Well, I think you probably do, but you're asking me whether I recall specific questions put to a family eight years ago, and I can't tell you that. What I can tell you is that I spent hours with these people, and that we talked about the family, and we [51] talked about Ron, and that I explored all that I thought I could with them, given their responses and given their limited knowledge of their brother.

So in a general sense I can tell you I asked about, you know, what was Ron's relationship with his parents. But,

no, I mean I didn't – I can't recall asking specific questions about whether his mother drank during her pregnancy.

Q You've been a criminal lawyer now for I guess 11 years, give or take?

A Something like that.

Q During that time have you had occasion to either defend or not defend, did you have any involvement in any cases involving issues of child abuse, beatings, or sexual abuse, anything along those lines?

A No.

Q Trying to get back to your thinking on the subject back in 1988, are you aware of any literature or any thoughts regarding – professional thoughts regarding the denial of abuse by those who are abused? Sometimes people who are abused deny it for reasons of mental health and psychology, that neither of us are experts on.

A Right.

[52] Q And you're aware of a denial dynamic if you will back at the time of this case?

A Yes. And that is why you at times rely on other people to give you that information such as siblings, such as your psychologists and psychiatrists to conduct their interviews and ask questions in a manner that would elicit this sort of information.

Q Now, if I could direct your attention back to Dr. Gross, after Dr. Gross gave you his report, I think you said he had no further involvement with evaluating Mr. Rompilla or giving you reports?

A As far as I recall, yes.

Q Basically we're done with that?

A I believe so.

Q If you could look at Dr. Gross's report which is Exhibit 1?

THE COURT: Let's take a ten-minute recess at this time. We'll be in recess for ten minutes.

* * *

(Whereupon, a recess was taken.)

Q I think before we broke, Ms. Dantos, you had indicated that you spoke to some members of the family, but there are a couple that you didn't talk to. And I think you didn't talk to Barbara Harris, is that right?

[53] A I don't remember whether I did or not.

Q Do you remember if you spoke with another one of Ronald's sisters named Randy Rompilla?

A I don't remember.

Q But it's safe to say nobody in the family gave you any inkling of an alcohol problem?

A That's correct.

Q Either on the part of Ronald or other people in the family?

A That's correct.

Q Did Ronald just flat out deny to you that he drank at all, but he said he drank but it wasn't a problem?

A Ron's position was that he could handle it, that he had a few beers now and then, but nothing out of the ordinary.

[53] Q Now, you specifically questioned Ronald about his drinking?

A Yes. Because it came up specifically in the case. And then we talked about it a little more.

Q You mean the facts of the guilt phase of the case?

A Correct. That he had been at the bar that night.

Q And this – the killing was at a bar?

[54] A Right.

Q And in Ronald's response to – I'm sorry. I keep saying Ronald, Mr. Rompilla's response to that was essentially that he drank sometimes, but he could handle it, he was not an alcoholic, doesn't have a problem?

A Right. In fact, I think he told us how many beers he had that night, and it was over the course of an evening, three or four beers.

Q Did you see any potentially mitigating value in this capital case or any capital case as to whether or not a person has a drinking problem?

A If they were an alcoholic.

Q An alcoholic or however one would define a drinking problem?

A Yes. I would think that that would be something that you would want to present.

Q Did any of your mental health experts discuss with you, either orally or in their writings, their views of whether or not Mr. Rompilla had a – whether Mr. Rompilla's drinking was somehow relevant to this case?

A I believe so.

Q And do you recall when that was?

A Not – I don't recall the specifics with Dr. [55] Cooke and Dr. Sadoff, but I recall that in Dr. Gross's letter there is an indication that Mr. Rompilla denied any alcohol abuse. But I think that Dr. Gross also indicated that there could be some violent behavior with drinking.

Q Why don't you look at Dr. Gross's report so you don't have to rely just on your memory of what it says. If you look at page 3 in particular –

A Yes. Yes.

Q It ends with a recommendation of this area, meaning alcohol abuse should be explored further, isn't that right?

A Well, I'm not sure that this area in that sentence refers specifically to alcohol, but you could read it that way.

Q All right. Let His Honor I guess decide that. The paragraph immediately above that one, sentence recommendation says, in my opinion – I'm sorry. Further down in the paragraph, the possibility does remain, however, that Mr. Rompilla, while under the influence of alcohol, had become prone to violent behavior, although he himself strongly denies this.

And then the next paragraph, my recommendation of this area should be further evaluated before definite conclusions are drawn. Would you agree [56] that's a fair reading of the report, that this area, quote, unquote, is referring to the alcohol use Mr. Rompilla denies having had?

A I think that you could read it that way, yes.

Q Do you remember if you read it that way?

A I don't remember if I read it that way or not. I know there were two other evaluations however.

Q Would you agree that Dr. Gross's evaluation that the alcohol issue needed further evaluation was made, even though Mr. Rompilla denied having an alcohol problem to Dr. Gross, is that right?

A Yes.

Q Okay. So Mr. Rompilla denied alcoholism to you, people in his family denied it to you, and Mr. Rompilla denied it to Dr. Gross, is that a fair summary?

A It appears to be that way.

Q And yet Dr. Gross felt the need of further exploration?

MS. PARADIS: Objection. Objection.

MR. WISEMAN: Fair enough. Withdrawn.

Q Dr. Gross's report indicates that it needs further explanation?

[57] MS. PARADIS: Objection. Your Honor, again the report did not indicate that the area of alcohol

abuse needs further investigation. If the Court has that letter in front of it, the last page, that's a real subjective interpretation. It could mean that the area of mental health needs further investigation. Depending on how you read it, it could mean anything.

THE COURT: Yes. I tend to agree, Mr. Wiseman.

MR. WISEMAN: Your Honor, Dr. Gross will be a subject of these proceedings or brought to these proceedings I guess.

THE COURT: Ask it then.

MR. WISEMAN: Right.

Q Ms. Dantos, do you recall doing anything further about – assuming for the moment this is discussing alcohol, would it be to explore it further, do you recall doing anything to further explore it at this time?

A Well, as I said, there were two subsequent evaluations conducted by Cooke and Sadoff. So to that extent, yes.

Q Did you do anything aside from having those two people see Mr. Rompilla, did you do anything to [58] further explore it?

A No.

Q Did you request of Dr. Gross that any type of neurological testing be done?

A I don't believe so, no.

Q Did you request of Drs. Cooke or Sadoff that either neuropsychological or neurological testing be done?

A I don't believe I made any specific requests for any specific sort of testing from either of those two.

Q Ms. Dantos, you probably remember at the penalty phase there was a rather large disagreement between the defense team and the prosecution in regard to the reading of the transcript of the prior rape conviction Mr. Rompilla had?

A Yes.

Q Just so the record is clear on it, that was – the prosecution wanted to read the testimony of the victim of the prior rape that Mr. Rompilla was convicted of?

A The direct testimony.

Q The direct testimony. Good point. The direct testimony of the rape victim of the prior case.

A Yes.

[59] Q Now, do you recall having had the transcript of that testimony prior to the penalty phase? I think, the transcript pretty clearly reflects you didn't have a copy of it?

A I don't recall having it.

Q You don't recall having it?

A Right.

MR. WISEMAN: So the record is clear, I'm going to be referring to a transcript of the proceedings of November 1, 1988 starting on page 31. Ms. Dantos says we need to look at the indictment. And referring to the indictment of the prior case that he is charged with, committing the burglary and then it's cut off. So it seems from that statement you made on the record, page 31, that you

had not or you didn't have a copy of the indictment handy with you, is that right?

A I don't – I don't recall.

Q So does this refresh your memory, the statement on the record that you need to see the indictment?

A If I said we need to look at it, obviously I didn't have it in hand.

Q Further down the page, Mr. Moyer, the prosecutor, says I had a copy, and I forgot to bring it [60] with me. And Mr. Charles says, can we see it, Judge. And then Mr. Moyer again says, it's a public record, Fred, you could have gone over lunch and looked at it just like I did. Does that refresh your memory as to whether you and Mr. Charles had the indictment of the prior case during the penalty phase?

A I mean clearly we knew about it. Whether or not we had the document at the time, I can't tell you. And, no, that doesn't really refresh my memory. But by the lines that you have just cited, it appears as though we didn't have it in hand.

Q Referring now to page 35 of the same proceedings. You addressed the Court. You said, Judge, can I request that you review the transcript first. Mr. Moyer says, I have no objection. And you say, I would like to review whatever he's going to read from. I take it at that point you're referring to the transcript.

Does that refresh your recollection as to whether you had the transcript of the testimony prior to the penalty phase in your possession?

A I believe that I did not.

Q Would it be fair to say that you hadn't examined that court file in the prior case prior to the [61] penalty case?

A No, that would not be fair to say.

Q Oh, you did examine it?

A It would be fair to say that we were aware of his priors, and we were aware of the circumstances. It would be fair to say that it appears as though I did not have the transcript of the direct testimony of the victim in this case, which was to be read to the jury.

Q All right. Do you recall actually going to look at the court file?

A I believe we had some things that we reviewed about it, yes.

Q We meaning you or –

A And Fred.

Q Together?

A Mr. Charles and I.

Q Looked at the court file?

A Looked at – I don't know if it was the court file that we looked at or documents that we somehow had access to either from the DA during discovery or on our own.

Q Now, not to be argumentative about it, I just want to make sure I understand. What you're saying is that you looked at some documents that clearly had come from the court file which you don't recall, and you [62] don't recall

whether you retrieved them from the file or they were provided to you –

A Right.

Q – from the district attorney?

* * *

(Whereupon, Defendant's Exhibit Number 7, was marked for identification.)

Q I'm going to show you what's been marked as Exhibit Number 7. I want you to take a look at that. Have you had a chance to look at it?

A Yes, briefly.

Q Did you review this when you reviewed the petition, this particular document which was attached to the petition?

A No.

Q If I could ask you – well, let me ask you generally if you have ever seen this document before?

A I don't remember seeing it before, no.

Q Is this material that you – well, withdrawn.

If I could ask you to look at the fifth page which says – that starts – it's entitled test status summary.

A Yes.

Q And look at the section that's labeled number two, achievement, and go down to the area of spelling [63] score and arithmetic score.

A Yes.

Q You look over on the right it says for spelling score fourth percentile and arithmetic score third percentile?

A Yes.

Q These are tests administered according to the document in the mid-1970's, 1976, by the Pennsylvania Department of Corrections to Mr. Rompilla when he was admitted on a prior conviction. Do you think being in a fourth percentile and third percentile respectively with regard to spelling and arithmetic are facts that you would have wanted to provide to your mental health expert at the time of the trial proceedings had you had these facts?

A I probably would have.

Q And, again, as we discussed with the IQ testing, that's because obviously it shows some evidence or red flag, if you will, to explore mental health issues?

A It might, although I note that the IQ is significantly different than that of the earlier documents you showed me.

Q The beta IQ?

A Right.

[64] Q That says 93?

A Right.

Q And you would want to present that to your expert and ask them to explain to you how it's different and whether the difference is something that's significant from the mental health perspective?

A Sure.

Q Now, are you familiar with the psychological testing MMPI from your work as an attorney?

A I'm familiar that it is conducted.

Q Okay. It's the Minnesota Multiphasic Personality Inventory?

A Right.

Q Did you see a score, or set of scores I should say, for that test on the middle portion of this document?

A Yes.

Q Do you know how to read those tests?.

A No.

Q All right. Well, assume if you would that Mr. Rompilla on this test scored abnormally high on schizophrenic scale, is that something that you'd want to present to your mental health expert?

A Yes.

Q For obvious reasons, right?

[65] A Right.

Q Similarly scored high on the paranoid scale. Is that something that you'd like to present to your mental health experts?

A Yes.

Q Obviously if there's schizophrenia, right?

A Right.

Q The fact that he scored abnormally high I should say. Assume the fact that if he scored abnormally high on the hypochondriacal scale, is that something you'd want to show mental health experts?

A Yes.

Q Similarly if he scored abnormally high on the neurosis scale, is that something that you'd want to present?

A I'm sure I would.

Q And similarly on the obsessive/compulsive scale?

A Yes.

Q You don't recall ever providing this document to any of your mental health experts, is that right?

A That's right.

Q In regard to the same MMPI result, assume if you would, that the most prominent profile that comes out of that test is what's known in the business as a [66] 4, 8 spike, and I'm going to be just referring to a page out of this book of the MMPI handbook. It's volume one, by Dolstrum, Welsh and Dolstrum.

Now, assume for the while that according to Dolstrum, page 873, that the prominent profile that Mr. Rompilla had in this test, among other things, is present in people who are impulsive.

Assuming that to be the case, is that impulsivity something that you'd want to present to a mental health expert?

A I suppose I would.

Q Would you assume also that it shows that people with that profile are underachievers, have marginal adjustment and uneven performance in life. Are those factors that you'd want to present to your mental health expert?

A I suppose so.

Q That the person with this profile is nomadic and live in social isolation. Is that something you'd want your mental health professionals to know when doing an evaluation of your client?

A Yes.

Q By the way, did you ever ask the family specifically whether or not Mr. Rompilla was ever in special education classes?

[67] A Again, I don't recall any specific question like that, no.

Q Did you ever ask the specific question as to whether or not he was ever left back in school?

A I can't say that I did or didn't. I don't recall that, no.

Q Did you specifically ask any of your mental health experts to look for brain damage in this case, organic brain damage, organicity?

A I believe we did.

Q Did you ask that?

A I believe so.

Q Was that based on any factor you had at your disposal?

A Not at all.

Q I'm sorry. Do you recall if any of your mental health professionals did any – forget I asked you that.

You indicate you don't recall whether they did any neurological testing, is that right?

A No. What I said was, I don't recall asking specifically for any specific tests was what I told you.

Q Do you know how one looks for brain damage?

[68] A No. Tests I would assume.

Q Now, there's no – I mean if you want to look at it that would be fine. There's no indication in Dr. Gross's report that he did any neurological testing, isn't that right?

A There's no indication in the report of that.

Q Obviously you would put it in if you did?

MS. PARADIS: Objection.

THE COURT: Sustained.

A I don't know.

Q As an attorney preparing a capital case, would you have expected your expert to put – withdrawn.

Would you have required your expert to put test results in a report that's giving you a full evaluation which Dr. Gross apparently was doing?

A Well, I know that we requested full evaluations from all three experts that we sent in, specifically from Cooke and Dr. Sadoff we requested that they did not write a report.

Q They just wrote you a letter?

A That's right. So their findings, and I do know that there was testing done by Cooke and Sadoff. I don't know specifically what they were, but I know [69] that their findings were negative.

Q Not helpful?

A Definitely not helpful.

Q Do you recall what testing Dr. Sadoff would have done?

A I don't.

Q Do you recall what testing Dr. Cooke would have done?

A I don't.

Q Do you recall that there was a break in the proceedings between the – between the prosecution's penalty phase preparation and the defense's penalty phase presentation?

A No.

Q Again, referring to the transcript of November 1st, '88, page 11, this is you speaking. I'll put a request on the record that I'm requesting on behalf of defendant that we have a break and we do not continue the penalty phase until tomorrow morning. And the Court replies, I'll tell you

what we'll do, you'll have until 1:30, of course referring to the prosecution, to prepare for his side.

We're going ahead with the Commonwealth's side at 1:30, and I will grant then if indeed he finishes early, we will let you go tomorrow [70] morning.

A I recall that.

Q So you asked for a break between the guilt phase and the penalty phase?

A Right.

Q And the judge said, well, I'll let the prosecution go, and then you'll go tomorrow morning?

A Right.

Q Now, I take it you needed that break?

A I think everybody needed that break including the jury.

Q Now, in regard to you in particular, why did you feel the need for that break at that time?

A I felt that the family, meaning the witnesses that I planned to present, needed some time to digest the fact that their relative had just been convicted of first degree murder before I put them on the stand to discuss the possibility of him getting life or death.

I felt that the jury, after having been in deliberation for overnight into the second day, needed a break and a time to get in touch with reality before having to make a life and death decision on a fellow citizen.

Q Were you prepared – I don't mean from – were you prepared to put the witnesses on yourself if [71] you had time?

A Yes.

Q If you had to have –

A Yes.

Q Sorry to ask you what may be obvious types of questions. You're obviously, you and Mr. Charles, were upset after the delivery of the guilt verdict.

A Obviously it was not necessarily unexpected which you all know, but you always hope for something other than first degree.

Q Do you recall when, prior to the delivery of the guilty verdict, that you had sat down and prepared your penalty phase witnesses? I mean did you do it a week before, a month before that day, that night, do you have any recollection of that?

A Well, I would say all throughout. Certainly during the course of the trial. Certainly I had spoken to them during the trial. Certainly we had had conversions with Mr. Rompilla. We were prepared.

Q Now, tell me if some of this is a fair statement or not. The witnesses that you put on in the penalty phase, with the exception of Mr. Rompilla's young son, essentially were testifying to what you just said earlier, to the three-month period between his last incarceration and his present incarceration?

[72] A And to their general relationship and feelings about him.

Q Do you recall anything in particular that any of the witnesses testified to about that three-month period?

A Who are you asking about?

Q Any of them that you recall.

A Yes.

Q What do you recall that they testified to?

A I recall that Mr. Rompilla's brother, Bobby, was upset with the verdict and also upset with the system. That during the period of Mr. Rompilla's release, between the time of his release from state prison until he was arrested on this incident, that he was upset with the system's lack of supervision.

Q Let me interrupt you there. Is that something that you discussed with Bobby before his testimony? Was that something that just sort of came out?

A We talked about it.

Q I didn't mean to interrupt.

A That's – that's what I remember. That's what Bobby was testifying to about that three-month period.

Q Was there any – do you have any other memory [73] as to what the other witnesses testified to about that three-month period?

A Not without reviewing it. I would – I believe I remembered Darlene might have testified about their relationship, that he was living with them and his relationship with

their children. But I'm not – I'm not 100 percent sure about this. And this – he was working for Nick, his brother Nick. And I don't know if that came from Nick or who that came from, but during that period of time he was working with them.

Q That – he was helpful around the house during that period of time?

A Right.

Q Did the laundry, is that a theme that came out?

A (Witness nods head.)

Q Do you remember that?

A I do remember that. I don't know if she was able to say that during her testimony, but I remember that we talked about that. So if this came out –

Q What I'm wondering is given that the testimony was related to some very discreet areas during a very confined period of time, how much time did it take you to prepare these witnesses for the testimony? Did you spend an hour with each one, would [74] you spend a few minute [sic] with each one, do you recall? Give us a flavor for how long it took to get them into the state of readiness.

A I would say hours.

Q You'll recall during the – during the guilt phase there was a jury note related to a question of, is there an accomplice in this case or – withdrawn.

There was a jury note that said to the effect, can we convict Mr. Rompilla of first degree murder as an accomplice? Do you remember seeing that note?

A I remember there was a note about an accomplice, yes.

Q And there was a somewhat controversial response from your view that the Court gave?

A Yes.

Q Now, do you recall whether there was evidence in the record in this case as well as police reports that arguably tend to show the presence of a person in addition to Mr. Rompilla at the scene of the crime?

A There was something that developed during the course of the trial that enabled us to argue that.

Q Argue that when, during the guilt or the penalty phase?

A Both.

[75] Q Well, correct me if I am wrong, you didn't argue that at any time, did you?

A Yes, we did.

Q When did you argue that?

A It was argued during the closing and guilt phase and also touched upon during my closing.

Q Maybe I misstated my question. Not that there was someone other than Mr. Rompilla or that it was Mr. Rompilla and another person at the same time. In other words, that he had an accomplice, you didn't argue he had an accomplice that would have gotten you relief on first degree, right?

A Right.

Q So you may have argued someone else was there, but you never argued that Mr. Rompilla might have done it with someone else obviously?

A I think there were some subtleties there that could have been drawn, but this was discussed between Fred and I on how to approach that and what was the best strategy. Because I think it's – it was a touchy area and could have – could have either been helpful or very detrimental to the case.

Q Sure. And just so the record is clear on this, what's touchy, of course, is that you don't want the jury to think there was an accomplice to [76] Mr. Rompilla, because that doesn't get you out from under anything?

A Right.

Q He still would have been convicted of first degree?

A Right.

Q So you were still constructing the plan for the argument?

A Correct.

Q None of those applied during the penalty phase. They already convicted him, so you don't have to worry about him getting convicted again.

A I would have to say yes, that your concern in the penalty phase – our concern in the penalty phase, one of them, is that you don't – this jury has just come back with a verdict of first degree murder. And obviously they didn't buy the argument and they didn't believe it. And so you want the jury to – you want to maintain some credibility

with the jury and not have them shut off your argument by continuing on a line that has proven not effective.

Q Correct me if I'm wrong, didn't each of your penalty phase witnesses express their feeling that Mr. Rompilla didn't do it, he was wrongly convicted?

A Yes, absolutely.

[77] Q And you knew they were going to say that ahead of time, you prepared them?

A Absolutely.

Q You didn't tell them, oh, please don't say that, that will turn the jury off and risk – increase the chances of death penalty even more.

A No.

Q So obviously you didn't feel that it was making a suggestion to the jury that was perhaps somewhat contradictory, to what they just decided. You didn't decide categorically that was something that you couldn't and should not do?

A We felt that the jury could accept from family members that they believe and support and love the defendant and therefore of course they are going to believe in him.

Q Okay. And so the answer is that you didn't feel that there was some blanket prohibition on arguing or presenting evidence to the jury that maybe there's some doubt about whether he did it or not?

A That's right. And I argued that.

Q Okay. I guess the point is that's contradictory with what the jury had just decided?

A It's not contradictory to say that a jury may have some doubt in their mind and that the evidence [78] would show why there had to be some doubt, like the lack of eyewitnesses, the hair and fiber that cannot be matched to Mr. Rompilla. As you know, doubt and reasonable doubt are different.

Q All right. It's not a trick question.

A I understand.

Q My point is simply that you had stated earlier that you were reluctant to argue an accomplice in the penalty phase, because you'd be asking a jury to shift gears. And you were concerned about credibility issues, correct?

A Yes.

Q My only point though is that same concern is not a blanket concern and didn't prevent from you arguing something else that was contradictory to what the jury had just decided?

A Maybe you're not understanding what I'm saying. What I'm saying is that to stand up and tell a jury that they have to have some doubt that may cause them to pause before rendering a verdict of death is different than standing up and telling a jury he is innocent and therefore you cannot give him a sentence of death.

Q Now, would you agree under that contract that you just laid out that one could argue by – withdrawn.

[79] Would you agree that one could argue to the jury under those circumstances that not only is there a residual

doubt about guilt, there's a residual doubt about whether or not Mr. Rompilla acted alone?

A Yes.

Q And, of course, whether or not Mr. Rompilla acted alone, what significance would it be on the penalty if Mr. Rompilla acted alone or acted with another?

A Whether or not the jury could find that his role was a minor one.

MR. WISEMAN: If I may just have a moment, Your Honor.

THE COURT: Yes.

Q Now, the Commonwealth's answer to this petition, paragraph number 47, states, quote, to quickly shift gears, after the jury found Mr. Rompilla guilty and argued the accomplice situation would have destroyed the credibility of trial counsel, unquote. Is that sort of the feeling you just expressed that you may have?

MS. PARADIS: Objection, Your Honor. She's a witness – she is not a witness for the Commonwealth at this point. She's a witness for the [80] defense at this point. The perspective in an answer certainly isn't controlling on how she thinks. So I'm objecting to it. It's argumentative.

MR. WISEMAN: Your Honor, if I can just ask one question connecting to it and perhaps that will answer the objection.

THE COURT: All right.

Q You used the word credibility?

A Yes.

Q And Mr. McIntyre, who wrote this pleading, used the word credibility. Is that coincidence, or is that –

A Yes. I can tell you that I have not reviewed his answer.

Q That was my question. Okay. Well, not only didn't you review it, you didn't have any part in its formulation?

A I did not.

Q All right. So you don't have any disagreement then with the fact that there was evidence in this case that one could reasonably argue to a jury that there were two people, Mr. Rompilla and another at the scene of this crime perhaps who committed the crime?

MS. PARADIS: Objection, Your [81] Honor. The record will speak for itself. That's a conclusion that this Court must make, not Ms. Dantos.

MR. WISEMAN: Counsel's decisions in trial are based upon evidence. Her decisions that she may or may not have made obviously are influenced by that. I have a right to know what she was thinking.

THE COURT: I'll permit it.

A I think that you could argue that. But again Mr. Rompilla, throughout our discussions with him, maintained his innocence. And there was never any discussion with Mr. Rompilla that that was a possibility or that that ever happened. I would agree with you that you could argue that.

Q In this case?

A That you could argue the presence of another individual.

Q Now, when you were a defense lawyer, did you ever present inconsistent defenses to a jury?

A Ever? I mean if you're asking me for my philosophy on that, I don't necessarily agree with that. I don't think that that's a position of strength for a defense counsel to come from. I don't recollect whether I've ever done that.

Q Let me ask you this, so that a criminal defendant has the right to –

[82] A Yes.

Q – to testify in a case, and that's a right that a criminal defendant can exercise regardless of what counsel thinks, isn't that right?

A Yes.

Q All the other calls in the case will obviously get your client's input, but are really your calls, the co-counsel's calls?

A Yes.

Q So you could have said, listen, Ron, I know you don't like what we have to do, but if you thought it was appropriate to do, you would have done it regardless of what Mr. Rompilla thought about it?

A Yes, we could have done that.

Q So the fact that Mr. Rompilla had maintained that he didn't do it really didn't and shouldn't have factored

into whether or not you decided to argue that to the jury in the penalty phase?

MS. PARADIS: Objection. It's leading. Argumentative. This is his witness, Your Honor. I know I have not been objecting and it's been going on, and at this point I'm objecting.

MR. WISEMAN: Your Honor, these aren't leading questions. This is – obviously she is a qualified expert, professional witness giving [83] testimony on her thought process. We could be here a week and a half with what did you do next. Obviously I have to direct her to the areas I'm concerned with.

THE COURT: It's leading though.

MS. PARADIS: It's also argumentative. I believe this was argumentative.

THE COURT: I don't think it was. Restate the question and see if you can –

Q Did the fact or did not the fact that Mr. Rompilla maintained that he did not commit this crime influence you in your decision as to whether or not to argue an accomplice in the penalty phase?

A I'd have to say that in the penalty phase my concern was with doing whatever I could to save his life. So my focus was not so much on Mr. Rompilla as he didn't want me to put on my witnesses, but rather in trying to save his life.

Q I take it from that answer then his views on that discreet issue were not controlling under the same?

A Yes.

Q Did you ever have a discussion that you can recall making about whether to argue that to the jury?

A Yes.

Q Did you make that decision sometime before [84] the jury came out in the guilt phase, or did you make it once that jury note came out and the time that you presented the penalty phase?

A I believe subsequent to the note. Actually I'd have to say after the cross-examination done by Attorney Charles on the FBI witness that elicited the testimony that allowed that argument.

Q Right. So there was a number of facts that came out of that evidence that the testimony would tend to support a view of the evidence and the reasonableness of the evidence that there was an accomplice, that there was another person?

A Another person. Fair enough.

Q Just so the record is clear, I think maybe we ought to just briefly discuss some of those pieces of evidence. Correct me if I'm wrong, or, you know, tell me if this comports with your recollection, no evidence of Mr. Rompilla's hair or fibers from his clothing were found on the victim?

A That's correct.

Q That was important because?

A Because –

Q Go ahead.

A Because there were hair and fibers, and they were not found to be those of Mr. Rompilla.

[85] Q And there was a fierce struggle in this case?

A There was a struggle, that's correct.

Q The reason the FBI was called in was to state whether any hair and fiber would be dislodged?

A Yes, sir.

Q Similarly, the victim's hair was not found on Mr. Rompilla when he was arrested or on his clothing?

A I believe that is correct.

Q Fibers belonging to the victim were not found on Mr. Rompilla, is this correct?

A I believe that's correct.

Q Do you also recall whether or not the sample recovered from one of the alleged weapons in this case did not contain Mr. Rompilla's blood?

A I don't recall.

Q Do you recall a fingerprint?

A Oh, yes.

Q There was a fingerprint?

A Yes.

Q Referring to the transcript of the testimony of October 25th, 1988, page 125 being the question that was asked of the witness, at that time, could you determine whether or not that blood was consistent with the blood of the victim, James Scanlon? Answer, yes, the blood was

consistent with Mr. Scanlon's blood. I [86] included Mr. Rompilla.

A Was this on the knife?

Q I was just going to say the questions before that, but I don't want to read the whole transcript to you. Middle of the page. Question – I'm not going to go through them all specifically, but you asked to examine Commonwealth Exhibit 6A and B. Answer, right. Question, which is a knife, two sections of the knife?

Answer, 6A and B are two sections, two pieces of the knife blade. I was asked to check them for the presence of blood, and I did. Question, did you find human blood on that? Answer, yes, at certain parts of the blade I found human blood, which I was able to also prove further than human. That's a typo. Says further than human.

Question, and could you determine whether or not the blood was consistent with the blood of victim James Scanlon? Answer, yes. The blood was consist [sic] at the present time with Mr. Scanlon's blood. I excluded Mr. Rompilla.

A Okay.

Q So you have no quarrel then that the blood – the knife did not have Mr. Rompilla's blood?

A Right.

Q That was another fact that continued to show [87] there may have been another person present?

MS. PARADIS: Objection. The only blood found on the knife which is what you expect was Mr. Scanlon's. The fact that another person's wasn't found on it isn't indicative of anything.

THE COURT: Yes, but I thought he was asking Ms. Dantos to answer that question.

MS. PARADIS: Thank you, Your Honor.

THE COURT: You can answer.

A I don't think so.

Q You disagree with what I said?

A Yes.

Q Okay. Fair enough. Fair enough. Hair recovered from the hand of Mr. Scanlon belonged either to Mr. Scanlon or Mr. Rompilla, do you remember that?

A Yes.

Q Do you think that continued to show there may have been another person in addition to Mr. Rompilla?

A That there was another person.

Q Okay. Well, again, I don't mean to argue with you about it, but we're in the penalty phase now theoretically and say analytically we're in the penalty phase, the jury has already decided Mr. Rompilla is guilty. So for purposes of these questions let us [88] assume that, and I'm asking you for these things, continued to show there was someone else present.

This last fact about the hair tends to show the presence of another person?

A Yes.

Q Okay. Similarly, blood recovered from the floor tiles or the [sic] in the bar, some of the blood recovered

from the tiles in the bar was not consistent with Mr. Rompilla's blood?

A I believe it was Mr. Scanlon's blood.

Q Not consistent with either. Okay. Would that tend to show another person possibly there?

A Arguably. I believe there was an explanation given at trial, but arguably.

Q There's different explanations but arguably?

A Yes.

Q A footprint on the tile floor of the bar did not match the shoes. One did arguably. And one did not match the shoes of Mr. Rompilla. Would you agree that that would tend to show the presence of another person?

A Arguably.

Q Now, aside from the testimony of trial, there were a number of police reports which I assume you got discovery in this case?

[89] A Yes.

Q There was a police report of February of 1988 of an interview with David – excuse me, James David Koch, Junior in which he told the police that he was approached on two occasions by Mr. Rompilla to try to enlist him to rob the bar. Do you remember that police report?

A No.

Q Do you quarrel with what I just told you?

A No, I don't quarrel with you.

Q Assuming that's the case, that it's in the police reports, would the fact that Mr. Rompilla – there was evidence available to you that Mr. Rompilla tried to get someone to help him do this, would that have been evidence that there may have been someone else there with him again for purposes of arguing the penalty phase?

A Someone might argue that.

Q There's another police report taken on January 20th, 1988, an interview with the victim's son, Timothy Scanlon, with Mr. Timothy Scanlon saying Rompilla did it, they've been working this place for a while.

MR. WISEMAN: Excuse me, Your Honor, I'm just reading the quote.

[90] Q The fuckers, plural, lit him on fire. Obviously this would tend to show the mind of the victim's son, that Mr. Rompilla did not act alone?

A I suppose you could read it that way, yes.

Q In another police report, January 20th, 1988, an interview with Kevin D. Schaller, S-C-H-A-L-L-E-R, Mr. Schaller purportedly told the police or let me read the quote the police officer wrote down. Mr. Schaller stated to me on January 20th at approximately 0830 hours he overheard Ronald Rompilla talking to another person at Welty's Bar.

Goes on to describe the person. Mr. Rompilla told this person that we just came from there, meaning the Cozy Corner, where they had just left there. He, Rompilla, told this person that he was sitting next to that, you know, they replaced a steel door on there. Now maybe we can go back later tonight.

Does that quote from the police report also tend to show that Mr. Rompilla may have had an accomplice, again for purposes of the penalty phase argument?

A Or was looking to enlist someone. It could yes.

Q Well, again, taking in all the forensic [91] evidence, attempts to enlist someone who strongly corroborates the forensics that there was another person present, correct?

A It could, yes.

Q Another police report of January 14th, '88 –

MS. PARADIS: Your Honor, I'm sorry to keep interjecting. I have to object on relevance. What we're working with is what the record said and what came out at trial and Ms. Dantos's conduct relevant to what came out at trial is only what's relevant, not whether or not they wanted to bring in witnesses to say that Ron Rompilla asked them to go rob the bar with him.

This makes no sense. These are witnesses that weren't called at trial who would have done nothing I would think to further the defense case. But certainly I don't think that's the issue. So what are we looking at is the time of trial and what Ms. Dantos did at the penalty phase, what came out at the trial.

So for that reason I'm objecting on relevance grounds. These are all police report notations that they may or may not have read in the post-conviction proceeding where a petitioner claims he's denied the sixth amendment to effective assistance [92] of counsel. It is almost always by its nature by definition an extraordinary exploration.

For example, why didn't counsel call the all [sic] witnesses? That's obviously not of record. That's something outside of record. It's wholly relevant in these proceedings and any post-conviction proceedings.

THE COURT: And here it's why didn't the defense team call the people who you've indicated.

MR. WISEMAN: Right. Were they aware of the existence of this information and what was the thought process.

THE COURT: Overruled. I'll permit it for this purpose.

Q The report of January 14th, '88 states that the detective interviewed a friend of Rompilla who overheard Rompilla talking with another and Rompilla said to the friend, we just came from there. We may go back tonight that steel door wouldn't beat me out. Again, does that tend to show that he may have acted with another, is that right?

A It could.

Q I can tell from the faces that, not to be that disparaging, that you obviously don't agree with this [93] as a strategy or as a decision?

A That's correct.

Q Or decision to have made?

A Right.

Q I guess my question then is, you have all this information at your disposal, you had these police reports, obviously you had the forensics, and you didn't use this

information. And I guess I'm just wondering why didn't you use the information. How would it have hurt in the penalty phase to have presented these theories?

A Well, I suppose that the strategy was the following: That it would not be helpful in asking a jury to spare a man's life and to show compassion and mercy to further show them plotting and planning and attempts to enlist assistance prior to the act.

And we felt that those issues had to be essentially argued. And that in this case if, this jury were to come back with a verdict of life, that it would be based on mercy.

Q Now, a lot of what I just went through with you was before the jury called the forensic evidence, right?

A The forensic evidence, yes.

Q You didn't argue absolutely or otherwise I [94] mean in your penalty phase summation that mercy ought to be dispensed because Mr. Rompilla played a lesser role, he never made that argument.

A I argued to the jury that they would never know what happened on that night, and that they had to have some doubts based on not knowing whose hairs those were in the victim's hands. So, yes, that was argued.

Q Was that not a part of your residual doubt argument about guilt which dovetailed with what the family testified to that he didn't do it. Are you saying that you specifically argued that in regards to the accomplice theory if you were cognitively aware of an accomplice and set out to argue that?

A I was cognitively aware of trying to reinforce to the jury that there may have been another person present, yes.

MR. WISEMAN: Your Honor, I don't know what the Court's schedule is. We were handed today by Mr. Charles a large 14 page, single spaced letter that I believe Ms. Dantos and Mr. Charles wrote to Mr. Rompilla just before the trial. It's a plea letter. I'm going to have not a whole lot more with Ms. Dantos, but I would like the time to review it before I question her about it.

THE COURT: All right. We're just [95] at about the lunch hour, and I do have a luncheon meeting. Why don't we recess at this point then. That will give you the opportunity to do that. We should revisit the scheduling. I don't know if Mr. Nelthropp is still is out there or where he is.

MR. WISEMAN: Yes.

THE COURT: I told Mr. Charles I would send him a note saying he didn't have to come in at 11:30 but at 1:30 but if you want –

MR. WISEMAN: My preference would be to have Mr. Nelthropp available shortly after we reconvene. I would hate to see Mr. Charles spend his afternoon in the hall or having him on call for later in the day, although I'm not sure when we'll get to him.

THE COURT: I don't know what they will need him for.

MR. WISEMAN: He was the appellate lawyer.

THE COURT: Would you anticipate it being lengthy?

MR. WISEMAN: He'll be awhile as well, yeah.

THE COURT: All right. Then if we could do this, if you could contact Mr. Charles and [96] have him come back at say 3:00, that should do it I would think.

MR. WISEMAN: Okay. Thank you.

THE COURT: Very good. All right. We'll be in recess until 1:30.

* * *

(Whereupon, a recess was taken.)

THE COURT: All right. Ms. Dantos.

MR. WISEMAN: Your Honor, if I may, the custodian from the school board is here from the hospital. I thought maybe if we could just I mean put them on now, put them on quickly and get them out of here.

THE COURT: Why don't we do that. That's fine.

* * *

RALPH TODD, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Please state your full name, sir.

A Ralph Todd.

Q And by whom are you employed?

[97] A The Allentown School District.

Q And are you reporting today in response to a subpoena?

A Yes.

Q What's your role at the school board?

A My title is director of instructional support services, which also manages the records of students that have been in special education.

Q So you're the custodian of record?

A Yes, that's correct.

Q Did you bring records in response to the subpoena?

A Yes, I did.

Q Could you hand them to me?

THE COURT: Are those the originals, or is this a copy?

THE WITNESS: Those are copies.

* * *

(Whereupon, Defendant's Exhibit Number 8, was marked for identification.)

MR. WISEMAN: Your Honor, I have taken the small pile of documents, and the reporter has marked them as Exhibit 8.

THE COURT: D-8?

MR. WISEMAN: That's right.

[98] Q Are those documents that you received in regard to Ronald Rompilla?

A Yes, they are.

Q And are there any other documents in the school board that you're aware of related to Mr. Rompilla, or is this his full file?

A My understanding is this is his full file.

Q Are those documents kept in the regular course of business?

A Yes.

Q And are the people who make entries in documents under duty to do so?

A Yes.

Q And are they, to your knowledge, authentic copies of the file of Mr. Rompilla's school board file?

A Yes.

MR. WISEMAN: Your Honor, at this time I would offer the previously marked school records of 4 and 5. My suggestion would be to make Exhibit 8 a substitute exhibit for 4 and 5.

THE COURT: All right. Would you like to cross-examine this witness?

MS. PARADIS: Just briefly, Your Honor.

* * *

[99] CROSS-EXAMINATION

BY MS. PARADIS:

Q Sir, I'm sorry. I didn't hear your name.

A Ralph Todd.

Q Mr. Todd, how long have you been employed with the school district?

A Twenty-six years.

Q You would not have been in employment at the time these records were kept, is that correct?

A No.

Q So you don't know whether or not the persons who entered the information – you didn't supervise them, you don't know their sources or anything like that, is that correct?

A That's correct.

Q Do you have the record?

A Yes, I do.

Q May I see it, please? Where are these records kept?

A The records, the top paper there, the post index record is kept at William Allen High School.

Q Where?

A William Allen High School or all students who attended there or were going to be attending there.

Q Kept in paper form?

[100] A That's correct.

Q Not microfilm?

A They are microfiche.

Q Microfiche?

A Yes.

Q So these are pulled from the microfiche file?

A That's correct. The same with the other records that are with the psychologicals. They were pulled from microfiche and housed in the administration building.

Q There are some things in your record here called the WISC record form?

A Yes.

Q You pulled them from the microfiche as well?

A That's correct.

MS. PARADIS: I don't have copies of these. May I have an opportunity to review them?

MR. WISEMAN: There were a couple pages that we didn't get in the initial production that the gentleman has brought.

Q Again, these would have all been on microfiche?

A That's correct.

MS. PARADIS: With the Court's indulgence.

[101] Q Do you have more up there that isn't – oh, I'm sorry. There seems to be more in this packet. Do you have something called a pupil's health record?

A I don't have that with me, no.

Q You didn't bring that with you?

A No.

Q When you apparently – someone from your school and maybe it was you or – excuse me, from the district had pulled copies of this recently?

A Yes.

Q Was that you?

A The WISC reports were pulled by me, my secretary.

Q The WISC records?

A That is correct. The other reports were pulled from the attendance/guidance office at the time of the request.

Q Do you know when that was?

A I believe the date was March – the beginning of March, March 25th sounds –

Q But you don't have something called a pupil's health visit or –

A No, I do not.

Q With health room visits, things of that nature?

[102] A I do not.

MS. PARADIS: Your Honor, I have no objection.

THE COURT: All right. Then it is admitted. We thank you, Mr. Todd, for coming in. Sorry to have brought you in here, but it happens. Thank you very much.

MR. WISEMAN: I'll get the next custodian, Your Honor.

THE COURT: All right.

* * *

BERNADETTE DeJOSEPH, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Can you tell the Court your name.

A Bernadette DeJoseph.

Q By whom are you employed?

A Employed by Sacred Heart Hospital.

Q What's your position at the hospital?

A I am the outpatient supervisor for records.

Q Did you respond to a subpoena today served by my office?

A Yes, I did.

[103] Q And did you bring anything with you in response to the subpoena?

A Yes. I brought a copy of the records.

Q Records of what?

A Of our outpatient records or emergency room record.

Q That would be related to Ronald Rompilla?

A Yes, it is.

MR. WISEMAN: Could we have this marked?

* * *

(Whereupon, Defendant Exhibit Number 9, was marked for identification.)

* * *

(Whereupon, Defendant's Exhibit Number 9, was marked for identification.)

MR. WISEMAN: Your Honor, the small stack of documents has been marked collectively as Exhibit 9.

Q Could you look at Exhibit 9 and tell me if that is the full record from your hospital of Ronald Rompilla?

A These are all the records that we have on Ronald Rompilla, yes.

Q And are those records kept in the regular [104] course of hospital's business?

A Yes, they are.

Q And are the entries made on those records made by people who have a duty to make those records?

A Yes, they are.

MR. WISEMAN: I would offer the exhibits, Your Honor, as a substitute exhibit for the previously marked Exhibit 6.

THE COURT: Would you like to cross-examine now?

MS. PARADIS: May I just see the record?

* * *

CROSS-EXAMINATION

BY MS. PARADIS:

Q I assume you haven't read these records, is that correct?

A No, I have not read them.

Q So you wouldn't be able to help us on any of this writing?

A No.

Q In fact, you weren't even employed in the hospital back in 1950 I take it?

A That's correct, I wasn't employed at that time.

[105] Q How are these records kept, on microfilm?

A Those are microfiche as well.

Q You had to retrieve the microfiche and make copies?

A No.

Q So there isn't a paper copy existing anymore, is this correct?

A That's correct.

MS. PARADIS: I have no objection.

THE COURT: All right. Then it's admitted. And thank you for coming in, appreciate it.

MR. WISEMAN: That's it for the custodians. Ready for Ms. Dantos.

THE COURT: All right. Ms. Dantos.

* * *

DIRECT EXAMINATION CONTINUED

BY MR. WISEMAN:

Q Ms. Dantos, we discussed this morning the question of the reading of the prior rape victim's testimony in the transcript at the penalty phase. You recall that discussion we had?

A Yes.

Q You were obviously against admission of that at the time of the trial proceedings?

[106] A Yes.

Q You argued it shouldn't be read to the jury?

A That's correct.

Q Do you recall the case that was cited by the prosecution at that time in support of their application to be able to read that material to the jury?

A No.

Q If I told you Commonwealth v. Christie, would that refresh your memory?

A No.

Q Are you aware of the case that was decided on October the 18th, 1988, Commonwealth versus Roland?

A No.

Q If I were to tell you that Commonwealth versus Roland – obviously the Court will make its own determination of what it says, but if I would tell you hypothetically that Commonwealth versus Roland says that burglary is inherently a violent crime and it specifically overrules Commonwealth v. Christie, which was the authority relied upon by the prosecution. Would you agree that that authority would have been good for you to have in argument against admission of the transcript?

A Yes.

[107] Q I take it you didn't have it since you aren't familiar with the case?

A Right.

Q Now, in the Commonwealth's answer to this petition at page 25 at paragraph 136, the Commonwealth states although the Roland case was decided one month before Rompilla's trial, it is clear this case had not been disseminated and was unknown to all counsel and the Court at the time of trial. In your professional judgment as a trial lawyer, do you agree with this statement of the district attorney?

A Yes.

Q That it was unavailable?

A That it was unavailable at the time, yes. It was unavailable to us.

Q Unavailable in what sense, you didn't know that?

A Right.

Q Was there anything preventing you from finding out about it?

A I don't know.

Q The Commonwealth's answer suggests that because it was of recent vintage a month before the trial, that somehow you as trial counselor are excused from having known about it. Would you agree with [108] that? I mean, well, would you agree with that characterization?

A I don't know if I would agree with it or not. I would say that we did not know about it.

Q Should have known about it if it was a one-month-old case directly on point to the issue you were arguing, you should have known about it, shouldn't you?

A I don't know that.

Q Was it a strategic decision on your part not to present that authority to the Court?

A No.

Q There's no tactical reason?

A No.

Q I don't want to beat around the bush. You sort of missed the boat on that, is that a fair characterization, a case right on point that was in existence for a month at the time of argument, you should have had that case?

MS. PARADIS: Objection to missed the boat.

THE COURT: Sustained.

Q Do you agree that you should have had the case if it was helpful and on point?

A I agree it would have been nice to have it [109] and probably would have liked to have had it. Obviously clearly we did not have it, sir.

Q Now, this morning we talked somewhat about your discussions with Mr. Rompilla's family at the time of the trial proceedings. I think you said you don't – you didn't ask any specific questions about abuse, is that right?

A What I told you is that I don't have any recollection of specifically asking that question. But we discussed his family dynamics. I asked about anything important or noteworthy about his family, upbringing, and none of that information was forthcoming.

Q Did you have any – do you recall asking specific questions of anybody in the family about head injuries that Mr. Rompilla suffered as a child?

A No.

Q Or as a teenager or young adult?

A No.

Q Do you recall asking the family if he had been in special education classes?

A As I told you this morning, I don't recall specifically asking that question.

Q Do you recall asking the family if the children, different children in the family, were [110] treated differently from one from the other?

A No, I don't recall asking that specific question.

Q Did you ask the family – do you recall asking the family questions in regard to their economic status were they rich, poor, middle class?

A I think we talked about it, but did I ask them how much money their parents made, no.

Q Did you ever ask anybody in the family whether the family ever went without food or were they ever hungry?

A No. I don't believe I asked that question.

Q Did you ask anything in regard to whether the family – well, how many siblings were there, do you recall, in the family?

A No, I don't recall.

Q If I told you nine, seem about right?

A (Witness nods head.)

Q Yes?

A Could be.

Q There's a large family, do you remember that?

A Yes.

Q Do you recall having asked the family whether the children in the family ever lacked necessities, clothing, shelter, things of that nature?

[111] A No, I don't recall asking that specific question, and I don't recall that information being given to me.

Q Do you recall having asked anyone in the family how the parents resolved any problems that they may have had in their lives, did they have family discussions, or did they have fist fights, or did they have something in between? Do you recall asking those kinds of questions?

A I don't recall asking that question, no.

Q Do you recall having asked the family how the parents may have reacted when Ronald was getting in trouble at school or not achieving in school?

A No

Q Did you ask anyone in the family whether Ronald had ever been left back?

A You asked me that this morning, and I told you no.

Q By the way, did you consult any mental health literature prior to your preparation of the penalty phase in this case?

A I believe that I did read some, yes.

Q Do you remember what you read?

A No.

MR. WISEMAN: Bear with me a [112] moment, Your Honor.

Q You've read – did you read the petition cover to cover?

A As I told you, I read parts of it.

Q Did you read the declaration that is next to the exhibit – next in the petition as signed to by Nicholas Rompilla?

A I read the portion a portion of it that was contained within your allegation.

Q If Mr. Nicholas Rompilla had told you at the time of the trial proceedings that the family had a rough – the children of the family had a rough childhood, is that something you would have found useful in preparing the penalty phase?

A A rough childhood is kind of vague, but I would imagine that if there had been some indication of abuse that, yes, I think that would have been –

Q In terms of providing information to your mental health professionals, the fact that Mr. Rompilla's older brother, Nicholas, was at reform school from the age of nine, is that information that you would have found relevant to give to your experts to assess the family dynamic?

A That the defendant's brother was in reform school?

[113] Q Yes. Yes.

A I suppose if I had had that information I might have, yes.

Q Would you have any strategic reason not to give it to the expert?

A No.

Q If Mr. Nicholas Rompilla told you that his father abused and beat his mother, is that information that you would have found useful in preparing the penalty phase?

A Yes.

Q You, of course, would have given it to your experts?

A Yes.

Q If Mr. Rompilla – I'll be referring to Nicholas unless I tell you different, if Mr. Rompilla told you that both his parents were heavy drinkers and had a history of alcohol abuse on both sides of the family, is that information that you would have found useful to have given to your experts?

A Yes.

Q I think we talked about this this morning about – well, withdrawn.

If Mr. Rompilla told you his mother drank when she was pregnant with Ron, is that [114] something you would have thought important and given to your experts?

A Probably.

Q Is Mr. Rompilla's father's physical discipline against the children, beating them with a belt or a broom or his hands, is that information that you would have felt important and provided to your to your experts?

A Had I had it, yes.

Q Now, moving on to the declaration of Darlene Rompilla, do you recall seeing that in the petition as well?

A A portion of it that was contained within your allegation.

Q In that declaration Darlene Rompilla speaks about a cage that the father, the family's father built and put Nicholas and the other older brother but not Ronald Rompilla into, that she was aware of that kind of bizarre treatment of children, caging them for undetermined periods. Is that something that you would have thought important to give to your experts for purposes of preparing a penalty phase?

A Yes.

Q If you had evidence at the time that obviously if Ronald Rompilla hadn't been put in a cage [115] obviously would you have thought this important to explore as well?

A Yes.

Q How about if he observed his brothers in that cage, is that something that would be important for a mental health expert?

A Yes.

MR. WISEMAN: Thank you, ma'am. I have nothing further.

* * *

CROSS-EXAMINATION

BY MS. PARADIS:

Q Ms. Dantos, you testified on direct examination that while Mr. Charles was the lead counsel during the trial, you actively assisted him in preparation for the guilt phase of the trial, is that correct?

A That's correct.

Q You indicated that you did the majority of client contact?

A That's correct.

Q By that I assume you mean that you spent the majority of the time contacting the defendant, Ronald Rompilla?

A That's correct.

[116] Q And would it be fair to say that you established a relationship with him?

A Yes, I did.

Q And how would you characterize the relationship that you established with him?

A I felt like I got to know him. I felt that over the course of the last year from the time that he was incarcerated that we developed a relationship of trust. I think there were times when there were ups and downs when we would tell him or I would tell him things that he didn't want to hear. But by and large I would classify it as a good relationship between attorney and client.

Q Have you had relationships with other clients who you characterize as not good?

A Oh, yeah.

Q In terms of your relationship, there is no question that this was basically a good relationship?

A Yes.

Q You indicated that you established some sort of trust in him. That trust, was that something that was immediately gained on each side?

A I don't think so.

Q And why do you say that?

A Because I think it's important for a client, [117] a defendant who's – especially in Mr. Rompilla's position, of putting basically his life into his lawyer's hands. That he has to be able to determine that his lawyer is, in fact, on his side and is in fact going to fight for him.

Q Are you aware of times when he ever put you to you a test?

A Yes.

Q And when was that?

A Well, I can't tell you how many times because I don't know, but I know specifically shortly before the trial started that he had given us some information that we checked out through our investigator and it turned out not to be truthful. And during a meeting with Attorney Charles and our then investigator, John Whispell and myself over at the prison that he said he had thrown me a curve.

And subsequently Attorney Charles met with Mr. Rompilla and asked me to leave the room, and they had a discussion about that. And I came back in after that.

Q So he admitted to you that he was throwing you a curve?

A Right.

Q And this was in regard to information that [118] your investigator did that uncovered – that was not truthful in terms of what he had told you?

A That's correct.

Q Okay. Now, you indicated that your relationship with Mr. Rompilla was good. How would you characterize the relationship you had with the members of his family?

A It was good.

Q All right. Did they ever let you know that they trusted you or would confide in you and tell you things?

A Yes.

Q How did they let you know?

A Throughout the trial we were – we were very close basically. And when you're in the situation, it's you, your client and his family against everyone, or at least that's the feeling you have. And they remained with us throughout the trial.

And after a day's work we would go downstairs and commiserate together and talk about it. And after the trial, even after the verdict, the family was oddly enough comforting.

Q Comforting to you?

A Yes.

Q Were they the type of family that would [119] provide you information when asked?

A No. As I said earlier, it seemed pretty clear that they didn't feel as though they knew Ron very well,

because there was a distance as a result of his being incarcerated and as a result of their own whatever was going on with them.

Q When you made inquiries into Ron's childhood with them, did you expect that they were not being truthful with you or were not forthcoming in terms of all three?

A Not at all.

Q At any time during the entire year that you were involved with the Rompillas and the defendant, did anyone ever tell you about the abusive childhood that he had?

A No. No.

Q Or alleged, excuse me, the allegedly abusive childhood that he had, did anyone ever tell you that he suffered any kind of head injury as a child?

A No.

Q All right. Did you attempt to find things out about the defendant through other sources?

A Through our experts.

Q They would be your psychiatrists?

A Yes.

[120] Q We've already heard testimony about some three psych – three mental health professionals who were retained by you. You had used Drs. Cooke and Sadoff in the past in your office, is that correct?

A That's correct.

Q They are very highly regarded in their field, is that correct?

A Yes.

Q And usually Dr. Sadoff and Dr. Cooke work with each other, don't they?

A Yes.

Q And, in fact, Dr. Cooke did the battery or testing, MMPI, the intelligence standards, those things?

MR. WISEMAN: Objection, Your Honor, speculation as to what they generally do and don't do.

A It's the speculation as to what they generally do. It is more a question as to whether or not it's a relevancy issue with regard to what they generally did and what they did here.

MR. WISEMAN: Well, certainly that's another – yeah, I agree.

THE COURT: All right. But there might be relevancy.

[121] MR. WISEMAN: I believe I can make this relevant.

THE COURT: I'll permit it. Go ahead.

Q You had used these individuals before, correct?

A Yes.

Q Dr. Cooke is a licensed psychologist, correct?

A Yes.

Q And he usually does a battery of tests?

A (Witness nods head.)

Q And Dr. Sadoff is the doctor who works with him, isn't that correct?

A That's correct.

Q And his function is usually to examine the client and rely on the findings of Dr. Cooke, the raw data?

A That's correct.

Q As interpreted by Dr. Cooke related to Dr. Sadoff?

A That's correct.

Q And in your experience in your office you were aware this is the way they operated?

A Yes.

[122] Q And so you chose to use them again, isn't that correct?

A Yes, we did.

Q Now, in other cases they have usually authored reports for you, isn't that correct?

A When asked.

Q In the public defender's office?

A Yes.

Q You made a strategic decision in this case and that you already testified that that was to not request a report or to tell them not to prepare a report. Would you tell the Court why?

A The information that was obtained from both Dr. Cooke and Dr. Sadoff was of a nature that I thought could be very detrimental to the client to the case. And there

was some – if you don't have the report, then there's no reciprocal discovery issues. So we made a decision after speaking with both of them on the telephone not to have them author a report.

Q Did they tell you what their testing revealed?

A Yes.

Q What did they tell you?

A To the best of my recollection, that there was no – nothing that we could use in terms of [123] mitigation, that there was no mental infirmity, certainly no insanity, that there is nothing, no organic brain damage, and that their findings were that Mr. Rompilla was a sociopath.

Q A sociopath. Okay. Did you feel that someone labeled as a sociopath – did you feel that that characterization would be something that you'd want the death penalty jury to learn of?

A Absolutely not.

Q You indicated also on – excuse me, direct examination that you had enlisted Dr. Gross as well?

A Yes.

Q You did – I assume you enlisted him to get confirmation of what the others had told you?

A Yes.

Q Why did you enlist Dr. Gross?

A We wanted to fully explore the area as we could.

Q If at any time any of these mental health experts had come back to you with any kind of mitigation, mental

health issues that you felt would mitigate him in the eyes of the jury or mitigate his crime in the eyes of the jury, would you have presented that?

A Most definitely.

[24] Q Okay. Now, Mr. Wiseman asked if you had had an opportunity to review the petition that he prepared in this matter?

A Yes.

Q And entered into evidence already are reports of a Dr. Erwin?

A I believe they are already in there.

Q In those reports, Ms. Dantos, Dr. Erwin relays that Mr. Rompilla apparently told her that he experienced blackouts and blacked out and murdered someone, that he committed a rape, and probably blacked out during that time as well, that he had a significant alcohol problem, and that he experienced blackouts. Is that something that you were made aware of at any time by your mental health experts?

A No. To the contrary, their reports were from Mr. Rompilla that he did not suffer any blackouts.

Q You told them that he did not suffer blackouts?

A That's correct.

Q Now, in fact, and this is going to have to go into a matter that's been waived, was Mr. Rompilla able to recount for you in detail what occurred during the time that the crime occurred? Now, his version.

A Yes.

[125] Q Okay. And did he give you a version?

A Yes.

Q Did he ever tell you that he experienced a blackout?

A Never.

Q Did he tell you at that time that he was under the influence of any type of alcohol?

A No.

Q Did you question him about his alcohol consumption on that evening?

A Yes.

Q And did he give you an indication that he was suffering in any way from the effects of alcohol on the early morning hours when this occurred?

A No.

Q Okay. So your information then, what came from your client, the defendant, and there was nothing in what he told you that indicated that he was in a blackout?

A That's correct.

Q And I am always very wary about treading on this area, because it's something that I'm not used to doing. But what did he tell you in terms of his specific conduct during the period of time where he allegedly experienced this blackout – strike that.

[126] He's now alleging apparently that he suffered a blackout during the critical time?

MR. WISEMAN: I object to the characterization. Its Dr. Erwin's opinion he suffered blackouts, nothing in there said Mr. Rompilla said he's suffering blackouts.

THE COURT: I don't read it that way. I don't know that it can be read that way at all. Certainly it can be read two ways. If it can be read that's her opinion as opposed to what was told to her by Mr. Rompilla, I'll permit it.

Q Mr. Rompilla is now saying I experienced a blackout during the critical time when Mr. Scanlon was murdered. Did the defendant, Mr. Rompilla, give you a version of what he was doing during that critical time?

A Yes.

Q Could you tell us what detail he gave you?

A He was always consistent about earlier in the evening having been at a bar. I believe it might have been the Wooden Keg with his brother, that there was an argument between the two of them. That ultimately he went to the Cozy Corner and had a few beers, glasses of beer there, that after leaving the Cozy Corner that when he left, shortly before closing, 2:00 or 10 of 2, that Mr. Scanlon let him out the door, that he had [127] enough money left to buy breakfast, that he went to Dina's Diner, had breakfast, and thereafter spent the rest of the evening with his friend, Butch Loveless.

That somewhere in there there was a telephone call made to his brother's home, and his sister-in-law asked if she should leave the door open. He said no. He spent the night with Butch. That was the first version.

Q And he gave another version?

A Yes.

Q And why – when did he give you that version?

A I don't know.

Q I'm sorry. I don't mean in terms of exact date or time. But did an event trigger a second version?

A Yes.

Q And what event was that?

A After he told us that he was with Butch Loveless he filed a notice of alibi. Our investigator tried to verify that Mr. Rompilla was, in fact, with Butch Loveless. Butch Loveless recanted his earlier statement and indicated that he was so inebriated he didn't know whether or not he was with Mr. Rompilla at all in the early morning hours.

Thereafter Mr. Rompilla advised us [128] that he wanted to go to sleep after he had breakfast, same initial facts of being at the Wooden Keg and at the Cozy Corner, went for breakfast at Dina's Diner, and thereafter he looked for a car to sleep in and that he found a car with an open door and he crawled in and went to sleep.

Q Again, in the second version did he include anything regarding a blackout?

A No.

Q Was this the second and final version that was given to you?

A No.

Q There was another version?

A Yes.

Q And what precipitated that, if you know?

A I believe we were discussing the results of our – we had hired independently an investigator, outside investigator from the public defender's office to assist us with the evidence in the case, specifically the fingerprint on the knife, the footprint in blood inside the bar. And after a discussion with Mr. Rompilla about how we were going to have to deal with these issues at trial, another version was put forth that he went back into the bar sometime after, I don't remember exactly, I mean to [129] Dina's Diner, and thereafter he went back into the bar to do a burglary, that he slipped in the victim's blood, that he was already deceased, and that he slipped in the blood, used something to wipe off himself, a towel, used it to wipe off the blood that got on him and that he left.

Q And, again, during this third version did he indicate any kind of blackout during the critical time?

A No.

Q So it's fair to say that you had no knowledge of any kind of alcoholic problem that you could present to the jury in this case in the mitigation stage, is that correct?

A That's correct.

Q You were not made aware of anything that you thought would be helpful to present to the jury?

A That's correct.

Q Okay. You were asked why or – strike that.

You were asked several questions regarding whether or not you thought of arguing to the jury the major role of the defendant, and you've already testified that you in

your – in the guilt phase, you, the defense team, had argued it was somebody else, it wasn't the defendant. And you even indicated you suggested during your argument to the [130] jury in the death penalty phase that you reminded them of that in a subtle way?

A Right.

Q You did not choose to pursue it as the defendant as a minor player in this, is that correct, as a minor player in the homicide?

A I think that could have been inferred from the argument that there was someone else there. Whether they choose to believe someone else other than the defendant or someone else with the defendant being present, I think we left it open for their interpretation.

Q In terms of strategy, do you feel it would have been a good strategy to do a complete 180 so to speak and invite the jury to say, okay, we said in the guilt phase he didn't do it, but now we are telling you he did do it. Would you – do you feel that would have been a good strategy?

A No.

Q Why did you choose that route? Why did you choose that strategy?

A Given all of the fact and circumstances of this case, given Mr. Rompilla's past, it was our belief that the only way to proceed and the only chance that we had of saving his life was to appeal to their sense [131] of compassion and mercy and to ask them to be better than they found him to be. And to – and you have to remember that the facts of this case were horrible, and they were represented to

the jury again during the penalty phase through Dr. Mihalakis with respect to torture.

And the only avenue that we felt we had was to go after compassion and to show Ronald Rompilla as a human being, as someone who is worth more than just this act, and to bring out all of these other issues about whether or not there was someone else, whether or not he had planned it before and brought in other people. We felt it would further enrage the jury when we were trying to appeal to another side of them.

Q You obviously had to deal with the evidence that had been presented at the penalty phase, and that included testimony regarding his prior rape and burglary, isn't that correct?

A Yes.

Q Was there anything about that particular act that added to your decision not to – not to choose another strategy? Do you understand my question?

A No.

Q Okay. The facts of the rape and burglary came out?

[132] A Yes.

Q Did you feel that another strategy would have happened in light of the fact that the jury had heard facts similar to the incident for which he had been – just been convicted?

A No. In fact, we felt strongly that once they heard the transcript of the direct testimony involving the rape

and burglary, that dealing with the knife again, that that pretty much did it. That's all I can say.

Q Okay. Mr. Wiseman asked you about why you didn't bring in or attempt to introduce those witnesses you had read about or should have read about in a police report regarding the fact that there was possibly another actor. Would you please tell the Court why you didn't bring those people in in the penalty phase?

A I felt that further evidence of any sort of premeditation would – plotting and planning and trying to enlist people certainly would not show Mr. Rompilla to be a minor player, but rather would have the opposite effect.

Q So those witnesses mentioned in the police reports this morning would not have helped in any way to portray Mr. Rompilla as a major player.

[133] A Not in our review of it, no. Not in our review of it, no.

Q Did you feel that you gave Ron's family the opportunity to tell you about him as a person and his growing up and his childhood?

A Definitely.

Q Did it ever come to your attention through them the type of home he allegedly grew up in?

A The picture that we were presented with was that they loved each other, and that they were supportive of each other and that they cared very much about what happened.

Q Did the family in any way offer to you mitigation for him other than what is on the record already in terms

of they love him, they support him, he's got some worth, that kind of thing? Did they ever offer any other evidence that they thought you should consider?

A No.

Q From what point – point is not a good word. Where was the family coming from in this whole thing?

A They were totally behind Ron. They believed in him 100 percent.

Q Did they ever waiver on the fact that they [134] thought he was innocent?

A No.

Q So it's fair to say no one ever tried to offer you an excuse as to why he might have done it?

A No.

Q Now, you indicated that you got to know him over the year. And setting aside anything that you did with the mental health professionals in terms of asking for certain testing, et cetera, was there anything in your contact with him, anything in your conversations with him, anything in your dealings with him that lead you to believe that he suffered any kind of mental retardation?

A No.

Q And again, your experts never told you that he suffered from any kind of mental retardation, is that correct?

A That's correct.

Q If the only significant physical history of the defendant was that at the age of two he had a temperature of 105 degrees and had some diarrhea, do you feel that that would have been evidence that you would have thought the jury found persuasive in explaining why he would do the things he did?

A No.

[135] Q Have you ever had a 105 degree fever?

A Higher.

Q You were asked to look at what – I don't know the exhibit number. I apologize. It's called the initial transfer petition.

A Yes.

THE COURT: That would be D-7.

Q D-7 in that petition. First of all, that petition is not authored by a clerk of the Court of Common Pleas, is it?

A Not that I can tell, no.

Q It appears to come from the Department of Corrections. That would be the state correctional facility?

A Right.

Q These papers are not usually routed to the public defender's office, are they?

A No.

Q And, in fact, they usually do not come to you after you've prosecuted a case or anything or, excuse me, defended a case, is that correct?

A That's correct.

Q Mr. Wiseman asked you about some testing on the MMPI scale and whether if you knew what they meant. Would that have been significant for you to [136] tell the psychiatrist? I just want to point to something there.

MR. WISEMAN: The psychologist?

Q Psychologist as well as psychiatrist. And would you feel that imperative to let them know about that? Would the testing data also including an IQ score of 93, would you have felt that that was something significant in terms of diminished mental capacity?

A No.

Q This IQ score, according to this report, would have been in the mid-70's, correct?

MR. WISEMAN: Is that chronologically or –

MS. PARADIS: The report itself seems to indicate test data summary from the mid-70's, 1975.

MR. WISEMAN: I was just confused. It was as opposed to the year it was written.

Q So you had no evidence from your mental health professionals or from your own involvement with the defendant that he had any way – had any kind of mental impairment, correct?

A That's correct.

[137] Q In fact, you said he was able to lie to you?

A (Witness nods head.)

Q Explain his lies to you, correct?

A Yes.

Q So he wasn't functioning as someone who would act mentally retarded, is that fair to say?

A That's fair.

Q Or who is mentally retarded. Excuse me. The issue regarding the Roland case which Mr. Wiseman referred to, decided October 18th of 1988, when did trial in this case start?

A I believe we started selecting the jury on October 18th.

Q October 18th, the very day that this case came down. So this case down – didn't come down a month before the trial began, but rather the day it began, is that correct?

A If that's the correct date of the case being decided, then that is the date we began jury selection.

Q And you went to death penalty October 31st or November 1st, is that correct?

A Yes, somewhere about there. I believe so.

Q You actually did what the holding enrollment says which is you offered to concede that burglary was a crime of violence, did you not?

[138] A Yes.

Q So you as counsel made a decision to concede what you didn't know had just been decided, is that correct?

A Yes.

Q By the way, did you ever read the advance sheets?

A Yes.

Q The advance sheets?

A Yes.

Q So have you ever seen an advance sheet published the day of, within a week of, or even within two weeks of a case being decided?

A No.

Q Usually the cases in advance sheets are pretty old?

A Yes.

Q Well, that's a relative statement I guess, but –

A Not that current.

Q So there would have been nothing in the advance sheets regarding this issue?

A That's correct.

Q Ms. Dantos, aside from what you did during the death penalty phase of this hearing, were there any [139] other efforts you made as counsel for Mr. Rompilla to spare him the death penalty in terms of preparing for trial, no bargaining, anything of that nature?

A Yes.

Q What were they?

A We went to Mike Moyer, and there had always been – in our discussions with Mr. Moyer it was always really clear that he wanted to pursue the death penalty. But he always left it open, left open the possibility that if

there were a plea or contemplation of a plea from Mr. Rompilla, that he would be spared the death penalty.

We firmed that up prior to trial and spoke with Attorney Moyer, who indicated that he would in fact offer that, life in exchange for a plea to first degree. And when we asked about concurrency on both charges, the robbery and burglary, Mr. Moyer indicated, you know, that you come back and tell me that he's willing to plea and then we will talk about that. But that seemed as though that could happen.

Q And did you relay that to your client?

A Yes.

Q How did you relay that to your client?

A We went over and talked to him about it.

Q All right. Did you ever set – form any kind [140] of statement to him regarding what you had done in a letter?

A Yes.

* * *

(Whereupon, Commonwealth Exhibit Number 1, was marked for identification.)

MS. PARADIS: Ms. Dantos – may I approach the witness?

THE COURT: Certainly.

Q Ms. Dantos, I'd like to show you what's been marked as Commonwealth Exhibit Number 1. Would you please identify that?

A This is the letter that Fred Charles and I prepared and had hand delivered to Mr. Rompilla subsequent to our meeting with him where we outlined what our read on the case was and what the offer to Mr. Rompilla was that was on the table.

Q How many pages is that letter?

A Fourteen.

Q Okay. Do you – what other things did you explain, and you don't have to go into detail, but just topic-wise, what did you explain to Mr. Rompilla in that letter other than the plea offer that you – plea agreement – you use plea offer in that letter?

A We explained in the letter what the law was [141] in terms of the death penalty. We explained in the letter that contrary to Mr. Rompilla's read of the case that it was our opinion that given all the facts and the evidence, that it was likely that he would be convicted of first degree murder, and that if that were to happen, that he faced the overwhelming possibility of receiving the death penalty. And our advice to him was to take the plea.

Q And he rejected that I assume obviously?

A Yes.

Q After the verdict in the first degree murder – or first degree murder came back, at any time in the immediate period after that and before you went into the death penalty phase, did Mr. Rompilla tell you, okay, all right. Fine. I did it, but look this is the reason why. I was in blackout. I really don't remember anything of that nature. Did he ever give you a reason to change your position in front of the jury?

A No.

Q And, again, no family members did either, is that correct?

A No. That's correct.

Q And this is the final area I'd like to go into at this point. And I keep – I referred to your mental health experts before you. You reviewed the [142] report of Dr. Gross, is that correct?

A Yes.

Q Do you have that in front of you up there?

A Yes.

Q All right. And in that report, he indicates that your client denied the charges entirely in the second paragraph, isn't this correct?

A Yes.

Q And he also goes on in the third paragraph to give a narrative that was relayed to him by your client regarding the details of the evening in question or the – and the morning in question, isn't that correct?

A Yes.

Q Okay. In the next paragraph, which would be the beginning of the fourth paragraph, he tells you that your client said that did he not feel that he was intoxicated during that night, isn't that correct?

A Yes.

Q And then further down in the sixth paragraph he indicates that Mr. Rompilla denied drinking heavily or

regularly and does not consider himself an alcoholic, and that he denied any period of blackouts isn't that correct?

A Yes.

Q He also denied any other hard drugs and that [143] he respected his body.

A That's correct.

Q Also there was no history of any psychiatric illness or treatment and that he had denied any head injuries?

A That's correct.

Q He indicated that his childhood was uneventful and that he denied any abuse, physical or sexual, while, growing up?

A That's correct.

Q Dr. Gross indicates that there was no evidence during the interview of any thought disorder or effective illness, is that correct?

A Yes.

Q So is it fair to say that based on your interviews with the defendant, his family, and then the report authored by Dr. Gross, that you had no knowledge, in fact, you had evidence to the contrary of any kind of physical abuse or abuse in the home?

A That's correct.

Q And again the blackouts?

A Yes.

MS. PARADIS: I have no further questions.

THE COURT: Any redirect?

[144] MR. WISEMAN: Yes, Your Honor.

THE WITNESS: I'm sorry. I have a day-care situation, if I could use the phone to let them know I'll be late.

THE COURT: Why don't we take a ten-minute recess at this time.

* * *

(Whereupon, a recess was taken.)

THE COURT: You may take the stand, Ms. Dantos. All right, Mr. Wiseman. You may begin.

MR. WISEMAN: Thank you Your Honor.

Q Ms. Dantos –

THE COURT: I guess I should say you may continue.

MR. WISEMAN: Hopefully we'll finish.

* * *

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q Ms. Dantos, you said you didn't get the exact words he used, but essentially that you weighed nothing to mental health mitigation, you had nothing by way of mental health mitigation to go on?

[145] A That's correct.

Q Did you record the large scar above Mr. Rompilla's left eye?

A No.

Q Are you aware that he has such a scar?

A Yes, I remember a scar.

Q Did you ever tell Dr. Gross, Dr. Gross, Mr. Rompilla has a four-inch long scar over his left eye?

A I don't believe I would have. Mr. Gross saw him, but, no, I don't recall.

Q So you were relying on Dr. Gross to make those observations?

A I didn't feel it important to relate that – well, let me back up. Why would a scar be important in this context, a scar on a head?

Q Because if there were a head injury that was reported or a head injury that could cause some kind of trauma.

Now, you're aware that Dr. Gross's report says no head injury?

A Yes, I am.

Q That's inconsistent with any observation of Mr. Rompilla, a rather large scar over his left eye?

MS. PARADIS: Objection.

[146] THE COURT: Sustained.

MR. WISEMAN: This witness is saying she notices the scar. Dr. Gross says no head injury. I'm asking if she thinks that's inconsistent with Dr. Gross.

Q Now, your attention is directed to the scar. Do you think Dr. Gross was wrong when he reports in his report no head injury, that Mr. Rompilla had no head injury?

MS. PARADIS: Again, objection.

THE COURT: Is a cut, a head injury that would lead someone to conclude something else, something happened to the brain or for instance I mean aren't we talking about maybe two different things?

Q Well, did you ever say to Ronald Rompilla how did you get that big cut over your left eye?

A I don't think so.

Q Did you ever ask him about the cut over his right eye?

A I don't think so.

MR. WISEMAN: I called it a cut. I'm using the Court's terminology. It's a scar. The record should reflect and obviously, Your Honor, could make its own observations, that the scar over the right [147] eye is about three inches in length, the scar over the left eye looks to be about four inches going up towards the scalp.

Q So you never asked him how he got those scars?

A I don't remember asking him that.

Q Do you know if Dr. Gross asked him?

A I don't know what Dr. Gross asked him.

Q You weren't at the interview with Dr. Gross?

A That's correct.

Q You weren't at the interview with other mental health people?

A Right.

Q By the way, you mentioned the beta IQ being in the 90's, is that right?

A I noticed it on the report.

Q On this exhibit?

A Yeah.

Q Are you aware of any difference of how that test is or how people perform on that test as opposed to the WISC test?

A No.

Q So you don't really know if that's of significant difference?

A No.

[148] Q Did you ever ask the family of Mr. Rompilla how did he get those scars on his head?

A I don't believe so.

Q Now, from your letter, your plea letter, for identification purposes we can call it your plea letter to Mr. Rompilla has a particular slant to it, doesn't it? I mean you and Mr. Charles took a position of recommending a plea?

A That's correct.

Q Was your view of Mr. Rompilla's assessment of the situation one that he had a realistic view of the likely outcome or had an unrealistic view of the likely outcome?

A. We believed it to be unrealistic.

Q Mr. Rompilla told you a lot of things that proved, during the course of your representation, that proved not to be true, right?

A Yes.

Q He would tell you stories, you'd check them out, they weren't quite right? Was it that he was a poor historian?

A There were things he told us that proved to be inaccurate.

Q Well he lied, is that what you're saying?

A (Witness nods head.)

[149] Q Throw a curve as I think the letter refers to it?

A Right.

Q And I think you referred to it in your testimony. Now, how do you know that he didn't throw you a curve when he told you he grew up in a nice household, you don't really know that, do you?

A No. I'd say, no, but that the – that my sense, and we all rely on our own common sense, was that the motivations for telling or throwing curves when you're talking about your criminal case are different than your motivations in telling someone about your upbringing.

Q So if Ronald Rompilla told you I did well in school, you would think he'd have no motivation to lie about that, is that what you're saying?

A There are different motivations.

Q Is it possible that Ronald Rompilla may not have understood the significance of doing well in school as a mitigating factor in a capital case?

A I don't think so.

Q Did you ever define for Ronald Rompilla what it means to do well in school, what it was you were looking for in terms of upbringing and background and school?

[150] A Mr. Rompilla and I were clear that I needed information for the penalty phase. So whether – I can't say that I told him if you did poorly in school that would help our case, but Mr. Rompilla was clear that I was trying to save his life, and that we needed information, and that's what I was looking for.

Q Understood. My question is, did you ever explain to him the significance of particular information related to his background, or did you just say to him, how did you do in school, Ron? And he said, I did fine. And you left it at that. Is that the way the conversation went?

A I don't think so, no.

Q Well, did you go check the school records?

A No.

Q No, you didn't. So essentially you said, Ron, how did you do in school? He said, I did all right, I passed. Is that essentially what he told you?

A That there was nothing unusual about it.

Q And you didn't bother to go check that out? You checked it out when he told you a story about the guilt phase, didn't you?

A Yes.

Q But you didn't check it out when he told you what was essentially now a story about mitigation?

[151] A Right.

Q What did Dr. Cooke or Dr. Sadoff or Dr. Gross tell you about the brain damage testing they did that you think they did?

A I don't recall any specifics about what tests were performed, but that there was no evidence of any brain injury, brain damage.

Q Do you know what brain damage testing they may have done?

A No.

Q Do you recall what brain damage testing you asked for?

A No.

Q And I take it from our prior discussion you didn't give them any background about his school records?

A Correct.

Q You didn't, by the way, expect Dr. Gross or Dr. Cooke or Dr. Sadoff to go to the Board of Education and get the record themselves, would you?

A Probably not.

Q That would be the attorney or investigator's job, right?

A Yes.

Q When they told you, Dr. Cooke and Dr. Sadoff [152] told you that they thought Mr. Rompilla was a sociopath, did you ever ask them what can cause sociopathic behavior?

A I don't recall that conversation about it, no.

Q Are you aware that sociopathic behavior can be caused by a variety of mental illness?

A I would assume so.

Q So, for example, if you were a schizophrenic you might not set a fire but if you were a sociopath you might set a fire, right, as an example?

A I'm not qualified to answer that.

Q Fair enough. Are you aware of a history of sociopathic behavior in child abuse, not in Mr. Rompilla's case but generally, clinically that there is a correlation there?

A No.

Q Abused children often act out when they get older. You kick a dog, it gets mean. Is this a dynamic you're aware of?

A Yes.

Q Were you aware of it then?

A I would assume so.

Q Did you explore that in view of the – were you aware of the fact – did you explore with the [153] doctors what it meant that he was a sociopath?

A They explained things to us that we relied on. We relied on their expertise. I'm not qualified to determine what causes it or what manifestations there may be as a result of it.

MR. WISEMAN: Okay. I have nothing further.

THE COURT: Any recross?

MS. PARADIS: No further questions.

THE COURT: Thank you, Ms. Dantos. All right. Mr. Wiseman, I saw Mr. Nelthropp.

MR. WISEMAN: If I could just have a moment to shuffle my papers. Actually, Your Honor, while we're waiting for that, just one housekeeping matter, the transfer petition that's been marked as an exhibit, I don't want to run into a problem later, but there's some question as to its origins and where it came from. Could, Your Honor, direct the Clerk of Courts to produce the microfiche film or verify some way that it's in there?

My recollection is it's a rather large microfiche file and may take them some time to print out. I wanted the Court to be aware we don't have to serve a subpoena downstairs, but I'd like the [154] clerk to come up and clarify that was in the file.

THE COURT: All right. Maybe is that something, Ms. Paradis, that do you have some question about or not?

MS. PARADIS: It says the Clerk of Court copy on it. I don't know which file this actually came from, that is my problem. It's clocked in the criminal – the juvenile division I noticed, which seems out of odds, because this is a state correctional institution summary, something that we have never been privy to.

MR. WISEMAN: Well, Judge, it's there. Have it brought up, and we don't have to banter.

THE COURT: All right. We'll deal with it. I'll have my law clerk deal with that issue for you, Mr. Wiseman.

MR. WISEMAN: I appreciate that.

MR. NOLAS: I was just informed Mr. Nelthropp went to the seventh floor to get a cup of coffee. Do you want to take five minutes?

THE COURT: Would you run up.

MS. PARADIS: Your Honor, another housekeeping matter. There are portions of the school record that was admitted that we don't have copies of, [155] and I would just like to make copies of those pages.

THE COURT: Certainly. If you could give them to her to do both issues she'll deal with this.

MR. WISEMAN: Perhaps we can make use of this time.

* * *

(Whereupon, an off-the-record discussion took place.)

THE COURT: We had a short, off-the-record discussion concerning the evidence, taking of evidence in

this case other than during open court, that is by deposition of Dr. Gross, which is apparently now set for 6:00 on Monday.

MS. PARADIS: I don't know that.

MR. WISEMAN: Tentatively set.

MS. PARADIS: I haven't discussed this with Mr. McIntyre. Mr. Wiseman did approach me about it after the lunch hour, but Mr. McIntyre is in trial, and I have not discussed it with him. He will be handling the deposition of Dr. Gross.

MR. WISEMAN: I don't think I firmly set that up with Mr. McIntyre. I might have discussed it. I might not have actually discussed it with him because of late breaking stuff with Dr. [156] Gross.

My proposal would be this, Your Honor, that we take, assuming Mr. McIntyre's availability, Dr. Gross's deposition at approximately 6:00 on Monday. The logistics of that is we would need a speaker phone, just a regular phone with a speaker and a court reporter and place to do it.

THE COURT: So you're not going to go to Dr. Gross's office for that you're saying?

MR. WISEMAN: I really didn't talk to him about that. I don't know.

THE COURT: Probably would.

MR. WISEMAN: I can discuss that with him. My concern though is getting a court reporter. I don't want to put the Court to extra expense, and I certainly don't want to incur the costs for getting a private court reporter

for what is part of the proceedings. I don't know what the availability is to get a stenographer.

THE COURT: I'd get a private one. I'd get a private one, because you need it. And you want to get out expedited copy because we want to move this along. So I would call – Ms. Paradis can help you with that. There are a couple of ones that whoever you think would be good and could do it.

[157] MR. WISEMAN: And I guess it is a question of expense at this point.

THE COURT: Well, that's something the county – your request of the county. Okay. Fine. Mr. Gallagher may do that, Ms. Paradis.

MS. PARADIS: Mr. Gallagher, why don't we try him.

MR. WISEMAN: Finally, Dr. Armstrong will actually be here in person during regular business hours for Tuesday afternoon for her deposition. And if there are any witnesses left after we're done tomorrow, I propose putting them on Wednesday.

THE COURT: Right. That's what we'll do. All right. Now, then with regard to those depositions that you've just told me about, there is no need for Mr. Rompilla to be present at those obviously?

MR. WISEMAN: Not from our perspective.

THE COURT: Very fine. All right. Mr. Nelthropp, I think you're on board.

* * *

ALBERT NELTHROPP, ESQUIRE, having been duly sworn, was examined and testified as follows:

[158] MR. WISEMAN: Your Honor, I've marked this collectively as Exhibit Number 10. It's not fastened with a staple, it's got a clip on it, but we can fix it up later.

THE COURT: Actually we have a stapler right here. Mr. Nelthropp, I will do that for you.

* * *

(Whereupon, Defendant's Exhibit Number 10, was marked for identification.)

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q Good afternoon, Mr. Nelthropp.

A Good afternoon.

Q What's your occupation, sir?

A Attorney and conflicts attorney in Lehigh County part time.

Q I didn't hear you.

A Conflicts attorney part time in Lehigh County.

Q Perhaps if you lean into the microphone. It's very hard to hear.

[159] A Okay.

Q How long have you been a lawyer?

A Since 1980.

Q What areas of law do you focus your practice on?

A Well, I was doing mostly criminal law, domestic relations.

Q When you say you were, you still do both?

A Yes, I do.

Q Now, you mentioned that you're conflicts counsel. What does that mean?

A Well, if there's a conflict between the public defender's office and the client they are representing, then they will – the Court will appoint me to represent that client.

Q And what is your arrangement with the county for that representation, your financial arrangement?

A They pay me a salary for the year as a part-time employee.

Q So it's a flat rate salary?

A That's correct.

Q You don't get paid per client?

A No.

Q Now, you know Ronald Rompilla, don't you?

A Yeah. I saw him before in Court.

[160] Q Is this the first time you've seen him?

A No.

Q When else have you seen him?

A When he was being tried the first time.

Q All right. Did you ever represent Mr. Rompilla?

A I was appointed to represent him.

Q At what stage of his case were you appointed to represent him?

A After he was convicted and sentenced then I was given the job to file his appeal.

Q Now, if you look at the first page of the Exhibit 10, there's a letter written by Mr. Rompilla to Mr. Siecer, S-I-E-C-E-R, do you see that?

A Yes.

Q And if you look at the second paragraph you'll see your name is mentioned as well?

A That's correct.

Q What was Mr. Siecer's role in Mr. Rompilla's case?

A Lawyer as well assigned to it. He was conflicts attorney, but when I got the file I basically did the work.

MS. PARADIS: Excuse me. Is this Mr. Sieger that we're talking about?

[161] THE COURT: There is a mistake that we should point out for the record. It's Mr. Sieger. I don't know what it was initially, but Mr. Sieger is spelled I believe S-I-E-G-E-R. And that's who I'm sure he's referring to.

MR. WISEMAN: That's correct.

Q So I guess I'm little confused. Was he formally assigned to represent Mr. Rompilla with you, or were you the one who was formally assigned to represent Mr. Rompilla?

A Well, my understanding was that I was appointed and assigned to represent him. I never asked Mr. Sieger if he was also assigned to do it.

Q So he had no involvement in the actual representation?

A Not that I know of, no, he didn't.

Q Now, could you describe if you would – withdrawn.

Did you ever visit with Mr. Rompilla while you were representing him?

A No, I didn't.

Q Did you ever have occasion to talk with him about the case?

A No, I didn't.

Q Did you ever receive letters from [162] Mr. Rompilla?

A Yes, I did.

Q How would you characterize or describe your relationship with Mr. Rompilla through those letters?

A Well, he'd send me letters and also send me documents and research that he had done, and he would send it to me and ask me to consider it to see if that would be an appropriate issue to bring forward in the appeal.

Q Did he make any demands or you?

A Not really. He sent me things. There was – he sent me a big package of issues that he had written himself. This was very lengthy, and I reviewed it. I attached it to the brief that I submitted to the Supreme Court in case there was any issues that the Supreme Court wanted to look at, issues that he had raised.

Q Was your relationship with Mr. Rompilla a good one?

A I mean it was by correspondence. I didn't have any sort of personal relationship with him.

Q Well, your professional relationship with him by correspondence was a good one or not?

A Well, until the time I filed a brief I don't see that it was a bad relationship. I mean I didn't – [163] it's as many relationships are, many kinds of these type of situations in criminal cases.

Q At the time that you were assigned to represent Mr. Rompilla had you ever done a capital appeal?

A No, I had not.

Q Had you ever done a homicide appeal?

A I don't think so. I'm trying to think maybe with the – like a neglect homicide or traffic case.

Q Not a first degree though?

A No.

Q Had you ever tried a homicide case?

A No, except I had tried – as a prosecutor I tried neglect homicide, but not first degree homicide.

Q By neglect homicide, would that have been a vehicular-type of a homicide?

A It was vehicular homicide.

Q It was?

A More than one.

Q Now, you got this case, and correct me if I'm wrong, post verdict motions had been filed by trial counsel?

A That's correct.

Q And it was your job to then file memorandum in support of that motion?

[164] A That's correct.

Q And you were assigned to the case in 1988, is that right, right after the trial?

A Somewhere after the trial. I can't recall the exact date.

Q Late '88, early '89?

A I'm vague as to the date. I know it was after the trial, sometime after the trial. '88 sounds about right.

Q Do you recall when you filed the memoranda for the post-verdict motion?

A No.

Q Would 1992 sound about right?

A I don't know. I know that I filed – appeal was filed.

Q Do you recall having –

A I couldn't tell unless I saw the document.

Q Okay. Do you recall having some difficulty with this case following the denial of post-verdict motions and the formal imposition of sentence as in regard to notice of appeal.

A Yes, because originally there had been one, which is different from other cases. As soon as the defendant is sentenced, the 30 days begins for the appeal, and unlike the other cases where the [165] post-verdict motions then took place and then the defendant was sentenced and then the appellate process began, in the death penalty phase the appellate process began immediately. So there was – there was a problem in that no one had filed a –

Q Let me just stop you. When you say no one, who else should have filed it other than you? It was your job to file it?

A No, because I thought that had been done. At the time it had to be done before I even took over the case.

Q So you thought that it was done prior to the formal imposition of sentence?

A No. According to the situation that arose, he had 30 days from the date that he was – sentence was imposed, which had been at the time right after his trial and his conviction. He had 30 days, and that had not been done. So that when the Supreme Court informed me there was no appeal pending –

Q So you're saying then that it wasn't your oversight in not filing the notice of appeal, it as prior counsel's oversight?

A I don't know if it was in between. They may have sent it to me thinking it had been done or I would have done it, and I received it from them thinking that [166] it had been or it should have been done, but in any event, the Supreme Court seeing it was a serious case allowed it to go through.

Q So you got notification from the Supreme Court that the appeal had not be [sic] heard except for the automatic aspect of conflict appeal, because notice had been filed late?

A But on agreement with the district attorney's office they agreed that those issues should be heard also.

Q We'll get to that point. I'm just focusing –

A I'm just telling you.

Q The Supreme Court notified you that the case would be heard?

A Yes, sir.

Q And you filed a petition for appeal nunc pro tunc?

A I believe.

Q And in that petition would be the third – starts on the third page of the packet in front of you if you want to look at it on that page, paragraph nine you state, accept full responsibility for the late filing. It was a misunderstanding of the proper procedure to file an appeal in a capital case.

[167] A Yes. I'll accept responsibility. I have no problem accepting responsibility.

Q Okay. I'm just asking. Now, I asked you earlier if Mr. Rompilla was a particularly demanding client, and I think your answer was he was not?

A Not particularly. I mean he wrote letters and he wanted responses.

Q I'm sorry?

A He sent letters and he wanted me to notice him on information.

Q Didn't he ask you for things also?

A He asked me for the transcripts at one point, and I was using the transcripts, I needed them. It was expensive to make a whole new set of transcripts, and I had to – I had to use them for the work that I was doing.

Q Were you working on his case continuously from 1989 until the appeal was filed in 1994?

A Not – I mean not on a daily basis.

Q Were you working on any kind of a regular basis?

A You know, as the schedule – things had to be done, they were done.

Q Why did it take four years to file the post-verdict motions memorandum?

[168] A I believe that I didn't receive any petition or schedule from any – from the Court demanding that anything be done, any memorandum be filed by a specific date. So I did not put the memorandum together, because I did not have a specific deadline to do so. I had – I was doing other work also.

Q All right. Now, the arrangement you have with the county for these conflict cases at that time from 1989 until the file of the appellate brief, what was the average number of cases that you had in any given time?

A I don't know, but I was in court constantly.

Q You were busy?

A Yeah.

Q Would it be fair to say that the more work you did on a case the less financially beneficial it was to you?

A That was not a consideration.

Q I didn't ask if that was the consideration, I asked if that was the case, the more work that you did, flat rate, the less you made per case?

A Well, I had my private practice on the side. So I worked, had that with my private cases, and I did what had to be done with the cases for the county. I did not look at it in terms of how much money per [169] case. I know that I spent a lot of time for the amount of – for the payment that I did receive.

Q Now, your testimony then is that there was no financial consideration in the way you handled Mr. Rompilla's case?

A No.

Q No issue related to how quickly you'd get to it or how much time you'd spend on it?

A No. It was just as other cases went, what had to be done with other cases, the work.

Q Why don't you look at that packet and a letter of April 15th. There's a letter that you wrote to Charles Johns, who is the prothonotary of the Pennsylvania Supreme Court.

MS. PARADIS: Your Honor, at this time I realize I should have asked for an offer of proof. I'd like to interpose an objection at this point. It appears –

MR. WISEMAN: Could we excuse the witness if there's going to be argument?

THE COURT: Well –

MS. PARADIS: It's not really substantive. It's not really substantive. It appears that Mr. Wiseman is examining Mr. Nelthropp as to the manner in which he handled the appeal. The issue is he [170] did or did not raise things of that nature.

My contention, which – well, not my contention. Mr. Wiseman's contention, which was conceded by Mr. McIntyre is, okay, we are not going to argue any waiver issues, we're going to address all the issues you raise here in PCRA court.

So the fact and what we're looking at is what happened down at the trial court level. So whether Mr. Nelthropp raised issues, did a good appeal, didn't do a good appeal, seems to be irrelevant in light of the fact that we're not contending the waiver. We're saying, okay, fine, let's address all the issues.

You now raise the fact that Mr. Nelthropp didn't raise them really is of no moment, because we are entertaining them. So at this point I probably should have asked for an offer of proof, but again –

THE COURT: Okay. All right. Mr. Wiseman?

MR. WISEMAN: My preference would not be to make my point while the witness is on the stand, if that's all right with the Court. I'm prepared to make a response only if the witness is excused.

[171] THE COURT: You can come up here. I'm not going to have him leave.

* * *

(Whereupon, the following discussion took place at sidebar:)

MR. WISEMAN: Your Honor, there are two responses. First, Mr. Rompilla is entitled to the effective assistance of counsel and to get an appeal in due process. And if he does not get it, he's entitled to a new appeal, the old one thrown out, and it doesn't have anything to do with a relaxed waiver. If Your Honor finds that counsel was ineffective, it goes to the Supreme Court, and he gets a new appeal.

Secondly, there were issues of delay that are relevant also to the United States Supreme Court and the case is called Lackey, L-A-C-K-E-Y, and it explored not only the question of time on death row relative to the delay, and by delay I don't mean delay caused by the defendant, delay caused by other actors in the process. These questions are relevant to this issue as well.

Finally, the whole issue of exhaustion of state remedies intertwined with delay. The third circuit ruled quite literally a number of cases such as Story v. Kindt, K-I-N-D-T, where long [172] delays in the state court's processing of issues can lead to the exhaustion of defendant's appealing.

These are all issues that are relevant to Mr. Nelthropp's testimony.

MS. PARADIS: The exhaustion issue, I understand what he's saying in terms of delays and things of that nature, however, we're starting here in PCRA court and addressing all of the issues that ultimately are going to conceivably, unless the Court rules in Mr. Rompilla's favor, will be addressed in the Supreme Court of Pennsylvania and it's a collateral approach.

So that I'm not sure I understand how Mr. Nelthropp's not advancing arguments that are now being substantively addressed is any way prejudicing his client. They are going to be addressed here. If they are exhausted, they are going to be exhausted from here on out, not back two years ago or three years ago when the appellate process was going on, the direct appellate process was going on. We're talking about exhaustion from this point forward, not exhaustion back three years ago.

THE COURT: Are you saying what he needs is a factual basis for many of the issues that you raised, and that's why –

[173] MR. WISEMAN: Well, there's a number of different components to it. The delay issue is something that I want to explore. The ineffective assistance issue has nothing to do with the delay. It has to do with Mr. Rompilla's right to a new appeal from square one. If Mr. Nelthropp was found to have been ineffective in this area of the law, what is good law one day is not always good law the next day.

I'd hate to come back years from now on an issue that we thought a relaxed waiver would apply to and that some

court somewhere else may decide doesn't apply. I think it would be prudent to get the information while we're here so we don't have to come back and do it again later.

THE COURT: That's what I thought we may be concerned with. All right.

MS. PARADIS: It's just that Mr. McIntyre conceded that we aren't going to argue waiver, that he's getting his appeal now. He's getting the appeal on the merits of the issues currently raised.

MR. WISEMAN: Different standards, Your Honor, on direct appeal and on PCRA, some issues and some circumstances. So he's entitled to pursue a direct appeal remedy.

[174] MS. PARADIS: But the bottom line is effectiveness of trial counsel, not whether or not appellate counsel looked at trial counsel's effectiveness. And the issue is, this is still a PCRA, and, bottom line is, was trial counsel effective. Not whether Mr. Nelthropp was effective, because Mr. Nelthropp had no part in the trial. So the PCRA is ineffectiveness of trial counsel.

THE COURT: Well, I'm understanding it's relating to appellate counsel as well.

MR. WISEMAN: Yes. Although –

THE COURT: You gentlemen know a lot better then I do.

MR. NOLAS: In a nutshell I can clarify it. The defendant is entitled to effective assistance of counsel on appeal. If the defendant does not receive that, that appellate opinion is no good. It's bad. It's prejudicial. It's something

that can't be relied on in this case. The district attorney's office has relied on it. All right.

In response, and that's independent, it's – we're entitled to explore it and for starters, putting aside what Mr. Wiseman said delaying changing from month to month. And we don't – [175] wouldn't have an opportunity to do something here and not do it.

THE COURT: That I understand. And that's – I felt that was probably a part of it. For instance, however, the fact that he didn't file the appeal, quote, timely initially for whatever reason, that's a non-issue since the Supreme Court granted the right to appeal.

MR. NOLAS: Eventually it would. But I know you can't just do the questioning in a vacuum. I think Your Honor knows that you can't just –

THE COURT: All right. I'll permit it. Let's try to get, for the reason that Mr. – well, both gentlemen mentioned it. Let's get the issues out. Let's get the testimony out and finish it.

BY MR. WISEMAN:

Q Mr. Nelthropp, I was asking you about a letter that you wrote on April 15th, 1994 to Charles Johns, the prothonotary of the Supreme Court of Pennsylvania. Do you have that in front of you?

A What date?

Q April 15, 1994. Can I help you find it?

A I have it, yeah.

[176] Q In this letter, the second paragraph you state to Mr. Johns, I should also inform you that I was appointed by the Court as conflicts counsel and have not received any special remuneration for representing Mr. Rompilla other than my part-time salary.

Is it still your position, sir, after reading that, that your level of remuneration had no impact on your representation of Mr. Rompilla?

A Yes.

Q Why did you write that? What did you mean?

A I know that in some cases when people are appointed to represent you in a murder trial they are directly appointed to do so and then they can devote all their time to it. And what I was trying to say there is I did not have this case as my sole responsibility. I had to survive.

Q You had to make a living?

A That's correct.

Q Economic component?

A It wasn't my sole, you know, reason for it. I didn't have to put that out. That wasn't what – I was trying to do my best for him under all the circumstances I was under.

Q Under the circumstances it was not financially advantageous to put this case in the front [177] of others?

A I wouldn't say advantageous. It's just that I have to make a living, and it's not a question of to my advantage. I have to work. I have – I have other cases to do, and I have to fit everything in.

Q In the next paragraph you state, as conflicts counsel I have a heavy case load along with private cases which I handle.

A That's correct.

Q With regard to our discussions, the county at this time is presently trying to hire a third conflicts counsel due to the fact that one attorney just resigned. It's – it's a heavy case load and demands of criminal court.

A That's correct.

Q Correct me if I'm wrong, what you seem to be saying in this letter is I've got a lot of cases, I'm conflicts counsel, to make a living I can't make a living doing just this case as my main priority, is that a fair statement?

A I couldn't make it my main priority, that's correct.

Q Now, do you recall that Mr. Rompilla wrote a number of letters to the prothonotary of the Supreme Court of Pennsylvania complaining about you?

[178] A I don't know if I received every one that he wrote to me, but I did receive a letter showing here that he did – he did contact him, and then Mr. Johns contacted me.

Q Well, if you look at the next – right after the appeal nunc pro tunc petition in the packet I gave you, you'll see a letter dated December 13th, '93 addressed to Mr. Rompilla by the deputy of the prothonotary of Pennsylvania Supreme Court?

A Said March 21.

Q December should be towards the beginning.

A Yes. I see that, sir.

Q In that letter you're copied on it?

A Yeah. Um-hum.

Q The letter says, among other things since you, Mr. Rompilla, are represented by counsel, we cannot accept your pro se filings. They are being forwarded to attorneys so they may consider the issues that you wish to raise. Do you see that?

A Are you talking about the –

Q Same letter, last paragraph.

A Talking about December 13th letter from William Corey?

Q That's right.

A Please review them.

[179] Q One before that. Also a letter on Mr. Rompilla.

A Okay. Yeah. I see that, yeah.

Q So basically it says, Mr. Rompilla talk to your lawyer about the issues you want to raise?

A Yes.

Q Did you talk to Mr. Rompilla about them?

A Well, he sent me a package of the issues and I used them. Any information he sent me, I used them.

Q Well, did you use – ever use them or put them on the back of your brief, submit them?

A Some of the issues I felt were proper to put in the brief, some were not. And I put them anyway. I submitted them anyway.

Q Did you discuss with Mr. Rompilla either in writing or in person or by phone the merits of the issues that you wished to raise?

A I don't know if I wrote him a letter stating that I would incorporate certain issues. I can't recall if I contacted him about it or not.

Q All right. If you flipped the page, the next letter, which is dated also December 13th for Mr. Corey, this one is addressed to you, it says, among other things please review the issues and consult with your client about whether you were to proceed on those [180] matters.

And correct me if I'm wrong, but what you seem to be saying is you didn't really consult with Mr. Rompilla, you decided what was good and what was bad, and you went with it?

A That's correct.

Q Now, if you flip the page you'll see a series of letters that Mr. Rompilla wrote to you. I won't take you through every line of them, just some samplings in regards to this question of whether Mr. Rompilla was a demanding client or not.

On the first letter the date is slightly obliterated, look likes 3/4/90 something. Mr. Rompilla wrote you three letters. This is my fourth letter to you concerning our legal problems and of this day you still refuse to answer any letters or show any interest in my case. Again, I ask you to

send all legal documents and trial notes to me and answer my legal questions.

Did Mr. Rompilla fairly characterize your, what he calls your lack of responsibility necessary for his inquiry?

A Well, at the time I received, you know, scores of letters from the prison. Every prisoner that I represent, every client I represent wants me to spend [181] every minute with him. So this is not very different from maybe four, five other letters or six I get in a week from my clients. And I contacted him when I could, and I sent him letters, and I sent him – I believe I sent him a copy of a memorandum that was done in the case.

Q Do you feel you responded to him in writing to these questions?

A I didn't respond to him as much as I would like to.

Q Did you respond to him at all at that point?

A Yes, I did. Somewhere along the line I responded. I know I contacted him.

Q The letter goes on, I tried my best to reason with you, and you just ignored the letter of mine, and then he threatens to sue you in ten days it you didn't take action, is that right?

A Yes, sir.

Q Does this refresh your memory perhaps as to whether or not you had a cordial working relationship with Mr. Rompilla or was it, in fact, somewhat tense?

A I have had many clients that have written similar things to me, and I have spoken to them or contacted them

later, and I had aired matters out with them. So I don't consider – every client in the [182] criminal process considers his case the only case, and it is their own case. And I have to respond to them. And I try to do the best I can to respond to every letter. But, you know, it's not possible to respond to everything.

And so I do consider just the fact that he may have been upset at the time, that that was – that was the whole issue. That was the whole attorney/client relationship right there in a nutshell.

Q I understand you can't drop everything and add what your client writes to you. I guess my question though is at this point in time had you responded at all to Mr. Rompilla's writing you these letters, not paying any attention to him?

A I don't know if I responded to him at this point. I know I responded along the line somewhere.

Q If you flip the page you'll see another letter dated 3/11/94, the middle paragraph. He asked you why you didn't inform me the Supreme Court granted your petition to appeal nunc pro tunc?

A Yes.

Q He was making a demand that you had not kept him informed of an important aspect of his case?

A No. He used the word nunc pro tunc. He knew that's what I intended to do.

[183] Q Well, eventually he found out obviously from the letter. The question is, he was making a demand on you again in regard to keeping him informed. He was

complaining I found out about the appeal nunc pro tunc, but you didn't tell me, right, is that fair?

A I may have sent him a copy. I don't know.

Q All right. Why don't you flip the page. The date is – it says date 11, 1994.

MR. WISEMAN: I wouldn't characterize what that is, Your Honor, other than it seems to be 1994.

Q Middle paragraph, it's been an uphill battle with you since 1989 trying to get you to send me the legal issues you plan to raise in my appeal to the Supreme Court and get a copy of the trial notes and other legal documents I have been requesting from you since 1989.

Would you agree that once again Mr. Rompilla is making a demand of you, of your time and effort?

A Yes, he's making a demand that I contact him.

Q Next letter, April 25th, second page, Mr. Rompilla writes, I'm sorry to hear about your heavy case load and private cases. If my case was such a burden to the rest of your cases, you should have [184] removed yourself from my case like I requested in the pro se petition.

A Why? Where are you?

Q Letter of April 25th, 1994, page two.

A You should have removed yourself from the case like I requested in my pro se petition and letters to you. You not only refused to file a pro se petition to remove yourself, Mr. Johns sent you a letter asking you, do you want to proceed with a pro se petition.

Again, you refused to answer Mr. Johns' request and mine to remove yourself from my case. And in a letter to Mr. Johns, April 15th '94, you still come up with excuses instead of giving us answers. Again, would you characterize the tone of that as an angry tone from Mr. Rompilla?

A Yes.

Q Did that tone have any impact on you in your handling of the case?

A Well, I understand, you know, his situation he was in jail and on death row in this matter, and I was trying to get his work out. And that's what I was doing. So I know that clients in this situation are – a lot of them are angry, angry they are incarcerated. So I don't – you know, it doesn't necessarily mean that they are actually angry at me per se, maybe just [185] angry in general.

Q Did you feel increased pressure to get the matter filed when you received these letters?

A Well, I had pressure to make sure that things were done. I was looking at making sure that his cases were – his case was taken care of and the matters were addressed.

Q If you turn the page you'll find the three-page document that starts by a cover letter addressed to Mr. Johns enclosing a pro se, handwritten petition to have you removed from his case. This petition was sent to the Supreme Court and appears to be dated November of '93, although the date again is not written in a way that's understandable. Have you ever seen this petition before?

A I may have seen it. It wasn't on lined paper.

Q I'm sorry?

A It wasn't on lined paper, the original.

Q I don't know lined or not, I just have the photocopy. Without reading every line essentially Mr. Rompilla is again complaining this time to the Supreme Court that you're ignoring him and ignoring his case, and he wanted you off the case. Did you take any action when you got that petition, did you agree with [186] the Court, did you offer to withdraw, did you oppose?

A I think I wrote them further down the road that I would withdraw if that's what he wanted me to do. I didn't after that letter, but somewhere along the line I did. He mentioned that on several occasions, and then I did after the documents were filed. I don't know if he proceeded, but on March 15th I did respond to him and responded to his –

Q Well, we'll to get [sic] that, Mr. Nelthropp.

A That's the same year. I believe it's March 15th. It's responding to his – to his petition or to his request.

Q Why don't you turn the page on the petition, and there's another letter, this one addressed to Mr. Corey, again deputy prothonotary of the Supreme Court, March 3rd, '94. And Mr. Rompilla writes, among other things Mr. Nelthropp refuses to answer my letters. I sent him a copy of legal documents and requested new counsel. He still refuses to communicate with me on how he will proceed with my pro se petition.

I'm in a serious stage of my appeal and need Mr. Nelthropp to communicate with me concerning serious issues to be filed in my appeal. He also says still shows no signs of interest in my [187] appeal in turning the page, I

wrote you, meaning the prothonotary, a few letters concerning Mr. Nelthropp's lack of interest with my case since 1989.

I wrote counsel and asked him to file a petition to the Supreme Court to remove himself from my case, and he refuses to do so. Then he goes on and says, Mr. Corey, I would appreciate any help in order to get counsel to communicate and send me copies of my trial. So it appears from this letter that at this stage Mr. Rompilla felt still dissatisfied with your level of communication, that you weren't communicating and that you weren't sending him the trial that he requested since 1989, is that right?

A I guess that's yes. I do know how he feels.

Q That's what the letter says. Now, if you turn again towards the back of the file, March 1, 1994 to that letter written by Charles Johns to President Judge Diefenderfer.

By the way, you had gotten correspondence from the Pennsylvania Supreme Court during this period forwarding some of the letters Mr. Rompilla had sent to them and asking you to do something, is that right?

A I may have. I don't –

Q The letter of March 21st, '94 from the [188] prothonotary of the Supreme Court to Judge Diefenderfer states among either things, as you notice, the appeal communicating the lack of communication between counsel and himself, correspondence from this office urging Mr. Nelthropp to correspond with his client, has been to no avail.

So apparently Mr. Johns was also complaining that your level of interest or action with your client was not satisfactory, would you agree with that characterization?

A He's complaining, yes.

Q Mr. Johns is complaining?

A Yeah, he's complaining.

Q The fact that he forwarded this correspondence to the president judge of the county up in last paragraph asked the president judge or suggested to the president judge you might want to review this material in considering any fee application he may make to Mr. Johns, right?

A I received this from Mr. Diefenderfer for – I don't see that he has stated anything directly to me. He didn't – this already was agreed to by Mr. Diefenderfer. I know how he had felt.

Q You are copied on it?

A Yes.

[189] Q So you got this letter?

A Yes, I did.

Q Were you feeling at this point pressure about this case?

A Yes.

Q You were?

A Yes.

Q Because you had done what the Supreme Court told you to do vis-a-vis your client, and you certainly didn't do what your client asked to you [sic] do.

A Not as much as I would have wanted. Not as much as he would have wanted to.

Q Because of pressure, the case load you had and subsequent issues?

A Mostly the case load.

Q Sir, time is money isn't it, right?

A I'm not going to get into argument about it. Time, there is only so much time.

Q Only so much time in a day. You have to make a living, it's perfectly understandable. The question is different if you didn't have the time, but isn't there a monetary component to that?

THE COURT: I think we've gone over this, counsel.

MR. WISEMAN: Sure, Your Honor.

[190] THE COURT: Just being repetitive now.

Q Sir, is it your testimony then, Mr. Nelthropp, of these dealings with Mr. Rompilla or the Supreme Court of Pennsylvania impacted upon your preparation of the appellate brief in this case?

A No. I mean I prepared the brief to the best of my ability and did it, as you know, I was instructed by the Court to do it as conflicts attorney. We're not – in many cases we're not taken off of a case just because someone complains.

* * *

(Whereupon, Defendant's Exhibit Number 11, was marked for identification.)

MR. WISEMAN: Your Honor, I've had marked the document which is captioned Commonwealth versus Rompilla, brief for the appellant submitted by Mr. Nelthropp, and I'm going to ask Mr. Nelthropp some questions about the brief itself.

MS. PARADIS: Your Honor, I'll stipulate that the brief does not contain the issue now raised in the PCRA petition.

THE COURT: All right.

Q Mr. Nelthropp, could you look at the table of citations that's four pages into the material?

[191] A Yes.

Q Could you just quickly scan that if you would. Are there any cases cited in there that were decided by the United States Supreme Court?

MS. PARADIS: Your Honor, at this point I'm going to object again on relevance. The petition that has been filed by the defense in this case regarding ineffectiveness of appellate counsel states that the extent the trial counsel or appellate counsel failed to appropriately litigate, raise or object to or otherwise remedy any of the above claims, that being the claims raised in this petition, petitioner serves such failures were ineffective assistance of counsel.

So the argument that the styling of the brief or issues raised in the direct appeal weren't good are irrelevant in light of the way this allegation in the petition is phrased.

The only allegation of ineffectiveness as to appellate counsel raised in their petition is as to whether or not he picked up on these issues. There's – it's not the way he litigated his issues, how he prepared his issues, his attorney/client relationship, any of those things are not raised in the petition.

THE COURT: And that's what you [192] were referring to earlier with Gross?

MS. PARADIS: This is not relevant.

MR. WISEMAN: Your Honor, I intend to question Mr. Nelthropp about the issues contained in our petition as they were treated in his brief. That's exactly what I'm asking him about.

THE COURT: What are you making reference to?

MS. PARADIS: Page 105 of the petition filed by the defense.

THE COURT: Right.

MS. PARADIS: The only allegation is regarding the ineffectiveness of appellate counsel. And it's a catch all. It says to the extent appellate or trial counsel –

THE COURT: This is paragraph 13?

MS. PARADIS: Your Honor, to the extent they failed to speak up on the issues raised in this petition, we attributed this to ineffectiveness of counsel. There's no allegation in here regarding appellate counsel's ineffectiveness in other areas. And I think it's appropriate to object again at this time if we're going to spend the next hour going over the issues, how they were raised, what

case was used, [193] things of this nature, because it's not in the petition at this point.

MR. WISEMAN: Judge, it is in the petition.

MS. PARADIS: Ineffectiveness on those grounds.

THE COURT: How is it in the petition?

MR. WISEMAN: I'm going to ask him about his treatment of issues in his brief that are in our petition. Either the way I treated or what way he did not treat a particular issue that we are raising.

THE COURT: What issues are you talking about?

MR. NOLAS: Your Honor, just so the record and Your Honor is clear with the – within each of the claims in the PCRA petition that were either inadequately prepared on appeal or not presented on appeal, there are claims of ineffective assistance of appellate counsel. In other words, that paragraph that the district attorney read to Your Honor, the summary at the end that you have other sections throughout the petition when dealing with each of those claims for relief.

MS PARADIS: And those relations [194] are that counsel, appellate counsel was ineffective for failing to raise these issues which we are now litigating.

THE COURT: All right. It says to the extent appellate counsel failed to appropriately litigate, is that what you're talking about?

MR. NOLAS: Yes, Your Honor.

THE COURT: – As opposed to just raise objections to or otherwise remedy. In other words, it's more than just the raising – the recognizing of the issues that they are claiming constitutes ineffectiveness, that's – am I understanding correctly?

MR. WISEMAN: Yes.

THE COURT: So it's not just the raising of them, that's what you're asking now, that it was your – your claim is that it was inappropriately litigated?

MR. WISEMAN: Exactly. Exactly.

THE COURT: All right. All right. we'll hear it. Co ahead.

Q All right. I think the question, Mr. Nelthropp, was, did you cite any United States Supreme Court authority in your brief?

A No.

[195] Q Did you cite any federal authority in your appellate brief?

A No.

Q They are all Commonwealth of Pennsylvania cases?

A That's correct.

Q Now, did you read the Pennsylvania Supreme Court opinion when it came out in this case, I'm sure you did, right?

A No, I did not see it.

Q You never saw the opinion in this case?

A I saw the opinion that was denied, yes.

Q I'm asking if you read it.

A I believe. I don't have it in front of me.

Q Did you ever read it?

A Probably did.

Q The Pennsylvania Supreme Court addressed the question among others of whether or not the jury instruction regarding torture was proper. Do you recall that?

A Yes.

Q That's not a point that you recognized in your brief?

A No, I did not.

Q Had you ever – I'm just going to name a [196] couple of Supreme Court cases related to that question. Have you ever read Godfrey v. Georgia?

A I may have. I, you know –

Q Are you aware now of the – were you aware at the time you wrote the brief that Godfrey v. Georgia deals with arguably facial vagueness of aggravated circumstances?

A No, I was not.

Q Had you ever read Mainer v. Cartwright of 1988?

A Probably. You know, that name rings a bell.

Q Do you have recollection of what it addressed?

A No.

Q It – he told you that it also addressed the question of facial vagueness of aggravated circumstances. Can you think of any strategic reason why you would not have put that in your brief if you thought the issue worthy?

A I didn't – I didn't consider that issue, you know, that's – I didn't put torture in. I didn't discuss the issue of the vagueness. So it wasn't in – I mean –

Q Just a couple others. How about Klements v. Mississippi or Shelby, decided 1990.

[197] A I don't recall reading those later or before that. All the paperwork I had in this case I turned it over to your office. So I wasn't able to review any of the briefs or opinions prior to today.

Q Do you know what Mainer v. Cartwright or Shelby or Klements, any those cases I just mentioned, do you know what they have to say about the aggravated circumstance of heinous, atrocious and cruel?

A I remember reading about it, but I couldn't tell you about it at this moment. I couldn't tell you at this time, but I remember reading those issues about torture, looking it up, researching it at one time or another.

Q In regard to this case?

A Maybe not in regard to this case, but at some time I have. Those cases do ring a bell, but I haven't reviewed them. I haven't seen them at this point, so I couldn't tell you about them.

Q Do you remember if you read those cases before or after you wrote this appeal?

A I couldn't tell you.

Q Now, you raised a point on page 14 of your brief regarding the reading of rape victim's testimony for the jury at the sentencing phase, do you recall that?

[198] A That's correct.

Q Do you recall what the arguments on both sides were regarding the admissibility of that transcript?

A Did – it was presented in front of the Supreme Court on the issue – one of the issues was – it was no – there was no law in Pennsylvania about that specific issue. All you had was law concerning bringing in the prior record, the prior accounts. But to read the transcript itself and go through the transcript word by word, there was no case in Pennsylvania that said that. That I argued was going to be beyond the bounds of what was intended by the law.

Q Now, in your evaluation or the treatment of these issues, were you aware that the Commonwealth's reason was authority for being able to read that transfer and show the prior burglary as violent crime?

A Yes, I argued that before the –

Q Commonwealth v. Beasley?

A – Supreme Court. The justices were citing a case that was not relevant at the time of the case that made the burglary appropriate at this time but not at the time that the defendant was – the crimes were committed.

[199] Q All right. Let me – just so we can make this out quickly. At the time of the trial proceeding, the Commonwealth argued that Commonwealth v. Christie was

the authority that said burglary is not inherently violent and thereafter we have the right to read the transcript.

A That's correct.

Q And is it also correct that probably three weeks before the penalty phase the Supreme Court decided a case called Commonwealth v. Roland?

A That's correct.

Q And Commonwealth v. Roland, which is the one you've heard by the Court, that burglary is inherently violent?

A Yes. Because it was brought up when I was arguing that very issue. And that was assuming that it did appeal any or all of this..

Q So Christie and Roland and the application, one to the other, how they impacted on the admissibility of the transcript is obviously an important issue?

A That's correct.

Q Are you aware of the decision Commonwealth v. Baber which essentially affirmed the whole Commonwealth v. Roland that is that burglary is an inherently [200] violent crime?

A I may have seen that case. I'm not aware at this point.

Q How about Commonwealth v. Rivers, which was decided 1994 which stands for the same proposition. Are you aware of that authority?

A Without the paperwork in front of me, no.

Q Have you – having just said that Roland and Christie and their interplay were important issues in this case, isn't it true you didn't cite either of them in your brief?

A They were cited in Court.

Q Were you in court?

A I wasn't in court.

Q They were cited in court or from the brief?

A They were cited in court.

Q Did you have strategic reason for not putting them in your brief?

A At the time of the brief there were other issues that I wanted to bring forward to help in the case that I did not put normally on the brief.

Q My question is, did you have a strategic reason?

A No.

Q Was it an oversight?

[201] A It may nave been an oversight.

Q The last thing I wanted to ask you about, sir, was the first point in the brief related to the admissibility of photographs in this case. Do you recall that?

A Yes.

Q Did you ever see the photographs?

A Yes, I did.

Q Where was it that you saw them?

A I saw – I can't recall where I saw the photographs, but I did see them either from the district attorney's office – somewhere along the line I did get to see the photographs.

Q Do you know – withdrawn.

Did you ever determine whether those photographs were forwarded to the Pennsylvania Supreme Court for their viewing?

A I thought that the file was sent to the Supreme Court, the whole thing, those photographs were included.

MR. WISEMAN: Very well. Thank you very much, sir.

* * *

CROSS-EXAMINATION

BY MS. PARADIS:

[202] Q Just a few questions, Mr. Nelthropp. Mr. Nelthropp, did you have a different type of relationship with the defendants that you were appointed to represent post trial than those that you are appointed to represent pretrial?

A Well, the ones that I have pretrial I get – I have more familiarity with and I represented them through the trial process. And when I got a client afterwards, the case that's already been completed it's more difficult. I have to jump in and then see what was there from before and try to learn the issues that I wasn't present to see myself, but I want –

Q And you do that by review of the transcript?

A That's correct.

Q And you indicated – you indicated that you kept those transcripts until you were finished writing the brief, is that correct?

A That's correct.

Q And you indicated that Mr. Rompilla's case was not the only case that you worked on during the period of time that you represented him as appellate counsel, is that correct?

A No. At that time it was on Mr. Sieger and myself doing the conflicts, you know, work. And we were getting a lot of cases. I'd spend maybe three [203] or – I probably went to Court almost every day on the conflicts.

Q When you did sit down and review the case, reviewed the transcripts, did it receive your undivided attention during the time that you were actually working on the case?

A Yes, when I sat down to review it.

Q Did you familiarize yourself with the facts of the trial?

A Yes, I did. I spoke with Mr. Dennis Charles – Fred Charles and Maria Dantos. I spoke with them about the case. And I spoke at length with Fred Charles, because he had been the trial counsel, about what the issues he felt were important since he was the one that had tried it.

Q Did you receive from the public defender office their file?

A Yes. What they gave me was a file with items in it, and that's what they gave – what I received. I then continued over to the – to the individual sitting here.

Q You did research on this case, is that correct?

A That's correct.

Q You wrote a brief?

[204] A That's correct.

Q Familiarized yourself with the facts of the case?

A That's correct.

Q So you didn't ignore his case?

A No, I did not.

Q You may not have had correspondence with Mr. Rompilla on the basis that he would have liked, but – or sent him, the things that he would have liked, but you didn't ignore his case?

A I didn't ignore his case. That case was one of those things I was doing at the time. And it was something I was doing. It wasn't just something that I just didn't want to deal with.

Q Okay. Now, you were asked about your familiarity with certain cases, and you indicated that you were familiar with the case law that held that burglary in and of itself is a crime of violence, correct?

A That's correct.

Q You brought those cases to the attention of the Supreme Court for what reason?

A To help in the defendant's appeal.

Q So when you –

A To help in his case, his argument, and the [205] argument of his appeal.

Q So when you presented that issue to the Supreme Court, is it fair to say that you didn't present that issue solely on the basis of whether or not there was prejudice in the reading of the testimony, but also that it was unnecessary, because burglary was, in and of itself, a crime of violence by definition?

A That's correct.

Q So you raised those issues in front of the Supreme Court. They heard your issues and made a decision despite your raising them, is that correct?

A That correct.

Q You already indicated that they queried you on that particular area of the law?

A There was a member – several of the justices discussed that issue. That was brought up. That was – that's one of the questions that was addressed there in the panel before the Supreme Court.

Q Okay. And so they were apprised of the issue?

A That's correct.

MS. PARADIS: I have no further questions.

MR. WISEMAN: Nothing further, [206] Your Honor.

THE COURT: You may step down, Mr. Nelthropp. Thank you. Give it back to the court reporter if you could.

MR. NOLAS: Your Honor, what time would the Court break at, 4:30 or 5? Mr. Charles is back at his office. I told him we'd call him when we were ready for him, we're proceeding today. But it took longer with Mr. Nelthropp. If Your Honor wants to we could pick it up tomorrow or break for the day and start fresh tomorrow.

THE COURT: Apparently my secretary called Mr. Charles to tell him to come on over, so we'll go for a while on it then.

THE COURT: Mr. Wiseman, Ms. Paradis, my law clerk just gave me this. My law clerk got from the clerk's file, the, pages in D-7. I don't know if you want anything more than that, Ms. Paradis. Are you satisfied that it be admitted? I assume if they are the identical pages and the case number is 1496 at 1994.

MR. WISEMAN: So the record is clear, we are agreeing that this came out of the Court file?

THE COURT: Yes. That's the D-7 I [207] believe, right?

MR. WISEMAN: Yes, Your Honor. One other aspect of the timing here, through no one's fault we didn't get to speak with Mr. Rompilla about the proceedings before he was brought in this morning. We came sort of late in the day. We were keeping track. We frankly wouldn't mind a slightly early break so we can spend some time with him tonight, could be extensive time. And it would be my request if we do 'break now. I would appreciate that. It would be my preference.

THE COURT: Since Mr. Charles is on his way I believe, right, I think we'll take a little bit. We won't stay too long. We'll go maybe to quarter of 5.

MS. PARADIS: I have a 5:00 appointment.

THE COURT: That's why I thought the quarter of 5 would be – is that enough time for you? Are you all right then?

MS. PARADIS: Yes.

THE COURT: We'll just be in recess. I'd like the people to stay around here until Mr. Charles gets here. He should be here momentarily. His office is very close. All right. We'll be in a [208] brief recess.

* * *

(Whereupon, a recess was taken.)

THE COURT: All right. Mr. Wiseman.

MR. WISEMAN: Yes, Your Honor. Mr. Charles.

* * *

FREDRICK CHARLES, ESQUIRE, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q What's your occupation, sir?

A I'm an attorney.

Q For how long have you been an attorney?

A. About 18 years.

Q And working backwards if you can just give us a brief description of the types of law you've practiced in those 18 years?

A Okay. Well, I've practiced criminal law since I passed the bar. If I can go backward and start forward I started with Attorney Wallace Worth's office in 1977. I remained there until 1979. I became assistant public defender in '79. I was an assistant [209] until 1991. In 1991 I became chief public defender. I remained as chief until 1991 at which time I became Lehigh County Solicitor.

I remained solicitor from '91 until the first week, of January of 1994. Since '94 I've been in private practice. I've done criminal defense for my entire career. I do federal litigation, personal injury, divorce, contract work, a little bit of everything.

Q Obviously you know the defendant, Ronald Rompilla?

A Yes, I do.

Q You do know him as you represented him in this capital case?

A Yes.

Q That was roughly 1988?

A Yes. I think this offense took place in January of '88. And the trial was in October and November.

Q And that was while you were chief public defender?

A Correct.

Q Did you have any other public defender assigned to the case?

A Attorney Maria Dantos.

[210] Q Was there a breakdown of responsibility between the two of you?

A What do you mean by that?

Q Well, do you each have separate responsibilities in the case?

A I guess. I mean not really. We both worked the case. We worked it. I was first chair, she was second chair. She had certain responsibilities, but they weren't really allocated, this is what you'll do, this – it's as it came up. She would interview the defendant.

We had an investigator who would conducted investigations and report back. We dealt with forensic people. I would assign things for her to do, and she would do them. But it was kind of like it really was more so co-counsel, you know, but we split up responsibilities.

Q Was there a division of responsibilities in regard to the guilt and penalty phase?

A She – what we did in the public defender's office for years we had a capital offense, and we would have one person responsible for the death penalty phase because of the nature of that kind of proceeding. I took the case in chief, she took responsibility for the death penalty phase.

[211] But this is not to say that she did not have responsibilities or work with me on the case in chief or that I didn't work with her on the death penalty phase. I don't know if that answers your question.

Q Was there, for lack of a better term, a chain of command as a final decision maker?

A Me.

Q And that would apply to the penalty phase?

A It would apply to everything in that office for every day that I was the chief. The responsibilities were mine, I had the last say, I was a hands-on chief. I was at every trial that my office had during that entire period, and I made decisions on trials that I was trying and that others in my office were trying. I had the last say on every issue in the Rompilla case. Does that answer the question?

Q Sure does. By the way, you produced a number of documents in response to this subpoena that was served on you I guess by both through the Commonwealth and my office. Aside from those documents you produced do you have any other handwritten documents or typewritten documents that you have yet to get your hands on?

A No, sir.

[212] Q You have given us everything?

A As I advised you earlier, I had some of the files in a building on 10th Street that had water damage. Some of the files were destroyed. I've gone through everything. Especially I received your subpoena duces tecum. And the documents I provided you were documents that I found in other files. Some of them were forms also with like suppression motion

and law and argument on that. So, yes, you have everything that I have, as far as I know to date.

Q There was an issue in this case that arose during the guilt phase regarding the jury question about accomplice liability?

A Correct.

Q Would you tell the Court your understanding of what that issue was in terms of the note?

A What I understood happened was that after the closing when the jury got together and started talking about it, somebody in the jury raised the issue that what if there – what if he was acting as an accomplice, can't we treat him the same as if he was an actor in chief.

And so a question came back very shortly after the jury went out. And the question was if we find that he was acting as an accomplice, can we [213] convict him of first degree murder. That's what I would I [sic] recall. Basically I haven't seen this since – you know, this is just straight up out of my memory.

Q Do you have any thought as to the evidence that went in in the guilt phase that would have led to that type of a question?

A Yes.

Q What are your thoughts on that?

A When we looked at the forensics and we cross-examined one of the FBI witnesses there was evidence that Mr. Scanlon had defense wounds. And they had taken fibers from his hands and other parts of his body and had tested them. And they came and they took samples from

Mr. Rompilla I believe because they were certain, they being the Commonwealth or FBI or prosecution, that they would match, and they didn't.

And so it was a very, very, very sensitive way of handling this, okay. But what I told the jury was, and I even stood in front of them and I almost did it in a boxer stance. And I said as Mr. Scanlon was defending himself who he was fighting with, you know, would have evidence of who that was when he opened his hands. And they tested it, and one thing, you know is it wasn't Mr. Rompilla. And so you cannot convict him was my argument if somebody fought [214] with him. But it wasn't Ron. And that was the argument I made to the jury.

And if I can explain it, there was a lot of evidence here. Mr. Scanlon had very rare blood. I think the testimony was four percent of the world has it. That blood was taken, and there was a print right by his head that they lifted of the tread. It was a Reebok tread, and it matched Mr. Rompilla's tread. And the blood that they tested from his shoe turned out to be matched up with that rare blood. So it was kind of a touchy situation.

But I thought our best evidence to argue against his being the fighter or the actor with Mr. Scanlon was the samples. But we tried to handle it strategically in a way that we left that issue open, saying whatever, that if you find he was there because the footprint is there or because that blood is on the shoe, then that means that he was, if his foot hit that tile. But it's great big help to take the actor or the one who had committed the murder out of there.

The problem I have and when I say strategically I'm a little cold on this, because I haven't looked at this in a

while. And the file had been out of our control for a long time. But I believe that there were three stab wounds from the back with a [215] knife that reached the heart. That's my recollection, one or two or three. But at least one of them reached his heart from behind.

The blade was broken off in two places, and this was a very smart jury. And you would figure it would take a bull of a person, at least I thought, to be able to take a knife, ram it through someone's back and get to the heart, ram it in and break it off in two places. And I mean Mr. Rompilla is a very, very imposing man as he is now. But he was, you know, also probably even more so in '88.

And he was very well put together. And, you know, I wanted to go real light on that, because I just wanted to have that in the jury's mind, that whoever Mr. Scanlon had the defense wounds from, and we had the samples from it, it wasn't Ron, so his footprint is there, but that doesn't make him the murderer. And that's the way I approached the jury closing.

Q Obviously you didn't argue in the guilt phase that he was an accomplice, because this wouldn't have gotten you anywhere?

A I didn't argue this. It wasn't charged. He wasn't charged as an accomplice. He never told us he was an accomplice. He never told us somebody else did [216] it. He said he didn't do it. He had – and he had no idea who did. And, you know, so I took the facts that we had.

Q I guess my question was perhaps inartful. Your knowledge of the criminal law is that if he were convicted as an accomplice it would have been the same level of culpability as being picked as the principal?

A Yes. But he wasn't charged as an accomplice.

Q You didn't pursue that strategy in the guilt phase, that there was an accomplice?

A Not that he was an accomplice. I pursued that someone else did the killing, even if he was in the place he wasn't the killer. The killer who's – whoever's fibers matched up with whoever they took off Mr. Scanlon. That was my idea there. I don't know if that answers the question.

Q Okay. Would you agree that with the rendition of the guilt phase verdict, that Mr. Rompilla's role as a possible accomplice took on a different dimension?

A Yes.

Q And why is that?

A Well, jeez, okay. On one hand you have an argument that he had a minimal role to be used as a mitigating factor. And I believe that was even [217] requested in a point for charge to Judge Mellenberg. On the other hand, you've got a jury looking at you that's going to decide his life who you have just gone through an entire trial and just closed and told them that he was not the actor, he was not the murderer and you can't give you [sic] any evidence as to who was.

And now you're going on to the death penalty phase, tell them yes he was involved, but it was minimal, you know. He was one of the people doing this. He was, but he was an accomplice. We know who did it, we just didn't tell you. I think that's very dangerous strategy, because I think what it does is first of all the jury's looking at you in a very different light after they have convicted him.

Second of all, I think it's a problem to in effect now tell them, yes, we weren't telling you the whole story up to the guilt phase in and out, but now we're going to tell it to you. I think you risk losing any chance to appeal to their mercy-dispensing power.

And so that it took on a different aspect. It is certainly something that we were cognizant of and we had to deal with. But it is a strategy thing. And it's something we talked about, we requested a point for charge for Judge Mellenberg to [218] charge them concerning that mitigating factor. And we talked about how we were going to, you know, handle it, use it, but not have it alienate the jury to the point where they would be – would be so angry we lost any chance to appeal to their mercy-dispensing power.

Q How did you then handle it with the jury? Well, you didn't do the penalty phase per se, you didn't present the witnesses, make the argument, but how did the defense team handle the accomplice issue in the penalty phase?

A I believe that Attorney Dantos made a very, very passionate appeal to the jury on closing that, hey, you're not certain that he was the actor here, your question that came back it is very, very strong that you have some question. And if you have questions as to whether he was the actor, whether he was the killer, or whether someone else did it, then you can't – you can't, you know, execute him. You can't give him death.

If you have a question, you have to give him – give him life. And she handled it very well. And she handled it totally in accordance with the strategy that we talked about. And I think that the way she did that, did appeal to their mercy-dispensing power. And I think she did it [219]

extremely effectively. The problem that came up and I think did us in or harmed us wasn't the way she handled that issue, I think she handled that extremely well and exactly the way we talked about handling it.

Q Was arguing or – withdrawn.

Was the treatment of the accomplice issue in the penalty phase something that you talked about and strategized over before the jury sent the note or after the jury sent the note? Or did you see this issue coming down the road or something that you responded to after the jury's note came out?

A The accomplice issue first really criticalized [sic] itself when we saw some of the forensic reports from the FBI that didn't match the fibers taken from Mr. Scanlon with Ron. That's when that issue first came on board that Mr. Scanlon put up a unbelievable fight, okay. And so in doing so and with the classic defense wound, and I can still remember asking Dr. Mihalakis to explain them, they were classic defense wounds.

And they showed he put up one heck of a fight. And so my argument was if he put up that kind of a fight with Ron, clearly some of Ron's fibers or something from Ron would have appeared in his hands or on his body. The fact that there were none meant [220] that Ron wasn't the one battling with him. That's the argument, and that's what crystallized to me, and that's how I approached that FBI witness. And that's how I cross-examined him.

And that's when it first crystallized. I thought we got all we could get from that during the case in chief. And I argued it to the jury. And I thought it was fresh in their minds. And I thought that, you know, the argument took

place on a Monday, and I think Maria's argument took place two days later. And I thought that that issue was pretty fresh with them. And I thought she handled it very well.

Q I guess what I am asking is a little different. You made some sort of decision to treat the accomplice issue in the penalty phase in a particular way? My question is, when did you arrive at that decision? Was it before or after the jury sent out its note?

A On the penalty phase?

Q Yes.

A I'm missing your question, and I really don't know what you're asking me.

Q Sure. Let me try again then. Obviously you were concerned with the accomplice issue as it related [221] to the forensics and the guilt phase. And you were concerned with that for some time in the case as you just said?

A Concerned? I thought it might have been the other thing we had in our favor. Concerned? That was the one thing I thought we had to hang our hat on.

Q It was a big issue?

A Yeah.

Q My question is leaving the guilt phase, did you give consideration to the use of the possible accomplice argument in the penalty phase? Did you consider that before the jury note came out, or did you consider it after the jury note came out?

A The jury note came out while they were deliberating the guilt phase.

Q I understand that.

A Okay. The – did you want to know whether as they were doing that did we consider –

Q Did you get the jury note and say, oh, they are really thinking accomplice, we can use this in the penalty phase. Is this the first time you thought about it, or had you thought about it earlier?

A We thought about it from the time that it became evident to us. We talked about that. At least I thought about it. I don't know. I thought we would [222] have discussed it, but I think that it was evident to me that it was an issue from the time we got the reports back.

As to whether or not we said that at the time the note came, what we were concerned with when the note came was what the Commonwealth was trying to do, to answer that question. And I thought that that was a very – a very good sign that they thought someone else might have done this. But what we were – we are focusing on from the time that note came was fighting with the DA and fighting with Judge Mellenberg about whether or not they should read the accomplice charge.

Our position was no. Accomplice liability is not charged here. Your answer to the jury has to be if you find he acted as an accomplice, no, you can't convict him as the way he's charged. And that took a lot out of us for several hours at this time. What he did – what he did ultimately, you know, we waited it out. We thought that we would use the accomplice or the minimum or minor role argument as a mitigating factor.

And we also put it on our points for charge. So, yes, I mean we did at some point discuss handling that. But now to get it to the jury [223] is what I was talking to you about before. I thought it was something more important to just argue than to try. And just – I don't know how you would introduce evidence, especially after his position was he never did anything. And we argued to them that, you know, he night have been in there, but he had nothing to do with this killing.

Q In your experience as a criminal attorney it's not unusual, or is it unusual, to argue apparently inconsistent positions to a jury? Have you done that?

A It's not unusual. Have I done – have I done that? I think it would be disastrous. It would have been disastrous in this case.

Q I –

A At times, depending on the facts and circumstances, it can be done.

Q I appreciate that you may think it would have been a disaster here. My question was one step before that. Can you argue inconsistent defense to a jury?

A I think you can, and I think the result is pretty clear each time you did that I think you come back with your hat in your hand. But you can't do that, and that's my experience in 18 years and about 1,000 cases overseeing, that's a problem to do this. And it's certainly a problem in a death penalty case.

[224]Q I'm just asking, sir.

A Okay.

Q So, if I understand the gist of your testimony relating to the penalty phase, the accomplice issue is something that you thought was an issue but one that had to be treated rather gingerly?

A Yes. And I think she handled it absolutely perfectly, couldn't have done better. And I don't think I could have handled it better. And I don't say that just because I'm here testifying. I thought the way she handled it was perfect and exactly the way we talked about when we were strategizing on how to handle it, couldn't have been done better. That's why I was glad she handled it. I don't think I could have pulled it off or done it as well as she did.

Q Let's move on to another area. There was obviously a controversy in the penalty phase regarding the reading of the testimony of the rape victim from a prior conviction of Mr. Rompilla's.

A That's a minor way of putting it. There was controversy, that's correct.

Q And let me just put it in a nutshell for the record and tell me if I'm doing it accurately. Essentially the Commonwealth wanted to read the transcript of the rape victim's direct testimony, and [225] in support of that argument they cited authority that since burglary is not apparently a violent crime, they need to prove that, in fact, in this case it was a violent burglary being the Commonwealth's position.

Q All right. And the defense position was what?

A The defense position was first of all that there is no way that this transcript should ever be read. That the value of reading it, even to prove a violent burglary, compared to the prejudice of what was contained in that

entire statement, the probative value of reading it was unbelievable [sic] outweighed to the perjury of Mr. Rompilla by reading it.

We also said that even though our feeling was we would stipulate and concede that the burglary that he was – that they were talking about from 1974 which had a rape attached to it, that was a crime of violence. And so for the purposes of that phase there was no need to read that transcript into the record. We will concede all you want that extra element that aggravating factor that there were a significant number of convictions of felonies involving violence. Significant at the time being more than one.

And we would concede that he had [226] that. And we would concede that element and concede that the burglary of Joe's Bar or whatever that was in '74 was a violent burglary. And we offer [sic] to concede that. The DA had said you can't limit me. I have the right to go in and do whatever I want to do as far as I want to show it to the jury.

I don't know if we could have objected more to anything. I mean I think the report is filled with objections almost on an hourly basis. But we object to it, offer to stipulate, and the Judge ruled that they could bring that transcript in. And that is what did that phase in for us, not the handling of the accomplice in my opinion.

Q Now, just to digress for a moment, when I read the transcript I noticed a number of objections where you tried to get a word in during the penalty phase, and the judge, often after the DA objected, said Ms. Dantos is handling this part, we're only going to hear from one lawyer, and you were sort of –

A I was dying. Yes. Yes, I remember.

Q Puzzled?

A Yes.

Q Dying would be fine?

A Yes.

Q So Ms. Dantos was left with the [227] responsibility for making the legal argument to keep out the transcript?

A Correct.

Q With you chiming in when you could?

A With me two inches away chiming in every chance I could.

Q Now, do you remember the DA relied specifically on a case, Commonwealth v. Christie?

A I don't. I don't. I don't remember him doing that. If he did, he did. I'm sure the record will show it, but I don't recall it.

Q Okay. Well, let me just tell you the DA did rely on a case called Commonwealth v. Christie which stands for the proposition that burglary is not inherently a violent crime. And the district attorney is entitled to bring forth proof that in this particular instance it was violent, the burglary was violent, and that was authority for getting this transcript in. Does that sound right to you?

A It may have. To be honest with you I know he was – he may have cited something, but I don't recall that being it. Maybe in the transcript that he cited that, but I

remember his arguing it, that he had the right to explore it and to get all of that in to show how violent it was. And if you say it's there I'll [228] take your word for it. He may have. I just don't recall if he used authority or cited that as authority. He may have.

Q If I were to tell you that your argument happened on November the 2nd – well, November 2nd, 1988?

A That's when it happened, sure.

Q That legal argument took place and the Court ruled that the Christie cite could come in. If I were to tell you that on October the 18th, 1988, approximately two or three weeks before that argument, the Pennsylvania Supreme Court decided a case called Commonwealth v. Roland which overruled Christie on point of burglary being violent.

A And said that they are inherently the crimes of violence?

Q Is violent?

A Yes.

Q Now, given you are familiar with Roland I take it?

A Yes.

Q And given the fact that Roland was decided some two to three weeks before this legal argument, if I were to tell you that neither you nor Ms. Dantos cited Roland, which overruled quite literally Christie [229] on this point, would it be fair to say that that was a mistake on your part, the defense team's part?

A If we failed to cite it, I think it was because we offered to stipulate to it. And I don't know that you could – you could. We offered to stipulate that it was a crime of violence. I think we even offered it. I do know it was on the record. It should be that, you know, that it was involving a rape, you know, of a crime of burglary to rape.

Q So your stipulation wasn't accepted, right?

A The stipulation – the Judge ruled that he could do it. And I don't think – I don't – I don't know that the Judge was going to change his mind on that even if we gave him that case. We give him cases, Attorney Wiseman, that showed him that he could not read the accomplice charge to the jury. And he read it anyway. So I don't know that – I don't know that that was a mistake. What that would have had in it was a mistake.

And I don't know if it was whether it would have any impact on this judge, because we went to a great length to show him the law that he could not read the accomplice charge to the jury, and he did. And then he did not read the culpability section, and we went to a great length and showed him that he had to [230] do this. So I don't know if that would have any impact on that. Whether it's a mistake, I don't know.

Q I'm not asking you to predict what the judge might have done. What I'm asking you is, you were two lawyers arguing legal point. Your opponent cited the case that was effectively gutted two weeks before by the same court. My question is, as a lawyer wouldn't you – wouldn't it have been appropriate and proper for you to have had that more recent authority that supported your position?

A And my – it might have been, sure, if we had it. If we had that authority or if we had an opportunity to present him with law in response, if he would have given us a chance to go down on that issue and even present to him some authority, he didn't give us the time on that issue to do anything. And that's why I didn't remember whatever Mr. Moyer said concerning the Christie case. I think it was somewhat of a spontaneous argument. And I'm not sure that had we had ten cases that he was going to give us a chance to go down and get it and show it to them.

And like we said, we had given him case law and authority. What he had been doing and he still did was in effect what the district attorney asked for.

[231] Q You knew well before the penalty phase that the DA was going to try to read transcripts?

A Yes.

Q And the letter you wrote to Mr. Rompilla says, look, if you go to the penalty phase they are going to read this transcript?

A That's correct.

Q So you knew ahead of time that this was going to be an issue?

A Correct.

Q Now, given that you knew ahead of time it was going to be an issue, it's really not Judge Mellenberg's fault that you didn't have the case with you?

MS. PARADIS: Objection. Objection. The Roland case –

Q You didn't go downstairs to get it? It's really not his fault that you didn't have it with you?

MS. PARADIS: Objection. The Roland case was decided after the letter to Mr. Rompilla.

MR. WISEMAN: That's not what I'm talking about, Judge. I'm talking about the argument of November 2nd.

THE COURT: All right, Objection [232] to the form of the question is sustained. We'll take this up tomorrow morning. We'll end now, and we'll take it up with that question at 9:15.

MR. WISEMAN: One housekeeping matter, Your Honor. We have scheduled a number of lay witnesses to appear in the morning. They are all working and taking time off from various things as I realize Mr. Charles is as well. We've already sort of lined them up for the morning.

Could we possibly ask Mr. Charles to come in in the afternoon? People have already gotten permission to get off of work and whatever their other obligations are going to create havoc with the schedule.

THE COURT: What's your schedule?

THE WITNESS: It's going to be a problem, Judge, for the afternoon. I have juggled everything today until tomorrow morning and everything in the morning to the afternoon.

THE COURT: We'll take Mr. Charles and get that done at 9:15. All right. We'll be in recess or adjournment until 9:15 tomorrow.

* * *

(Proceedings adjourned.)

[233] CERTIFICATION

I.

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me of the above cause and that this is a correct transcript of the same.

DATE: 1-6, 1997

/s/ Moira E. Evans
Moira E. Evans, RPR
Official Court Reporter

II.

The foregoing record of the proceedings on the within trial is directed to be filed.

DATE: Jan. 6, 1997

/s/ Thomas A. Wallitsch
THOMAS A. WALLITSCH, J.

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME IV, PAGES 653 TO 938

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Relevant District Court Docket Entries 1

Notes of Testimony (11/1/88, penalty-phase)..... 2

Notes of Testimony (11/2/88, penalty-phase)..... 120

Notes of Testimony (11/3/88, penalty-phase)..... 211

Pennsylvania Supreme Court direct appeal opinion, *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) 241

Court of Common Pleas post-conviction opinion 257

Volume II

Pennsylvania Supreme Court post-conviction opinion, *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998)..... 269

Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 5) 288

Commonwealth's Response to Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 9)..... 441

Volume III

Relevant District Court Exhibits (District Court docket entry 17):

Notes of Testimony (3/28/96) 456

Volume IV

Notes of Testimony (3/29/96) 653

Deposition of Dr. Barry Crown 824

TABLE OF CONTENTS – Continued

Page

Volume V

Deposition of Dr. Carol Armstrong 939

Deposition of Dr. Paul Gross 1015

Deposition of Dr. Gerald Cooke 1057

Deposition of Dr. Robert Sadoff.....1102

Deposition of Dr. Frank Dattilio.....1162

Lodging

Sacred Heart Hospital Records on Ronald Rompilla ... *L1

School Records on Ronald Rompilla..... L11

Pennsylvania Department of Corrections Records (Initial Transfer Petition and Initial Classification Summary) L31

Juvenile Court records on Ronald Rompilla L41

Juvenile Court records on Nick Rompilla L49

Police reports provided to trial counsel through discovery L111

Reports and Commutation Recommendation prepared by Dr. Kate Erwin (1995) L121

Volume VI

District Court Opinion 1280

Third Circuit Panel opinion and dissent 1325

Third Circuit *en banc* ruling and dissent 1448

* Items paginated with L numbers are bound in a separate volume.

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CRIMINAL

COMMONWEALTH
OF PENNSYLVANIA

vs.

RONALD ROMPILLA

No. 1988/682

* * *

NOTES OF TESTIMONY

Heard before The Honorable Thomas A. Wallitsch, J., on March 29, 1996.

APPEARANCES:

Jacquelyn C. Paradis, Esq., and Michael P. McIntyre, Esq., (Atty. McIntyre appeared at the afternoon session only.)
for the Commonwealth

Michael Wiseman, Esq., and
Billy H. Nolas, Esq.,
for the Defendant

* * *

[2] INDEX

Witness:

Fredrick E. Charles, Esq.
Direct Examination by Mr. Wiseman..... 3

Cross-Examination by Ms. Paradis 102

Redirect Examination by Mr. Wiseman 122

Randi Rompilla
Direct Examination by Mr. Wiseman.....127
Cross-Examination by Mr. McIntyre 146
Redirect Examination by Mr. Wiseman 167
Nicholas Rompilla, Jr.
Direct Examination by Mr. Wiseman.....169
Cross-Examination by Mr. McIntyre 185
Redirect Examination by Mr. Wiseman 196
Barbara Harris
Direct Examination by Mr. Wiseman.....199
Cross-Examination by Mr. McIntyre 210
Redirect Examination by Mr. Wiseman 215

Exhibits Marked:
D-12 (dispensary card)..... 85
C-2 (letter from Sandy Whitby) 105

[3] THE COURT: All right. Mr. Charles.

MR. CHARLES: Good morning, your Honor.

FREDRICK E. CHARLES, ESQ.

resumed the witness stand and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (con'd)

BY MR. WISEMAN:

Q. Good morning, Mr. Charles.

A. Good morning, Mr. Wiseman.

Q. I neglected to ask you this yesterday. Did you ever review the post-conviction petition filed in this case?

A. No.

Q. Have you spoken with anyone about this case or about your testimony since yesterday?

A. About my testimony? No.

Q. Before we discuss Mr. Rompilla's penalty phase in detail, I just wanted to get some sense of your expertise in the area. At the time you represented Mr. Rompilla in 1988, had you ever done a capital case before?

A. To a jury verdict?

[4] Q. Yes.

A. No.

Q. Had you ever represented someone who potentially was looking at the death penalty?

A. Yes.

Q. Oh how many occasions?

A. Oh, geez.

Q. You you can give a ball park figure.

A. I would say half a dozen. I mean I'm – I represented people in numerous murder cases. I had the murder case – one of the codefendants with the little girl who drowned by the Lehigh River. I had a codefendant – or I had a man who murdered his wife. I represented him along with cocounsel. I had – you know, it's like a blur. This case that just came down, the Yohn case, that received a lot of publicity, I had one of the codefendants in

that when that case started out. That, I believe, originally started out – I could be wrong, but at least we were told there were possibilities of that being a capital case. I might be wrong on that, but that was my recollection. I had a double homicide on the east side which were to be capital cases, and then – but I got the murder charges dropped at the [5] magistrate. And I went to jury with that. But that – my charges were, I think, hindering apprehension, where the other two codefendants were charged with first degree murder. I had the case of Commonwealth versus Meixsell. I tried that to a jury. But that was not capital. That was – in fact, we did a group voir dire in that.

So I think I had several cases that were capital offenses, but they had never reached to the jury stage. And then I had tried – I picked a jury in the one case where it started out as a double homicide, but then part of the way through that we received a plea bargain from the Commonwealth where my client was to receive I think two years, and we took that. And I'm probably missing a couple. But, you know, I had done several murder cases. I'd say over a dozen. And I think at least half or a good percentage were capital offenses.

Q. All right. So the point being that you've had – prior to Mr. Rompilla's case, you had some experience in getting ready for and preparing and litigating a potentially capital matter.

A. Not only myself personally, but I also [6] helped my assistants. I know that before Mr. Rompilla's case we had a potential death penalty case – several of them – that I had assistants that were doing that I helped prepare also those cases. So, yeah, I have been involved in preparation

for death penalty cases or capital offenses numerous times.

Q. Now, yesterday Miss Dantos testified that she had been out of law school about two years at the time of the Rompilla trial.

A. Yeah, probably. I think she started in March. She started in February of '86 with our office. She was an attorney. February of '86. And the Rompilla trial began, I believe, in October – it was October of '88. So she had about two and a half years.

Q. So she was considerably junior to you in this case, obviously.

A. Junior to me, yes.

Q. Yes. And, as you said yesterday, you assumed and continue to assume full responsibility for the decision making and the preparation and such in the case?

A. Absolutely. But let me tell you something. Don't assume, because Miss Dantos was [7] junior to me, that she was junior in experience or junior in ability. Two and a half years in the Public Defender's Office, being time-tested with her caseload, she was anything but junior or inexperienced or a neophyte. She was junior to me simply by age and years in, but she certainly had experience. And any judge in this courthouse will tell you what a terrific assistant public defender she was.

Q. All right. Now, in preparing your capital case – in preparing this case, you certainly are aware of the importance of mitigating factors.

A. Correct.

Q. And, in fact, in your – what's been marked as Commonwealth Exhibit 1, your October 14th, 1988, plea letter to Mr. Rompilla, you refer to the importance of mitigating factors in his case.

A. Correct.

Q. And you went so far as to actually recite verbatim the entire death penalty statute, including all the mitigating factors that theoretically apply to any – not theoretically but that apply to any capital case.

[8] A. Correct.

Q. Now, three potential mitigating factors in any capital case that are obviously recited in your letter – and I will refer to them by the shorthand of E-2, E-3, and E-8.

A. Okay.

Q. And by that particular – you're aware of E-2, the defendant was under the influence of extreme mental or emotional disturbance?

A. Correct.

Q. And E-3, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law are substantially impaired?

A. Correct.

Q. And then there's the catchall E-8, any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense.

A. Correct.

Q. So you were obviously aware of those, and you counseled Mr. Rompilla on them; right?

A. Correct.

Q. Now, would you agree with the proposition that counsel has a duty, in preparing [9] a capital case, to fully investigate their client's background?

A. Correct.

Q. And that's because the catchall mitigator even uses the words "background of the defendant" as a potential mitigating factor; is that right?

A. Correct. Yes. "Fully investigate," though, is somewhat of a subjective term. But fully investigate given the resources and given what you have, I guess for lack of a better word, in way of time leading in. "Fully investigate" to somebody who has one case and nothing else compared to somebody who has 120 cases – what's full investigation? It could mean different things to different people. But I agree that you should use your maximum resources to investigate, you know, a capital offense and anything else that would help your client.

Q. Sure. In regard to that duty to investigate, would you agree with the proposition that it applies not only to the E-8 catchall but to mental health mitigators E-2 and E-3?

A. Yes.

Q. Would you agree with the proposition [10] that your duty to investigate for mitigation is equal to your duty to investigate the guilt phase?

A. Yes.

Q. Now, when you prepare for a capital case, in your experience, and you investigate and gather material, depending on what material it is, you might give it to an expert to evaluate.

A. You might.

Q. Depends what it is, obviously.

A. If you have anything, you might, yes. Whatever you have.

Q. Now, in regard to the two mental health mitigators and to the catchall mitigator, what are some of the obvious things that you would look at in preparing for the penalty phase of the capital case?

A. Okay. Well, the catchall is you look at anything. I know of a case – and we even talked about a case that Mr. Moyer, who was the D.A. in our case – there was interim – before he did our case, he had a capital offense with an individual where there were something like seven aggravating or six very severe aggravating factors or five aggravating factors, and the only mitigating factor was that he had once broken up a fight at [11] the Seven-Eleven Store. And the jury weighed that over the five aggravating factors and gave the defendant life. So in investigating on the catchall, you look for anything. Okay. That's a little different than investigating what you're going to do on the, you know, in effect, diminished capacity/ mental infirmity type mitigators. I think what we did or what –

Q. We're not up to what you did yet. I'm just trying to get a sense –

A. Well, you would take advantage – I mean you would investigate. You would speak with the defendant. You would investigate as best you can to determine whether or not this person suffered from some kind of psychiatric problems or had a history of psychological problems. And then you would get – I would get that to a professional, since I'm not a professional in that field, and I would try and let the professional conduct the testing and determine whether or not there was – I think that the mitigators – that the other two are more so for a professional testimony than the lay testimony. And I would get that to a professional to try and develop it.

Q. Let me ask you this. Would an obvious [12] thing to look at, both in regard to the two mental health mitigators and the catchall, be that you would speak to the defendant's family and acquaintances, friends, things of that nature?

A. Yes.

Q. And would you inquire into the defendant's living situation at the time of the commission of the offense?

A. Yes.

Q. Was the person living in a mansion or was the person living on the street?

A. Yes.

Q. Would you look back in time at the person's living situation as they grew up? Were they a child that had everything that he needed and love and attention? Were they a child who was brought up homeless?

A. That might – you might look to that. You might and you might not.

Q. Well, we're talking now about investigation. What –

A. Well – okay.

Q. Let me ask my question. What – leaving aside your resource question, do you have any reason why you wouldn't investigate whether your [13] client was raised as a homeless child?

A. I would investigate by asking my client, "How was your childhood? Were there any problems that you suffered? Any kind of abuse? Tell me something about – is there anything you can tell me from your youth till now that can help us? Tell me, is there anything that sticks out? Don't think whether it's important or not. You just tell us, and then we'll determine whether or not we can use it." Investigate it that way. Would I send somebody to the person's elementary school to talk to the teacher to see if they remember him from 25 years or 40 years before? No, I didn't have those resources in the office. So I would do an investigation. But again, "investigate" is a subjective term. Investigate given what your resources are in light of the office. I had two investigators and 2,000 cases. And I'm sure you know the difficulties with bugeting [sic] caseloads and having to get investigations done given the resource you have. I will talk to the client, talk to the family, and see if anything developed from there. If something did, we would then amplify on it and develop it. If it didn't, we would go from there. There's a certain point in [14] time when you have two or three thousand cases in a year that you have to deal with some of the things your client tells you and give that some full faith and credit and rely on it.

Q. All right. In this particular case Mr. Rompilla told you a number of things about his involvement in the commission of the offense that you didn't believe – withdrawn. He told you a number of things that you checked out and subsequently determined probably weren't true.

A. He told – yes.

Q. He told you a couple stories. You didn't think that they were quit [sic] right. Or he told you to check them out, and you checked them out.

A. He told us stories. We investigated them. We tied up investigators. We went and checked them and found, one by one, the stories to be just absolute fabrications.

Q. So he told you more than one story?

A. Yes.

Q. He told you different versions of the events. You checked them out seriatim, and they each proved, in your view, not to be quite accurate?

[15] A. They – if you want me to use that term, "not to be quite accurate" is a way to put it. They proved to be just bold-faced, outright lies.

Q. I think in your plea letter you actually refer to him throwing a curve to Miss Dantos.

A. He said to me, after we sent our investigator out for days to follow up on one of his stories – no, that was on a different one. After he told us one of his stories and then we hired experts to come in to follow it and they told us that story is literally impossible, we went back to him and said, "This one is impossible." And then – "And here's why. We have evidence, and it's absolutely forensic evidence

that what you're telling us is impossible." And then he said, "Well, okay, that's right. But I wanted to see how sharp Miss Dantos was, so I threw her a curve."

Q. All right. So you went to some lengths, both in terms of the expenditure of time and resources, to check out his guilt phase version of the events; is that right?

A. That was on the guilt phase, yes.

Q. I understand. That's what I'm asking. Now, do you think counsel in a capital case has an [16] obligation in preparing for the penalty phase – and perhaps even the guilt phase – if there's a mental health issue, to obtain prior records about your client? Would you look for a rap sheet, want to know if your client has priors?

A. Well, I would get a rap sheet as part of the discovery. So I wouldn't look for it. That – I would expect that in discovery. I would talk to my client, see if there is anything that he tells me or that his family tells me that sets up a flare that there's a problem. Then from there I would have my client interviewed, examined, and tested by an expert. And if the expert needed information, I would do my doggone best to get it. But I would get him to an expert. I would not determine that this might be important psychologically that this happened. I would let an expert say, you know, "In testing him, in talking to him, he told us that this happened, and we think it's important. Go obtain it." So, I mean, I can't be any clearer. I talk to the client and have the client tested for the purposes of those mitigating factors that I think require expert testimony.

Q. Very good. Now, do I take it that [17] routinely what you're saying is you would not – withdraw it. Is what

you're saying that you would not routinely, in a capital case, order your client's school records?

A. That's correct.

Q. You wouldn't routinely order military records?

A. That's correct.

Q. You wouldn't order hospital records?

A Order hospital records from where? Would I go and find out where my client – I mean –

Q. Would you try to get your client's birth records?

A. No.

Q. Would you look at the files related to any prior convictions that the prosecution intends to use in the capital case?

A. Depending on the time. If the prior conviction is one that's recent, I might. If it's one that's stale, I might not because of the length of time that's passed. What happened with somebody, you know, 20 years before may not be as relevant. And so, depending on the nature of the crime, the length and time between that crime and [18] this crime, there's a lot of factors that would enter into whether or not I would go looking for a prior document.

Q. Well, let me ask you a little more specifically with regard to Mr. Rompilla's case. In your plea letter, which was written approximately two months before trial started, you make reference to the testimony that is going to be read into the record regarding the prior rape.

A. My plea letter was rendered four days before trial started.

Q. Oh, my mistake. I'm sorry.

A. Okay.

Q. My mistake.You're right. It's October. Is it safe to say in your October 18th letter –

A. October 14th, Mr. Wiseman.

Q. You're right again, October 14th, 1988. You were aware at that point that the District Attorney was going to use that transcript.

A. He was going to attempt it. I told you that he also said if he takes – If Mr. Rompilla takes the stand, I'm going to – and in any way brings into question his representation or character, I'm going to try and impeach it with [19] bad acts," which we knew about of acts where he had been alleged to have committed another rape and to have beaten an older man, both of which were never followed through, and that we knew they were going to try to do that. We were going to try and stop that. We were going to try and object to their putting on the testimony of the prior rape. Those are some of the things that Mr. Moyer was very forthright in telling us that he was going to try to do, which is why we put it in the letter to Mr. Rompilla as soon as Mr. Moyer told us.

Q. Do you remember roughly how long before the writing of the plea letter that you knew they were going to use that transcript or try to use the transcript?

A. I'd have to look at the letter. I thought that Mr. Moyer told us a couple days before. He might have told us before. I thought – it's in the letter I think. But I'm not sure how much in advance. I thought he told us at the

time the plea bargain – it might be October 12th or something like that. I'm not sure of the day on that.

Q. Okay. That's fine. Just so I fully [20] understand – getting back to the penalty phase, just so I understand your position, you investigate based upon what your client tells you?

A. No, that's not my position. Okay. I know how you want to simplify this. But – and so I don't know if I can answer you in the terms of your question. But I'll try. We investigate the evidence that we have, the evidence that's given in a preliminary hearing. We look at the probable cause affidavit. We look at the examination that we took in this case from the preliminary hearing. We looked at the evidence that came forth during the suppression hearing. We looked at the evidence that –

Q. I'm talking about the penalty phase.

A. But whatever came, we – you know, you don't – we don't sit and separate it. It's an investigation. The penalty phase is something that we keep an eye on. But I have to tell you in this case you had a very, very objecting client. Whenever we tried to talk penalty phase and death penalty with him, he was resistant to that.

Q. Let's discuss that.

A. Sure.

Q. Let's discuss that. What I thought you [21] said just before was that you sit down with your client and you say, "Tell me how you [sic] schooling was," and your client would say, "I did okay in school." We're talking hypothetically. All right? If you have a client who is reluctant to discuss how his schooling was because he doesn't really

want to talk about the penalty phase, do you, as counsel, have a duty to go further than just talking to your client about it?

A. It depends.

Q. Depends on what?

A. It depends on what evidence you have in the case. It depends on what he's told you.

Q. You –

A. Let me finish, Mr. Wiseman. He didn't tell us, "I'm not willing to talk to you about my schooling. I'm reluctant to talk about my this." He said there was nothing wrong. "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, very smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me." He [22] said, "I have home box in my room that I can watch, and I'm bored being here listening to it, and I'm going to go watch home box," and he walked out. That's why, when we tried to go through the death penalty phase with him and he left, we wrote it in that letter. And I said, "Since you won't hear it when we sit there, it bores you, I want you to at least read it." His reluctance wasn't an overall reluctance where he said, "I don't want to talk about my childhood, because it's too painful. There was no indicator from anything he told us that would send us searching for elementary school records, high school records, any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. And

so no, we didn't go beyond that. And my professional opinion is that, given what Ron Rompilla told us during the numerous discussions we had with him and the countless discussions that John Whispell, our deceased investigator, had with him and was over to see him constantly, there was nothing that came across our table that would make us go looking for his elementary school records, his home life records, or anything. And if he knew of anything or his family knew of anything, [23] they never told us. And I know most certainly that we asked, and I know Miss Dantos asked.

Q. Asked what?

A. "What can you tell me about Ron? What was it like for him? What was his life like? What was it like growing up? What was his relationship? What kind of a brother was he? What kind of a brother-in-law was he? What do you know?" Their response was they hardly know him. I mean one said, "He was in a reformatory. He's been away the whole time. We didn't know him that well." Things of that nature. But I remember her specifically going one by one and talking to him. "Is there anything you can tell me? Tell me about yourself. Tell me about your background." She was, you know, meticulous to cover points. And she had a way of doing that, because she was legitimately concerned. And I thought it was disarming. They engaged in numerous what I considered to be cordial conversations. Some of the times I felt like I was in the way even being in the room, and I'd go get coffee. And she would sit down, and so would John Whispell. John Whispell was like a buddy with them, and they would go over and talk. "Tell me about yourself." [24] We undertook to try and determine from him and his family whatever

information we could. Nothing came across to us that made us do what you're asking about.

Q. All right. Are you aware of the dynamics that exist among people who are subject to child abuse, that they don't readily like to talk about those kinds of things? Is that something that you –

A. Sure.

Q. – see in your experience?

A. Sure.

Q. So you go to an adult – well, let's say – well, you go to an adult who may have had an abusive childhood, and you say, "How was your childhood? and the person says it was fine. Would you agree that, given your awareness of the abuse dynamics, that maybe it would be more prudent to go beyond the client and beyond those who may have abused the client to look for other indications of abuse?

A. It may in a vacuum. But, my goodness, you have – with 2,000 defendants you have over 50 percent that tell you, "Yes, I've been beaten. I've been raped. I've been molested." I mean, [25] what's the difference? It's hard to determine when someone says, "No, I had a great childhood. I had no problems," the difference between that and being in denial. I mean we talked to him more than once, and we believed that there was nothing outstanding. His family didn't tell us anything. I mean maybe the family would say, "Hey, you know don't believe him, because he was one heck of an abused kid." That never was volunteered. It was never told during any of the times that we talked to them. You know, even if Ron denied it, I mean, somebody in the family would have known it. His wife

would have known it. Somebody would know it to tell us. And I don't think that it's looking back and I really think it's classic. I don't want to say that. You're looking back at it in a vacuum. Because when he says, "No, there's nothing there," you know, what's the difference between the truth, there was nothing there, and classic denial? I'm not an expert. That's why I send them to an expert.

Q. All right.

A. And I figure that Dr. Cooke or Dr. Sadoff or Dr. Gross, who do this for a living, might be able to say, "There's something in the [26] way he denied this that shows it's classic denial syndrome, and we ought to explore it a little bit." So I get him away from me making that call. I'm a lawyer. I'm not a psychiatrist or a psychologist. And so I get him to a pro, and then I get on with the business of preparing the rest of my case. And that's what we did with Ron Rompilla's case.

Q. Now, obviously you're testifying that you – withdraw it. You're testifying that you spent a great amount of time and energy talking to the family to try to get to any issues that might have been there. My question –

A. Let me tell you that's not what I testified to. We spent a great amount of time talking to Ron Rompilla. We talked to Ron's family at different times. And different ones of us – John Whispell spent his time talking to Ron's family and investigating the leads and the wild-goose chases that Ron sent us on. Maria Dantos spent time talking with the family intermittently over the period of the course this case was proceeding in. So I'm not saying that I sat and spent –

Q. The defense team did.

[27] A. We did it at different times, and cumulatively we spent a lot of time talking to them, but not in any one bunch.

Q. Let me ask you this then. You know where the Allentown School Board is?

A. Yes.

Q. It's across the street –

A. That's correct.

Q. – from the courthouse; is that right?

A. Yes.

Q. All right. Some 300 yards away?

A. I don't know. Could be 300. It's across the street.

Q. Would you have considered it an undue expenditure of time to walk across the street, which may have taken you five minutes, and ask for Ronald Rompilla's school records?

A. Yes.

Q. That would have been an undue expenditure in time?

A. Yes, given the fact that we sent Ron Rompilla to two – the best forensic psychiatrist around here, to a tremendous psychiatrist and a fabulous forensic psychologist. I would walk across there – I would drive to Pittsburgh to get [28] his records if they felt it was necessary. But to get his records generally without anything else telling us that was necessary or that would be helpful, I would be spending my time on other things. But had

anybody said, "You know what we need here professionally? We need Ron Rompilla's school records," then I wouldn't think that it would be an expenditure of time to go to California to get them, and we would have gone and gotten the records from there or Missouri like we've done in the past. We would have gotten them if someone told us they were relevant. But on my own would I have just said, "Geez, I want to take a look at his records"? I wouldn't be able to interpret what those records mean and whether or not they fit into any kind of psychological profile or diminished capacity anyway. If I read them, they would be meaningless to me. And if Mr. Cooke, Dr. Sadoff, or Dr. Gross wanted them, we'd have gotten them.

Q. Let me ask you this. If you have evidence in a capital case that your client is mentally retarded, is that something that you ought to give to the mental health experts for their evaluation?

[29] A. I think I would give that to them to assist them. Maybe it's for background. Let them – I don't know whether that figures in or not. I would give it to them.

Q. Well, let me ask you something.

A. I would give it, but I would think that that would be something that they would want to know. If it's obvious that he's determined to be mentally retarded, I think that, you know – but they probably would figure that out themselves after they interviewed the person, and they probably might not need that. I would think – I would hope they would know that.

Q. Would evidence of mental retardation be something that you would want to present under the catchall "background of the defendant"? Is that something you

want the jury to know about – at least consider whether you want the jury to know about that?

A. Depending on – you know, I'm not looking to be evasive. Depending on what the nature of the retardation is, I may want to use that in the case in chief. I may want to use that under the mental infirmity. But I would have to know how to use that, having been given that by my [30] professional witnesses. I don't know how mental – using mental retardation as a catchall might be classic ineffectiveness if you could use that in one of the other factors. And I don't know whether you can use that. That's why we hired two psychiatrists and a psychologist.

Q. Okay. So mental retardation could conceivably be a catchall. It could also conceivably add something to the D-2 and D-3 mental health mitigators.

A. It might.

Q. It might?

A. Sure.

Q. If you have evidence that when your client was six years old he scored on standardized I.Q. testing in the mentally retarded rage, is that a piece of information that you think would be helpful to your mental health experts in their assessment of your client?

A. They'd have to tell me. I don't know. I would – if he scored low on a test, I don't know whether they start doing the Reitan Battery test or they do the MMPI test, you know, with 470 questions or whatever it is. I would think that they would – I don't know how many times I can [31] testify to this. I would not make the determination that an Iowa test score is something that would be

needed in the catchall or the mitigating phase element. I wouldn't make that determination. I wouldn't know whether that's important. I would think that the people who you give the charge to do the psychological testing and the MMPI and the Wechsler I.Q. test and the projective tests like the Rorschach test, I think that they would be the one to determine, "Hey, maybe there's something there." I wouldn't do it on my end. If they told me that it's important, I'd go get it. That's why I hired them.

Q. Okay. So your client tells you in your interview with him or you ask your client in your interview, "How did you do in school?" Your client says, "I did fine. Nothing unusual." You go to the family. The family says, "Yeah, he did fine." And you then report to your expert nothing unusual about –

A. No.

Q. Let me finish my question.

A. Okay.

Q. And you report to your expert, "I interviewed my client. He reports nothing unusual [32] about his childhood."

A. The premise is – no. What I say to my expert is, "Here's the file. Here's what my client's charged with. Okay. Here. What do you need from the file? Dr. Sadoff, Dr. Cooke, Dr. Gross, Ron Rompilla's charged with first degree murder. These are the facts. I have a file. Here's the information I have. What do you need from the file?" He tells me. It's put together and sent down to him. "Anything else you need, doctors, let us know. We'll go get." That's how I would do that. I would not give him, "This is what he said about" – I'd let him do the questioning. Maybe Ron Rompilla won't talk to me in the same way

he'll talk to the doctor when the doctor sees him. I would let the doctor handle that. And that's how I did it in ever case that I've seen.

Q. So then what you're saying essentially is that it is not your job to secure records, but it is your job to await your experts' direction to get records. Is that accurate?

A. Yes, having been giving nothing else on the front end from the client or family that would raise an obvious red flare, you know, to us I [33] mean if, there's something there that we know that might be of interest, I mean, if it's obvious – and I don't known [sic] what that would be. But I would most likely say if there was something that stuck out, if Ron Rompilla said, "I was beaten every day by my elementary school teacher for a year," and there are reports to show it, I might say to Dr. Cooke or Dr. Sadoff, "By the way, he told us he was beaten. every day for a year, and I don't know if that factors in. Do you want me to do anything?" If something like. that was on the front end, I might look at it. But hearing, "Everything was fine. It was a normal childhood. I had good things at home. No, there was no problem" – hearing that from his family, no, there's nothing that would make us go say, "Well, geez, just to be sure, let's run down every record on his life." No, I won't do that.

Q. We're not talking about every record in his life. We're talking about –

A. Well, school records. No, there was nothing in this case that would make me go to the school district on the front end. Had Dr. Cooke, as I said before, or Dr. Sadoff or Dr. Gross said, "We need those school records," we'd have gone and [34] gotten them no matter where they were.

Q. Did Ronald in your interviews with him indicate that he had a successful career in school?

A. No.

Q. In fact, he told you he stopped going to school in ninth grade.

A. Something – he might have told Maria that. I don't think he told me anything about when he stopped going to school. He told the group – I think he did – something to that effect.

Q. The defense team?

A. Yes.

Q. He had some indication that he didn't have exactly a, quote, unquote, normal experience in school; right?

A. He didn't finish school, which is not –

Q. He didn't – go ahead.

A. Mr. Wiseman, it's not unusual, dealing with public defender clients, to find public defender clients that didn't get through high school, didn't get through ninth grade, didn't go to college, didn't become doctors.

Q. It's standard that public defender [35] clients often have problems in their lives; right?

A. And they often have problems in school.

Q. Right. So it wasn't as if you knew nothing about Mr. Rompilla's background to maybe make you think about looking into the school records; right? You did know something.

A. I knew that he didn't finish school.

Q. You knew that he didn't finish. And from your experience as a public defender and as a criminal defense attorney you know that people don't finish school for a variety of reasons which can be indicative of problems growing up; right?

A. Yes, they can be.

Q. They can have abusive parents or they could have alcoholic parents.

A. Sure.

Q. They could be stupid; right?

A. Correct.

Q. They could be mentally retarded; right?

A. Correct.

Q. They could have learning disabilities; isn't that right?

A. Correct.

Q. And these are all things that can cause someone not to finish school; isn't that right?

[36] A. Correct.

Q. And yet when Ronald Rompilla told you he only went to ninth grade, you stopped there. You didn't look any further; is that right? You didn't look further.

A. In light of what I've testified to. When we asked him, "What was your childhood like?" "Fine." "Did you have any problems growing up?" The questioning – something to

that effect. "What was your childhood like?" He said it was fine. "What was your relationship like with your parents? Any problems?" He said, "No, everything was fine." Yeah, given what he told us, there was nothing that I thought that required us to get those records.

Q. Did he tell you he was an "A" student?

A. No.

Q. Did he tell you he belonged to extracurricular clubs?

A. No.

Q. Was he on the tennis team or –

A. No.

Q. – the chess club?

A. No.

Q Was he the president of his class?

[37] A. No.

Q. Was he active in student government?

A. No.

Q. Didn't tell you any of that?

A. No.

Q. He gave you no reason to think he was a good student?

A. No. He didn't give me any reason to think he was any kind of anything with school. He just said he didn't finish school and he didn't – I don't think he said it to me,

but the word that I got back was that he went to ninth – has a ninth grade education or tenth grade. I don't even know what grade it was. But he didn't finish high school.

Q. Now, the same kinds of things that might have prevented one of your public defender clients from finishing school might also affect how his siblings do in school, theoretically?

A. I imagine, theoretically.

Q. If you have an abusive parent or there is some sort of alcoholism going on in the home or genetically the family maybe not the brightest family around, that could conceivably affect other siblings in the family; right?

[38] A. It could.

Q. And you knew in this case Ronald Rompilla's older brother was in a reform school at age nine?

A. Correct.

Q. Did that give you any indication of maybe there was something going on in the family that you needed to look for – look at a little bit more closely?

A. No.

Q. That didn't mean anything to you?

A. It didn't give me any indication, with what we had, that there was something else to look for, no. I don't know how many times I can say this. I'll try again. I was waiting to hear from the professionals. I'm not a professional. I would think that they would do the intake and that they would do the testing and that they would come back to us. I didn't make that determination on the front

end. I never did. That's why I hired professional people. So, you know, as many times as you want to ask that, I'm going to respond the same way. In this case, from what he told us, what I did do is I sent him to what I thought are two of the best forensic psychiatrists and [39] psychological – psychologists and psychiatrists in the area. And then I also sent him also to Dr. Gross, who I have an immense amount of respect for. And he practices locally. But no, I did not do it on the front end. And I don't know – I've seen families where one person in the family drops out at ninth grade. Another person in the family becomes a lawyer. There are people where you have siblings where one sibling just doesn't excell [sic] and the other four do or other five do. We had people – family members where there was one, for lack of a better term, black sheep in the family. So the fact that Ron says everything was fine and Nick was in a reformatory didn't tell me this is how I should interpret it psychologically. What it told me was: Get him to the best people and let them handle that end of it and come back and tell me. And that's what I did.

Q. Now, we talked earlier about the responsibility to investigate the guilt and the penalty phase and that those are equal responsibilities.

A. It's all part of the defense.

Q. Okay. When Ron told you, "I didn't do it," and he gave and you a set of facts to support [40] that, you went and had those facts investigated; right?

A. Some of the facts. An alibi we investigate. I mean we looked at the discovery.

Q. You checked his story; right?

A. We checked out his alibi and – yes, we checked his alibi out. Basically that's what he was –

Q. The truth remains then, sir, that when he told you everything was fine at school, you didn't check that out; did you? Did you?

A. You want an answer to that?

Q. Well, I want to know if you did or you did not check it out whether he did well in school. That's a very –

A. Okay. I did not check it out whether he did well in school. But –

Q. My question, sir –

A. Let me answer.

Q. My question, sir, is if you checked it out or you didn't. That's my question. Easy question.

A. I did not check out his school. I checked out his alibi. I felt that – in my mind I can understand, as an attorney, when someone [41] says, "From the hours of three o'clock till 7:00 I was with Butch Lovelace." And if I asked Butch Lovelace, "Was he with you from 3:00 till 7:00?" and Butch says no or says yes, I thought that was something, as an attorney, I can grasp. I didn't need a higher power to explain that to me. So yes, I could check out his alibi and feel that that was something I could understand and interpret. When he tells me, "I did well in school," and I didn't know that – what the meaning of that means, I think that's something that I'm not qualified as an attorney or as a lay person in determining. So I sent him to a psychiatrist or a psychologist. But I understand what an alibi is, having been a defense attorney for at that

time I don't know how many years, and I know how to check out an alibi. It's not that difficult.

Q. Let me ask you this, sir. If you checked out your client's school records and they indicated that he was the valedictorian and it indicated that he was one of the brightest students ever in the class and that one time during his career in school he saved three lives in a fire, all right, and you say to your [42] client – assume those facts – and you say to your client, "What was your your school life like?" He says, "Nothing unusual." Are you saying that you wouldn't feel any obligation or duty to check school records for both good stuff and bad stuff, good stuff that maybe makes your client look better to the jury as well as less flattering things that perhaps could be used in the penalty phase?

A. If he told me that, then I would tell – Dr. Cooke and Dr. Sadoff.

Q. If he told you what?

A. That he saved three lives.

Q. No, he didn't tell you anything. He's telling you, "My school life was nothing special."

A. How did I learn that he did that then?

Q. Well, I'm asking you if your client tells you – let's put it this way. If your client tells you, "My school life is fine," and you learn later all those facts, after the fact, wouldn't you think that maybe you should have gotten school records to see if there was anything good or bad in your client's background to use in the penalty phase?

A. Okay.

[43] MS. PARADIS: Objection.

THE COURT: Sustained.

BY MR. WISEMAN:

Q. Now, you're aware that mental health professionals rely on what's known as collateral data?

A. Yes.

Q. All right. So, in other words, they don't just sit down with the client/patient and do an interview and rely on nothing else.

A. Okay. I mean that – I think that's an unfair generalization. It depends on the professional, and it depends on what you expect the professional to do. When I sent Ron Rompilla to Dr. Cooke, I expected that he would do a MMPI. I expected he would get some kind of a personality profile. I expected that he would do a Reitan Battery test to determine if there was any brain damage. I would expect that he was going to do something to the effect like a Rorschach test, some kind of projective test, and some kind of a Wechsler I.Q. test, something like that that he would do data – he would get data. I expected that Dr. Sadoff and Dr. Cooke would then at some point in time want to see the data or they might [44] call him or they might – and Dr. Sadoff or Gross, I mean, may rely upon that. I expected testing to be done, interviewing to be done, those types of things from those people. That's what I'm sending him down there for. So collateral information – what collateral information they need contemporaneous to doing that kind of testing, yeah, I expect them to get whatever they need. And I also expect them, if they need a school records, to call me and say, "We don't have his school

records. Can you get them for us? They're important." and we go get them. Or he might say that "these school records mean nothing. We don't – it's not important. We found on the Reitan Battery test this, or we found on the MMPI test that he has an odd way of thinking" or he's paranoid or he has wierd [sic] tendencies or this or that. If something came up there and then they said, "Now, is there anything you have that can amplify that?" then I will go through whatever we had. And if, as you're saying, I had it in my hands that he at some point in time was valedictorian of his class and did all of that, I would then turn that over and say, "Does that affect it at all?" But I expected that that [45] decision would be made and those tests will be done by the doctors.

Q. Did you ask Dr. Cooke – do you have a specific recollection of asking Dr. Cooke to do a Reitan Battery?

A. No, I didn't have a specific recollection of – that's what I expected him to do, because that's – my experience with him is that's the kinds of things that he does. That's what's done. I mean, he has done – he's been one of our witnesses on several cases that involved issues involving insanity and mental infirmity, diminished capacity, those types of things. And time after time – I know that he was hired in the case of Commonwealth versus Warren Schaffer, and I know that he did – I believe he did all of those tests. And we had Dr. Sadoff and I think Dr. Gross or one of the other local psychiatrists looking at that. So I know he did that case. I know he had been in a couple of the cases that were in my office. And I know that, you know, that he had perform those, because I think he came up and testified. I think he also did some work in a case that we had originally but we conflicted out that Attorney Makoul did – I think the name [46] was Kroll or something

like that – with a boy who killed his girlfriend. And he had come in and testified in that case, and I watched some of that. So I know that Dr. Cooke had – as part of his package, that those were the types of things that he did. I specifically didn't set up, "These are what you're to do, Dr. Cooke." I think that most of the conversations with Dr. Cooke were between I think he and Attorney Dantos.

Q. So you don't know for sure that he did a Reitan?

A. No, I don't. I didn't say he did a Reitan, only that this – I'm saying those are the types of things that he did.

Q. I'm not arguing with you, sir. I just want to understand what your testimony is.

A. Okay.

Q. So you're not sure that he did a Reitan?

A. No, I'm not sure what he did.

Q. Do you have a recollection of specifically asking him to do one?

A. I didn't talk to him on the front end, Mr. Wiseman.

Q. When I say you, your defense team.

A. Did Maria ask him to do a Reitan [47] Battery? I don't know if she did. Because I was not in the room I don't believe when Maria talked to him about what we wanted. I'm not sure. I'm not sure if she did or she didn't. She might have, I mean, but I don't recall it specifically.

Q. Did you ask any of the doctors how he did on the Reitan if they did one?

A. No. No, I did not.

Q. Did you – do you have a recollection of whether the defense team asked for any neurological or neuropsychological testing to be done on Mr. Rompilla?

A. I don't know what was – I would never have asked for that. It would be – I would have expected it to have been done, and I think so would Maria have expected it to have been done. Because that's the type of stuff that he did, and that's that – we used him before, and those were the things he did in his workup. I don't know whether one test leads to another. I don't know if you do the MMPI first, if you do the Reitan first, if you even do it, if it calls for it. I would figure that would be up to Dr. Cooke or Dr. Gross or – I don't even think Dr. Gross does that. He is the psychiatrist, but I think Dr. [48] Cooke would be the one to do that. That's what our experience had been in the office. I don't know that you have to specifically direct them. I think that, again, you start becoming the psychologist.

Q. Why would you ask or why would you expect a Reitan neuropsychological or neurological test to be done?

A. If it was necessary, I would expect it. If it wasn't, I wouldn't.

Q. What does it test for?

A. It tests for some type of brain damage. I think the Reitan does brain damage. Like I said, I don't know how many times – again, I'm not a psychiatrist or a psychologist. I think that Reitan tests brain damage. How it tests it I don't know, but I think that's what it does.

Q. Why is it important – why is brain damage potentially important on a capital case?

A. Because I think that can be a mitigating factor.

Q. On the catchall as well as –

A. As well as probably one of the other ones.

Q. The mental health mitigators?

[49] A. Sure. But I'm not telling him to to [sic] the Reitan.

Q. There's no question posed at this point.

A. Okay. Sorry.

Q. That's all right.

Now, assume that in a court file kept in this building there is an MMPI on your client that shows him to have scored abnormally high on the schizophrenia scale, that it's a valid test. Is that something that you think your mental health professionals would like to see in doing this evaluation?

A. I don't know. I would think that what they would do is do fresh tests. I'm not sure that – and again, if they had done a test six months earlier or tested the person – if it's in the file because we had the person in 1987, and they did it, and now its 1988, and it was a recent test, fine. Then I might want to say, "Hey, didn't you just do something a year ago?" If they did it umpteen years ago – or how long those tests last for I don't know. I would think that they would test all over again when you send a person in, and I don't know whether they would want that or not.

[50] Q. So you're not sure whether they would want to see historical mental health information on your clien..

A. I don't know what they would want to see. I mean, historical mental health information? I don't know whether a MMPI test, you know, how long – whether that's forever, whether that's at different stage. I don't know. I would expect that the MMPI that he's done in '88 would be the one that I'd want to, you know, rely on.

Q. All right. If, in that same MMPI, it showed that your client scored abnormally high in the paranoia scale, in the hypocondriacal [sic] scale, in the neurotic scale, in the obsessive-compulsive scale, are those bits of information that you think you ought to get to the mental health people so they can have a historical perspective on your client?

A. Again, you're putting the horse in the wrong end here. I would expect the mental health people would obtain that and give that to us.

Q. They go to the court file and pull it for you?

A. No, they conduct an MMPI. That's what [51] I'm paying them to do.

Q. A new MMPI. My question is: Do you think they would benefit from – well, if you're diabetic in 1996, do you think your doctor who sees you might want to know if you were diabetic in 1986?

A. If I was testing –

Q. Sir, it's an easy question.

A. Its not. It's really not. It's a loaded question. The MMPI that I ask for –

Q. I'm asking about diabetes, sir.

THE COURT: Just a minute. Just a minute.

BY MR. WISEMAN:

Q. I'm asking you –

THE COURT: Just a minute. When I'm talking, you stop, Mr. Wiseman.

MR. WISEMAN: I apologize.

THE COURT: I'm getting tired of it.

MR. WISEMAN: I apologize.

THE COURT: Now, we're going to act civilly. We're not going to talk over. You've been talking over Mr. Wiseman. Mr. Wiseman, you've been talking over Mr. Charles. [52] Let's knock it off right now. I'm warning you. All right.

MR. WISEMAN: Very well.

THE WITNESS: I'm sorry, your Honor.

THE COURT: All right.

MR. WISEMAN: May I pose my question?

THE COURT: You may.

BY MR. WISEMAN:

Q. I'm asking you, by analogy, if a medical doctor is seeing a patient in 1996 who has a chronic condition, would that medical doctor want to see records related to that cronic [sic] condition that predates his evaluation by ten years?

A. I don't know. You'd to have ask that medical doctor. And if he said yes, I would get them if I had them.

And if he said no, I'd let him make that decision. I wouldn't – I wouldn't superimpose what I think he might want in a field that I'm not an expert in. So I would let him tell me.

Q. Now, if that same Court file showed your client in 1976 to be reading – I'm sorry, to be in the third percentile in mathematical ability, [53] is that something that you think your expert ought know? If your answer is no, you can just say so.

A. I don't know, Mr. Wiseman. I don't know what my expert wants or needs for any particular test on any set of facts. I don't know, and I don't pretend to know. I don't know if those things are valuable to him or not, even if we had them. I would expect that when you send somebody, he's going to do a current workup. And if a 12-year-old or 20-years-old test is important, he can incorporate it into his current workup. I don't know. I'd let him determine that.

Q. How would your mental health expert in this case know whether the MMPI was done ten years earlier if you don't tell him that it exists?

A. He might talk to the, you know – I don't know that answer. But he might say to the defendant, "Do you see this test that we're giving you? Did you ever take a test like this before? Do you remember whether you took it. Did you ever see – have you ever done anything like this before?" I don't know. Maybe Dr. Cooke can explain that better than I can how he would know. I'm sure that he would be able to develop what he needs to develop on the testing. At least I would [54] think that. And he might be able to determine that or ask, you know, "Were you ever examined for diabetes before? Did you ever take insulin

before? Did you ever take an MMPI? Were you ever in an office like this? Did anyone ever do this with you before?" I would think that a doctor would have an easier time of eliciting that information and get it current than me. And I won't pretend to know what's important or what's not important in the field of psychological professional opinions or psychiatry.

Q. Do you get records about your client's prior convictions in all your criminal cases?

A. Yes.

Q. Do you – well, why would you do that? Why is that important?

A. It's a discoverable rule. I mean, it's a rule in discovery. that they're to provide you with that. And in some cases you may want to know because it may impact your filing some of kind of motion, and in other cases it may have no – absolutely no effect. And in cases where the offenses are 12 or 14 years old, it's probably nothing. It is probably of no value to you except – to argue to the Court that any kind of an attempt [55] to impeach on something 14 years ago is stale.

Q. Do you get your client's prior prison records if he has one?

A. What do you mean by that, "prior prison records"?

Q. If your client's been in prison before, do you try to get their records from the prison to see how he did in prison?

A. No.

Q. In a capital case?

A. No, not unless something stands out, no. There was nothing about his prison records – you mean as to misconducts or something like that?

Q. Well, are you aware that a person's prior prison conduct is a potential mitigating factor according to the United States Supreme Court?

A. I would not go to get his prison record short of something sticking out from something that he told us or something from our interview, no. I would not go, as a matter of fact, and get his prior prison records. And I didn't then, no. If you ask someone, "How are you getting along?" "Fine." "Any misconducts?" "No. I get along fine. It's no problem," then I would just say, [56] "Fine." I'm not – I wouldn't necessarily go and get the extent of the prison records, no.

Q. Now, let's assume that your client in question has scored in the mentally retarded range in I.Q. testing as a child for a period of six consecutive years. Or put it, in other words, from age six to 13 your client has scored in the mentally retarded range. And you sit down with your client and you talk to him. Would your interview of your client be a different one if you knew that on these tests he had scored in the mentally retarded range?

A. I'm not sure if I understand your question, Mr. Wiseman.

Q. If you think your client is mentally retarded because he scored in the mentally retarded range in the past, would you consider your client to be as reliable a historian than if he scored well in that test?

A. If I thought – if I thought he was mentally retarded, I would – you mean, if somebody made a determination and told me this person is mentally retarded?

Q. Right.

A. Okay. So now I'm sure that he is [57] mentally retarded, because an expert or somebody who knows about this told me he is mentally retarded. Would that affect my interview with him?

Q. Right.

A. In what way?

Q. Well, would you take what the client tells you at face value, or would you be more inclined to check it out?

A. It would depend. It would depend on what – the nature of the interview. I think there's different levels of retardation. And so it would depend on what was asked and what was said.

Q. All right. And I think, as you said a number of times, you are not a mental health person – you are not a mental health professional I should say – and you don't feel comfortable making those calls; right?

A. Right.

Q. All right. So you would want to sit across the table from your client and assess his I.Q. and factor that into how good a historian that client might be; right?

A. When you say – you mean when he gives [58] me a fact pattern, if he had a low I.Q., would I not want to rely on what he's telling me because he had a low I.Q.?

Q. Yes.

A. It would depend. I think that, you know, a person with a low I.Q. can tell me what his childhood was like. He might not be able to tell me, you know, something about nuclear physics, but he might be able to tell me about how he felt about his mother and father or his brother. So it may or it may not. I might rely on him a hundred percent even with a low I.Q. When you say he's a historian, it depends on what history he is talking about.

Q. Right. Now, if you say to your client who scores 110 on I.Q. testing, in the genius range, 120 – if you say, "Were you subjected to child abuse?" and the client says, "No, I wasn't," you feel fairly comfortable that that person understands the term "child abuse"; right? In general discussion they know what child abuse is, because they're a genius.

A. I guess. I don't know.

Q. Conversely, if the client has consistently scored in the mentally retarded range [59] and you said, "Were your [sic] abused as a child?" and he says, "No," wouldn't you agree that you might have to look a little deeper and not just take that at face value?

A. It depends. Not absolutely. And those are very extreme levels between being retarded and being genius. Those are very extreme levels. But even at the lower end it would depend, and it would depend on how I felt the person – what the information was. It would depend. I don't think you can answer this the same way every time. It's not a general type of an answer that you can give. It would depend. I might not be able to. I might be able to. It depends.

Q. Are you familiar from your work on the range of I.Q. scores and where the mental retarded range starts roughly?

A. I've never worked on I.Q. scores. I don't know where you got that. I'm not familiar with what – I didn't know 110 was genius, and I don't know what breaks where. It's not an area that I know. And so I've never done work in an I.Q. area. I don't know where you got that from.

Q. I didn't get it from anywhere. I was asking you.

[60] A. Well, you started the question in my work in the I.Q. area I think. So I haven't done that.

Q. I meant in your work in being a criminal defense lawyer.

I want you to take a look at Exhibit 8.

A. Okay.

Q. Exhibit 8 has been admitted as the authenticated records in the possession of the Allentown School Board in regard to Mr. Rompilla. I'd like to direct your attention to the first page of the exhibit. Approximately half way down you'll see an entry that says "9-54, test SRA," and skip over. You see "I.Q." and the column to the right. Do you see that?

A. Yes.

Q. Now, part of that I.Q. number is not visible; is that right? It seems to be obliterated.

A. I don't know. It looks like 60.

Q. Looks like six something; right? You think its 60?

A. Looks like six zero, but it's not obliterated on there.

[61] Q. Really? Maybe it's my copy.

You're right. It's a better copy than I have.

All right. So it says I.Q. 60?

A. Yes.

Q. And that's 9-54?

A. Yes.

Q. And that's when Mr. Rompilla was approximately six years old?

A. Okay.

Q. All right. Now, just assume for these questions that the range for mental retardation is 75 and below.

A. Okay.

Q. All right. So it would appear from this school record that in 1954 at the age of six Mr. Rompilla tested in the retarded range.

A. Okay.

Q. Look at the next entry below that. 4-57, a couple of years later, he tests at 75 in the I.Q.

A. Yes.

Q. Right? Right on the border of the borderline mentally retarded range. Below that, [62] 10-59, you see the entry where he scores 64 on the you I.Q. test?

A. Yes.

Q. Right? That's when he was about ten or 11 years old.

A. Yes.

Q. All right. And right. Below that you see 6-61, you see Stan. Ach., which I'm assuming means – stands for achievement test. And you see the "R" there that he reads on a third grade level when he was about 12 years old? Do you see that?

A. I see the numbers. I mean, if that's what that means. It says R.3.3 S 4.1 and looks like an "L" with a line under it. I mean, whatever that means.

Q. Okay. Now, go down to the next set of entries where is says elementary school and it's got a series of years there. See it says 53 to 54 he was in grade K, and it goes on, grade 1, 2, and 3. Do you see that?

A. Yeah.

Q. All right. And if you look below that, the grades stop getting numbers and it says S-p.

A. Correct.

Q. All right. Are you aware what that [63] entry means, S-p?

A. No.

Q. If I told you that that entry meant Special Ed, would that fact be something that you think your mental health experts ought to be aware of going into their evaluation?

A. I don't know.

Q. All right. By the was [sic], all the I.Q. tests that we just talked about, are those things that you think your mental health experts ought to have been made aware of prior to their evaluation?

A. I don't know. I don't know what my mental health experts need to know or need to be aware of. I don't know. I don't know whether they would need this test or wouldn't need this test. I can't tell you. I would think if they needed it or they wanted to take a look at it, they would call me and say, "We need something else. Get it for us."

Q. All right. Let's just stop there for a moment. Would you agree that your answer implies that they knew of the existence of such testing?

A. No. No. I think my answer implies that if they test him, and he tests in a very, very low record, and they felt it was relevant, they would [64] say, "Geez, he's tested so low. I think it would be important for you get us his school records so we can incorporate that in with our testing." And then I would do that. But I don't think I would make that determination on the front end. I would get it for them when they asked for it.

Q. If you turn the page, about three-quarters of the way down you'll see entry 12-61, again under intelligence testing, and you'll see an I.Q. score of 69. Did you see that?

A. I am on the second page?

Q. Yes, second page.

A. Okay.

A. Where? You know, help me out here. Where am I looking for this? I don't see anything down here. You mean down near bottom?

Q. No, the exhibit – right here.

A. Okay.

A. It says "FS 69."

Q. All right. Under I.Q.

A. Okay.

Q. So your answer, I take it, would be the same?

A. Correct.

Q. That is not something you feel obliged [65] to provide at the front end as you put it?

A. Correct.

Q. Are you aware of environmental factors that can affect one's performance on I.Q. tests that have been in controversy about I.Q. testing, racial bias and cultural biases? Are you aware of that?

A. No.

Q. I am going to show you what's been marked as Exhibit 7.

THE COURT: Maybe, if we're going into a new area, this might be a good time to take a 15-minute brake [sic] for –

MR. WISEMAN: Sure.

THE COURT: – our stenographer and all of us.

MR. NOLAS: Your Honor, would you consider 15 minutes? I have an emergency phone call I want to get out of the way.

THE COURT: Certainly, Mr. Nolas. Be glad to.

All right. We'll be in recess for 15 minutes.

(There was a recess.)

THE COURT: All right, Mr. [66] Charles.

MR. CHARLES: Sorry, your Honor.

THE COURT: That's all right.

MR. CHARLES: There was another matter.

THE COURT: That's all right. All right, Mr. Wiseman.

MR. WISEMAN: Thank you, your Honor.

BY MR. WISEMAN:

Q. Is the exhibit up here?

A. Here. It's Exhibit 7 I think. Looks like No. 7.

Q. Mr. Charles, if you'd look on the exhibit in front of you, No. 7. If you'd turn 5 pages into it.

A. It says "Test Data Summary."

Q. That's right.

A. Okay.

Q. Before I ask you questions, let me just tell you that this exhibit has been admitted as having – it was in the court file related to Mr. Rompilla's rape prior – that was the prior that was read at the penalty phase.

[67] A. Okay.

Q. If you look at Section 2, achievement, do you see "reading score, spelling score, arithmetic"?

A. Yes.

Q. All right. And you see under the spelling score fourth percentile; arithmetic, third percentile?

A. The spelling score, it says three point – the four, is that talking about, at the end?

Q. Right.

A. Four and three, yes.

Q. Now, did you have that information when you were evaluating Mr. Rompilla's penalty phase presentation?

A. No.

Q. Look further down.

A. Well, let me say this. I don't – I did not have it in the file. I don't know if any of the – if Dr. Sadoff, Cooke, or Gross had this and used this in their testing. I did not have this document in the court file in question.

Q. In your file?

A. In my file from '88 in the homicide [68] case.

Q. Well, if I told you that Ms. Dantos testified yesterday that she didn't get this document, and you apparently didn't get it, would you agree that – is there any other way Dr. Sadoff, Dr. Gross, or Dr. Cooke got this document?

A. They didn't get it from us. They might have gotten it from wherever it's origin is. I mean, they might have gotten it from the files. They wouldn't have gotten it from our office, no. This was in an old court file in the courthouse? Most likely if they didn't use it, I would guess they didn't have this. I would think if they needed this, they would call us and say, "There's something in the court file. Get it." But, you know, I would think they didn't have it if this comes from an old court file.

Q. Now, again, not to be argumentative with you, but I guess I'm still not following. How would they know to get this from a court file if they don't know it exists? How would you envision that happening?

A. Well, I mean, I think some of these – I don't know what all of these tests are. But as far as the test evaluations, are these from when [69] he was in prison or are these from –

Q. These are from the 1976 evaluation done when he went into D.O.C. custody on the rape case.

A. They may have asked him, "Have you ever been evaluated or have you ever been tested or have you ever met with a psychiatrist or psychologist before? Had you ever done testing?" You know, "Did you ever do this before or go through this kind of procedure before?" They may have been aware that he was tested on a prior occasion by talking to him. That's one of the ways they might have

found out in their evaluation of him for the 1988 case. And if he remembered being tested and what for, he might have been able to tell them, and then they would have been able to make a determination whether they felt it was relevant or not.

Q. Are you suggesting that Mr. Rompilla would have been able to tell Dr. Cooke that "I took a WRAT"?

A. No. I think he'd be able to tell Dr. Cooke that "I was tested prior to my 1974 case or during it or as part of it. I took various tests." And Dr. Cooke probably could have said, "What kind of tests were they? What questions [70] were asked? What did you do?" And he would probably be able to determine what kind of a test it was I would think.

Q. Now, look down at Section 4, personality. You'll see an initial MMPI.

A. Yes.

Q. And that's the MMPI you spoke of earlier?

A. That is an MMPI.

Q. I'm saying that's the test – not the specific test but the type of test that you mentioned.

A. That's one of the types, yes.

Q. Do you know how to read one of those scales?

A. No.

Q. Now, do you see – looking down the record, it says T-Score.

A. Yes.

Q. It says 90 under S-c.

A. Yes.

Q. All right. If I told you that was the schizophrenia scale and that that score is an abnormally high score, do you think that's something Dr. Cooke and Sadoff and Gross might [71] have wanted?

A. You would to have ask them. I don't know.

MS. PARADIS: Objection. Asked and answered.

A. I don't know.

THE COURT: I think that's been answered.

MR. WISEMAN: I'll move on to something else, your Honor.

THE COURT: All right.

BY MR. WISEMAN:

Q. Exhibit 1 which I'm handing to you is Dr. Gross's report.

A. Do you want this back or –

Q. You can hold onto it if you want.

Why don't you take a minute and read through it, since it's probably been awhile.

A. Okay.

Q. Before we discuss the report, some other thoughts came to mind. You didn't get – or withdrawn. You didn't attempt to secure any medical records that might have existed in the local community related, to Mr. Rompilla; is that [72] right?

A. That's correct.

Q. Now –

A. There's second part. Can I answer that fully? I wasn't aware of any medical records of recent origin in the community since he had been only in the area for a short period. And for 14 years prior to that he was in prison. So, you know, at that point in time, no, I didn't secure them, nor did I think that he had had any kind – he hadn't told us that during the short period of time that he was out that he had had any kind of medical problem. And so, you know, he had been in prison 14 years or maybe even more leading up to that. So no, I did not look at any community areas.

Q. Well, would you agree that medical complications that may have occurred in his life many years back as a child might have some relevance to a mental health provider/evaluator?

A. They would determine that. It might. It might not. I mean, it would be up to – they would determine that, not me.

Q. You'd rely on the mental health provider to make a determination as to whether or not –

[73] A. Correct.

Q. – they were necessary and whether they existed?

A. Whether or not they were – whether or not there was – yes, whether they – even whether they existed, sure, whether or not there was a need for going to a hospital. If the person examining Mr. Rompilla learns during the course of his examination that Mr. Rompilla was in a hospital for this – during this period of time, yes, I would leave it to them to determine what's relevant, to bring that

in in their interviews and their examinations and then to determine whether or not those documents were necessary to help them in an evaluation. I would leave that to the professionals, yes.

Q. So your recollection is that Mr. Rompilla did not disclose to you any hospitalizations – disclose to the defense team any hospitalizations?

A. Correct.

Q. And, therefore, you had no hospitalizations to disclose to your experts?

A. And I don't know that I would be the one to make a determination whether in this case any [74] hospitalization is relevant to what they're testing. I would leave that to the professionals doing the testing.

Q. All right. So the professionals doing testing would make the determination as to whether or not this would be appropriate to get hospital records?

A. If they determined hospital records existed and under what circumstances. If he said, "I stepped on a nail and got a tetanus shot," they might say, "We don't need that." Okay. "How did you do that?" "I was at work." Something like that, they might not determine that's necessary. They might determine it is. I would leave that for them to do the interview, to determine what is there, what isn't there, and what we need to provide them, if anything, to assist the professionals in making their determination.

Q. All right. Look at Page 2 of Dr. Gross's report, the fourth full paragraph.

A. That starts, "There is no" – you mean that?

Q. Right. Look at the next to last sentence.

A. "He has never been in the hospital"?

[75] Q. Right.

A. Okay.

Q. All right. So that you didn't report any hospitalizations to the doctor, and presumably from this Mr. Rompilla didn't report a hospitalization?

A. I never did. I assumed from this that that's one of the types of questions that the professionals would ask. And if Mr. Rompilla said, "Yes, I had this or I had that," they would then say, "Hey, let's try and get it." Or "Let's call the P.D.'s Office and say there's some documents we need you to obtain for us so I can go further."

Q. And again, we discussed earlier, that is relying on Mr. Rompilla to be an accurate, reliable historian of prior hospitalizations.

A. Or if some test that they conduct shows that something's there. I mean, again, I don't know how many times I can tell you. It's not totally – I don't think totally relying on what comes out of his mouth. Some of their indicators or pointers may come from how he tests.

Q. Okay.

A. I don't know.

[76] Q. Dr. Gross makes a statement, an assertion in his report, that he has never been in the hospital.

A. Correct.

Q. That's all we are talking about right now. Okay. And my question is: He didn't get information from you to the contrary. Apparently he didn't get information from Mr. Rompilla to the contrary. Is not Dr. Gross's assertion, therefore, relying on Mr. Rompilla's accuracy in his description of "I've never been in a hospital"?

A. You'd have to ask Dr. Gross. I don't know what he relied on, and I would not venture a guess as to that. You'd have to ask Dr. Gross.

Q. Would you agree that there is a component of whether or not the reporter of the information is reliable if he's retarded, for example? Is that something that maybe you'd evaluate the accuracy of his statement, "I've never been in a hospital"?

A. Again, I don't know. You'd have to ask the doctor.

Q. All right.

A. I don't know what he relies on or what [77] he doesn't.

Q. What if a hospitalization took place when the person was two years old, and the doctor doesn't get the information from you? Are you suggesting that he would have to then get it from the client who was two at the time of the hospitalization?

A. I'm not suggesting he had to do anything. If the hospitalization took place, I don't – again, I don't know if there's a test or one of the questions or the testing shows something that would lead the doctor to have a question and that the doctor may talk to Mr. Rompilla or to the patient. He may call the family. He may call me and ask something further if something – if a red flag goes up

through the testing procedure. I don't know. I don't know if it's relevant. And, obviously, I don't know whether a two-year-old's hospitalization would evidence itself through the result of some test somewhere that would lead him to believe, "Hey, this person must have suffered something along the way. Go get all his medical records." That's what we left for the professionals to tell. I don't know. And how he would get them, if he felt [78] something was there to be explored, he wouldn't have to solely rely on Mr. Rompilla. He could call the Public Defender's Office and say, "There's something else to be explored. We think it's relevant. I think I need it for my testing. Go look for it." But that – and I don't know how many times I can answer that. But I'll continue to for each question. That's how we would do it. I wouldn't expect him to do anything. I would assist him in any way he wanted us to assist him and don't know if that two-year-old's hospitalization is relevant or not. That's why I'm hiring him.

Q. Dr. Gross obviously – well, withdrawn. Dr. Gross included an entry in his report that there has been no hospitalization; is that right?

A. That's correct.

Q. In your experience with Dr. Gross, does he put extraneous, unimportant material in his report or does he put germane things in the report?

A. He puts germane things in. He's put things in his reports that aren't germane. He does his reports; and his reports are his reports. Sometimes what's in his report I find to be or [79] found to be germane. Sometimes he's put things in his reports that I haven't liked on cases. Not every single sentence of every report that he's given me or my office was what I wanted to hear or was germane to

what I was looking for. It was germane to what to [sic] he felt was germane.

Q. Okay. But by "germane" I mean relevant to a mental health evaluation, not relevant to helping or hurting your case.

A. You know, like I said, the report is germane to – not every line is right on the money I guess. I don't know. I would imagine the doctor – if you're asking me if the doctor's report answers the question and does what you asked him to as far as doing the evaluation, yes. He does not hand out reports with superfluous, you know, matters being contained just to lengthen the report.

Q. All right. So you would agree then that making a notation about hospitalizations is something that the doctor did because it's germane to the overall evaluation?

A. It may very well be.

Q. Now, Exhibit 9 is a composite exhibit which has two hospitalizations from Mr. Rompilla. [80] I'm directing your attention to the one of his hospitalizations at the age of two. And if you look down midway at the page, you'll see a notation of a fever of 105 degrees in the hospitalization at some period in the case.

A. Yes, I see it.

Q. So just so the record's clear, have you ever seen this document?

A. No.

Q. Did your office – did anyone affiliated with the defense team to your knowledge provide this document to Dr. Gross?

A. I don't believe so, no.

Q. Does it appear then from the facts before you now, Dr. Gross's report and your knowledge of the hospitalization – does it appear to you that there's an inaccuracy in the report because of the fact Mr. Rompilla had been in the hospital as a child with that condition?

A. Let me see. Well, you know, what I say is Dr. Gross says he has never been in the hospital, and there's a report that he was in the hospital. So –

Q. So the report's wrong on that fact?

A. Whatever that is is whatever that is.

[81] Q. The report is wrong on that fact; isn't it?

A. I imagine. It appears to be. I mean, again, I don't know. I don't know – ultimately it probably is wrong, but I don't know why Dr. Gross said he's never been in the hospital. He could tell you that. If this is accurate, then what Dr. Gross has in his report is incorrect. If it's accurate. And I don't know why he put that in then.

Q. Now on the next line it says that he denied any head injuries.

A. Yes.

Q. Do you recall in your dealings with Mr. Rompilla seeing any prominent scaring on his head?

A. No.

Q. You never saw the scar above his left eye and right above his right eye?

A. If I did – I might have. I don't know whether or not he was scarred. I might have seen it. I don't know. I don't remember today whether he was scarred or not.

Q. Is that something that, in preparing your capital cases, you routinely do look for or don't look for?

[82] A. I would not look for that. The scarring – it depends. I mean, in his case I wouldn't look for it. I imagine that the professionals that look at him would look at it, want to know how it got there. But I wouldn't ask him. It might have been from a fight. I mean, you're not talking about somebody who is coming in out of, you know, a very nonviolent background as far as prison. He's in Graterford State Prison for 14 years. You know, that may very well have been something that he got there. I don't know. I didn't ask him. I don't know if – it was nothing that I remember; but if it was that visible, I would think, to the extent that that's relevant, that professionals would have noticed it and asked about it.

Q. Do you have any recollection of asking Mr. Rompilla how he got scars?

A. No.

Q. Did you ask anyone in his family or anyone who knew him how he got scars?

A. No. No.

Q. Did you ask any of the mental health providers to explore that with him?

A. No, I did not.

[83] Q. Now, leaving aside how he got it, would you agree that – well, withdrawn.

When you said he may have gotten it in a fight, the point remains, does it not, that however he got it if he had a blow to the head which resulted in his scar, that's something the mental health professionals would maybe be interested in exploring?

A. I don't know. I have scars. I mean, I have scars on my face. I don't know what that's indicative of. Okay. I know people with scars. I don't know what a scar over the eye or in the chin means. I have one myself. I don't know what that means about me. Okay. I would not determine what implication a scar over the eye or a scar – especially from someone who spent 14 years in Graterford Prison and has been – you know, which is a rough area to begin with – I wouldn't know what it presents and if it had any kind of import or whether it was a lead-in to a line of testing. I would leave that, obviously, to the professionals that examined him. And, obviously, when they examine him face to face they see his face. And I would leave it to them.

MR. WISEMAN: All right. Just [84] so the record is clear, your Honor – and I guess Mr. Charles maybe can't see – the one scar is down over the eye. It's actually in – sort of above, going into hairline area.

MS. PARADIS: Your Honor, at this point I'm objecting; because the scars, first of all, weren't apparent – if they were even in existence at the time, they're not apparent to Mr. Charles. And there is no evidence at this time that those scars were apparent at that time.

THE COURT: All right.

MS. PARADIS: They're here today.

I assume they're here today or you wouldn't be testifying about it.

THE COURT: I guess I'm not sure what – go ahead.

MR. WISEMAN: I would have an offer at this time. I'd like to introduce a one-page entry from Mr. Rompilla's Department of Corrections records from 11-8-88. These were records we obained [sic] from the Department of Corrections. And among other information, this entry notes a scar above the left eye. I'd ask to have that marked.

[85] MS. PARADIS: That was an admission after this trial. The scar – 11-88 was after he was convicted of the murder. So that doesn't tell us anything about when it got there or –

MR. WISEMAN: Your Honor, the entry is six days after the imposition of sentence in this case. The record may bear that out.

Can we have that marked?

(Defendant's Exhibit No. 12 was marked for identification.)

THE COURT: All right. It's been marked, Mr. Wiseman.

MR. WISEMAN: Thank you, your Honor.

BY MR. WISEMAN:

Q. Now, in the report Dr. Gross says Mr. Rompilla denies any head injury.

A. Correct.

Q. So would you take it from that entry in the report that that was based on a self-report? In other words, he, Mr. Rompilla, denies a head injury.

A. I don't know, Mr. Wiseman. I don't know where or why Dr. Gross placed that there. I don't [86] take it. I don't know. I would suggest you cross-examine him. I don't know why he placed it in.

Q. I didn't ask why he placed it in. My question is: The statement, quote, "He denies any head injury," unquote, does that appear to your eyes, as a reader – as a professional reader of this report, that that's based on a self-report from Mr. Rompilla, that Mr. Rompilla denied a head injury?

A. No, it doesn't. It would – what it implies to me is that at the termination of the testing done by or the evaluation done by Dr. Gross he determined, from whatever he did, that there were no head injuries. Okay. I don't know what he did. It might have been alone just from a discussion. I don't know what he did to make that determination. What it implies to me is that was his professional conclusion, to a reasonable degree of medical certainty, there were no head injuries. That's what it implies to me.

Q. I [sic] appears to be wrong. Would you agree?

A. I don't know that a scar is indicative of a head injury. I don't know that it means you've had a head injury because you have a scar. [87] There's a lot of different ways to get a scar. Are your talking about a shock trauma type of an jury? A laceration? You can have a scar over your eye playing a basketball game and taking an elbow. That doesn't necessarily mean it's indicative of a head injury. It

means that there's a scar there. So no, I don't know that it's indicative of a head injury or that that's inconsistent or contradictory.

Q. Now, obviously, there are ways one can get a scar on the head. You can cut yourself with a knife. You can get an elbow to the head. You can have a blow more serious than that. But you'd agree that any of those three ways of getting a scar is an injury; wouldn't you?

A. It's an injury.

Q. And it's an injury to the head; isn't it?

A. It's an – I guess you could say it's an injury to the head, the head area. I don't know. A scar over my eye, is that a head injury? You can call it that. I don't know.

Q. All right.

A. I've had scars over both my eyes from playing basketball. I didn't consider them head [88] injuries. Maybe somebody else would. I don't. I've had lacerations that I don't think involve a great deal of trauma or for which I did not go to the hospital and receive anything more than maybe a tetanus shot. At injury to the area of my body, yes. So if that's what a head injury is, fine. If that's a head injury in psychological or psychiatric terms, I can't tell you. A doctor would have to tell you that.

Q. All right. And you just said that you wouldn't consider a blow – withdrawn. You wouldn't consider a scar obtained in a basketball game to be an injury to – a head injury, whereas someone else might.

A. It might and – it might be a head injury, depending on the level of the force and the result. It depends. You can have a scar that involves a head injury. You can have a scar – an elbow in a basketball game that can kill you. But you can also have one that cuts your skin without doing much more than some minor swelling. And it may not be something where a professional would determine it to be a head injury. I don't know. That's a loose term, and I'm taking it in the term that Dr. Gross gave it.

[89] Q. How do you know what term Dr. Gross gave it?

A. Head injury to me means head injury. I don't think he had –

Q. How do you know how Dr. Gross –

A. I don't.

Q. You don't know how Dr. Gross –

A. I don't know. I'm just reading it off the paper. However Dr. Gross gave it, that's how he wrote it. I don't know what he meant by that.

Q. Now, would you agree then that, given the subjective nature of the reporting of the head injury as you just said, one person might consider something a head injury where another person wouldn't, wouldn't you agree then that, given the subjective nature, relying on Mr. Rompilla's apparent statement that he denies a head injury, that that again is relying on Mr. Rompilla to be an accurate reporter and historian of his life?

A. No.

MS. PARADIS: Objection.

THE COURT: Sustained. This is ludicrous, honestly ludicrous. Dr. Gross is the only one – I mean, Mr. Charles has indicated it. We went through this yesterday. I mean, what [90] Dr. Gross meant by "head injury" is for one person to tell you. That's Dr. Gross. That's it. Now, how can Mr. Charles or anyone else make that determination? Now, I mean, this is ludicrous.

MR. WISEMAN: Well, your Honor, just to beg the Court's indulgence here. I understand –

THE COURT: Certainly.

MR. WISEMAN: My point –

THE COURT: I have given you a lot of on this, but go ahead.

MR. WISEMAN: My point, your Honor, and the point of this line of questioning is that, obviously, Mr. Charles and the defense team relied upon Mr. Rompilla as an accurate reporter of his life. And I am simply trying to show that, in at least a few areas, that proved to lead to inaccurate conclusions on the part of the doctor.

THE COURT: Lead to what?

MR. WISEMAN: Inaccurate conclusions.

THE COURT: How can you make that – that's what I'm saying. How can you make that leap when you don't know what Dr. Gross meant [91] by "head injury"?

MR. WISEMAN: Well, we know what he meant by hospitalizations.

THE COURT: And you've gone over that. I didn't say –

MR. WISEMAN: It's a similar point, and it's –

THE COURT: It's not a similar point. A hospitalization is a hospitalization. There you have a record, and no one – there's no objection to that, and you went through that. This is a totally different situation. And it's ludicrous, I mean, unless you have some proof of what Dr. Gross meant by that.

MR. WISEMAN: Well, Dr, Gross will be a witness.

THE COURT: Well, then let him make that determination.

MR. WISEMAN: Your Honor, again, just so the Court understands where were's [sic] going, it's not a one-person operation, an evaluation of a client in a capital case. It's an evaluation that is based on what a lawyer does and what the mental health professional does. And one part in isolation the law says is not what the [92] Court needs to look at. You need to look at everything.

THE COURT: Okay. I agree, and I understand that.

MR. WISEMAN: That's where we are going.

BY MR. WISEMAN:

Q. Did you ask Dr. Gross what he meant by anything in his report? Did you sit down and go over it with him?

A. I didn't talk to Dr. Gross, no.

Q. Do you know if Miss Dantos went over the report with him?

A. I'm sure she did. But you're going to have to ask her. I believe she did. I believe she spoke to each of the professionals that we went to; and I believe, from the results of Dr. Gross, we actually contacted Dr. Sadoff for further investigation. So I think she talked to Dr. Gross. And I know Dr. Gross does some forensic work. But Dr. Sadoff being what I consider the pre-eminent forensic psychiatrist probably in the country, we went to him, and I think – you know, again, I believe that Maria talked to Dr. Gross and that, as a result, we then [93] went to Dr. Sadoff. That's my best recollection, Mr. Wiseman.

Q. In your experience as a criminal defense lawyer are you aware of alcohol consumption being a possible cause of organic brain damage?

A. Yes.

Q. And that can happen? You've seen cases where that happens?

A. I'm aware of it, you know, in a general sense. Obviously, I don't know that it's particularly related to any one case. It's kind of a general knowledge that I believe that alcoholism can cause brain damage, yes.

Q. Okay. Now, did Mr. Rompilla tell you he was an alcoholic?

A. No.

Q. And by "you" I mean the defense team.

A. Not that I know of. No, he never told me that, and I don't believe he told Attorney Dantos that.

Q. So he denied alcohol being the major problem or a problem at all in his life?

A. He didn't deny it. He didn't say it. I don't know – I mean, it's not like we said, "Hey, Mr. Rompilla, we have a feeling that alcohol is a [94] major problem in your life," and he said, "No, I deny that." He never mentioned it. He never brought it up.

Q. Did you or Miss Dantos ask him if he drank a lot?

A. Maria may have. I think that John Whispell may have talked to him. But he was very – he was very much into being like a health freak. I mean, he was telling us – I knew while I was over in the prison that he lifted weights, and he was bench pressing some incredible amount of weight. And I think they even were going to get more weights over there so they could accommodate him. I know he was a physical fitness person, and I know he was very proud of the fact that he was in good shape. I think he used the terms – I think that it's reported somewhere that he's proud of his body and he respected his body and he takes care of it. So no, I don't believe he ever told us that he had problems with alcohol. And I don't think that he told us that, having been out a month or whatever after 14 years in Graterford, that he was suffering from alcohol use while he was in Graterford. So I think that the answer is no, he didn't bring that up to us. To [95] the contrary, he was a physical fitness person. He kept himself in good shape, and it was very obvious he was in great shape back at that time. I'm not saying he is not now. But he was working out every day, and he told us about that he was running a little bit and doing regular workouts. And he told me that. He told John Whispell that. he told Maria that. In fact, John Whispell; who is deceased, was also very much of a physical fitness nut, if I could use that term loosely, and I think they had conversations about that. That was one of the ways John and Ron had common

grounds, and he was comfortable talking to John, because I think they talked a lot about things like working out.

Q. Okay. Now, Dr. Gross saw Mr. Rompilla in June, June 4th of '88. His report is undated, but that's the indication in the report is that he saw him on June 4th, '88. And would you look at the last two paragraphs and tell me what you think they mean, what your interpretation of them is.

Let me withdraw the question. I'll ask a different question.

Why don't you read the paragraphs.

[96] A. I'll read them.

Q. Okay.

A. The first one being "in my opinion"?

Q. I am going to ask you a different question, but –

THE COURT: No, he was just checking which two.

A. Which two did you want?

BY MR. WISEMAN:

Q. I'm sorry, the last two on page –

A. Including "my recommendation" being the last one?

Q. Yes.

A. I've read those.

Q. Would you agree that the statement, "My recommendation is that this area should be further evaluated,"

in your view is that relating to the alcohol – violence while under the influence of alcohol referred to in the paragraph above?

MS. PARADIS: Again, this is objected to. Dr. Gross's statement is something that speaks for itself, and only Dr. Gross can tell us what he meant by that.

MR. WISEMAN: What I was going to say, your Honor is that counsel's [97] interpretation of that and what action he may or may not have taken based on that is what I am looking for.

THE COURT: I'll permit it.

A. I can answer that.

I'm not sure that he was talking about alcohol. The way I interpreted that was – you know, you have to understand that we're giving Ron's case to Dr. Gross for something, okay, to see if he can have something to help us anywhere along our case. I read that to mean – he says here there's a strong element of antisocial behavior, but "there is no other evidence at this point in my evaluation for underlying psychiatric or mental disorder." There's a possibility that he may become violent when he's prone to alcohol, which I think is a general statement, because I think they would say that – there's been testimony that, you know, high levels of alcohol consumption and violence may have some correlation. So that could be a general statement there. I think what he was talking about in the last sentence was, "If you're looking for some kind of evidence that's going to help you in your case, you should get further [98] evaluation, because I can't help you." That's how I read that. "This area" meaning his antisocial behavior.

Q. You think he was telling you to further explor [sic] antisocial behavior?

A. No, get him further evaluated I thought. What I figured this means is, like he said, "In my opinion there is certainly a strong element of antisocial behavior, but there's no other evidence at this point in my evaluation for underlying psychiatric or mental disorder." Okay. And so, I mean, I take it to mean there's nothing in that for what he has. Explore that further. Because he doesn't have a yes for us that there's – he doesn't have something that we can use. "If you wish to move on, you should get further" – he can't find anything. You know, get another opinion.

Q. Okay. So he's talking about antisocial behavior, and he's talking about this alcohol aspect. In your view, is that – when he says "this area," he's referring to one or both?

THE COURT: He didn't say that. That wasn't what he said.

MR. WISEMAN: I'm asking.

[99] THE COURT: That's not fair. Now, listen. You know, that's just a mischaracterization of what he just said.

MR. WISEMAN: Maybe I –

THE COURT: It's a total mischaracterization of what Mr. Charles just said. And, you know, the questions aren't testimony, but I don't like counsel totally misrepresenting. I mean, Mr. Charles just got finished an answer. His answer was diametrically opposed to what you then put in the question saying, "That's what you just said." It wasn't what he just said. Now, maybe you didn't want to

hear that, but he didn't say that. Now, please, you know, let's proceed in a proper way. Listen to what he answers, and then go on.

Restate your question if want to be in the area.

BY MR. WISEMAN:

Q. Exhibits 1 and 2 are the letters you received respectively – I'm sorry, make that Exhibits 2 and 3 are exhibits you received from Dr. Sadoff and Dr. Cooke in regards to their evaluation.

A. Yes.

[100] Q. Now, the dates on those indicate – what are the dates that each doctor evaluated Mr. Rompilla?

A. Dr. Cooke evaluated Mr. Rompilla, according, to this letter on Monday, June 18t... Dr. Sadoff did an evaluation on September 15th of 1988.

Q. Between the time that you received Doctor Gross's undated report and the time that Dr. Cooke did his evaluation, did you do anything to further the recommendation Dr. Gross makes in his report?

MS. PARADIS: Objection. Asked and answered. Mr. Charles already testified yes, he did. He went and elicited the help of Cooke and Sadoff.

THE COURT: That's what I thought. But go ahead.

BY MR. WISEMAN:

Q. Aside from eliciting the examinations of Cooke and Sadoff, did you do anything else to further explore the recommendation of Dr. Gross?

A. No, I don't believe so. I mean, we worked the case as far as the case in chief. But as far as Dr. Gross's recommendation, no. I [101] believe I – we secured Dr. Cooke and then Dr. Sadoff. And Dr. Sadoff is not somebody that you can call on a Monday and get him to do something two days later. He has quite a backlog. He lectures out of the country. He's traveled all over the world. And so you really are kind of stuck with his schedule. And we got Dr. Sadoff as soon as we could so that he could make arrangements to see Ron. And I assume that this was the earliests [sic] that he could see him due to his schedule that summer.

Q. Do you know whether Dr. Cooke had Dr. Gross's report when he did his evaluation?

A. I don't know if he did or he didn't. He might have. I don't know.

Q. And do you know if Dr. Sadoff had the report?

A. I don't know. I'm sure that Attorney Dantos would have told Dr. Cooke that Mr. Rompilla was examined by Dr. Gross. But given the fact that – the relationship with Dr. Cooke and Dr. Sadoff, I'm not sure whether they would call for that report or not. Dr. Cooke may very well have wanted to give him his own set of – his own examination. So I don't really know.

[102] MR. WISEMAN: If I could have a moment, your Honor.

THE COURT: Certainly.

MR. WISEMAN: I'm just looking to see if I left any questions out, your Honor. I think I'm about done.

THE COURT: Certainly. That's all right.

MR. WISEMAN: I have nothing further. Thank you.

THE COURT: All right. Ms. Paradis.

MS. PARADIS: Just a few questions, your Honor.

THE COURT: Ms. Paradis.

CROSS-EXAMINATION

BY MS. PARADIS:

Q. Mr. Charles, Mr. Wiseman asked you whether or not you were aware that the case law allows you to present to a death penalty jury the prison record of the individual for whom they are judging whether they should live or die.

A. Yes, he did.

Q. And you indicated that, yes, you're [103] familiar – you're aware of that; isn't that correct?

A. Sure.

Q. Would you have wanted this jury in the Ronald Rompilla case to have learned that your client had earned numerous misconducts, that he was placed according to his – because he was so aggressive, that he cared little for anything but own his own immediate gratification, that the likelihood of his rehabilitation was not good? Would you have wanted your jury to hear those things about your client?

A. No. And I certainly wouldn't want the fact that the likelihood for any rehabilitation was not good. No, I would not want that there. I believe, if I recall, one of the

best lines of questioning that I think really impacted on the jury is when Maria Dantos talked to Ron's brother. And Ron's brother – and then on cross-examination he was crossed about the fact that Ron was in prison so long. And he said, you know, he's been left in prison, and he gave some testimony that I thought got the jury to at least be a little sympathetic, and it was something that we talked about drawing on when Maria and I talked about [104] that. "Geez, they may have been touched a little bit by seeing the brother stand up and say, you know, he's been punished in prison. I don't remember the exact line of testimony, but I thought that that was very significant. But no, I would not want what his prison record was, given what you've read, to go to a jury, not on this case,

Q. Would you consider those things about your client to be any kind of mitigation?

A. No.

Q. You and Miss Dantos, the defense team, had the opportunity to interact with Mr. Rompilla's family over the course of the pendency of the criminal charges; isn't that correct?

A. Yes.

Q. And your relationship I believe with that family was a good one; isn't that correct?

A. I thought it was.

Q. They were a constant source of information for you?

A. Yes.

Q. And you felt free to ask them for any information that would be helpful in helping to defend their brother?

[105] A. Yes.

Q. Or – their brother I guess.

A. Yes.

Q. Yes. In fact, did you ever receive any correspondence from any of the family members who spoke for the family?

A. His wife sent us a letter I think the day after the verdict came in or two days later. She sent a letter to Maria and to me.

Q. What is her name?

A. Sandra Whitby.

MS. PARADIS: I gave a copy of that letter to Mr. Wiseman.

(Commonwealth's Exhibit No. 2 was marked for identification.)

MS. PARADIS: Your Honor, may I approach the witness?

THE COURT: You may.

MR. WISEMAN: Your Honor, is this being offered in evidence or –

MS. PARADIS: I'm just showing it to the witness at this point.

MR. WISEMAN: Can I ask the relevance of the line of questioning about a letter that was sent after the trial?

[106] THE COURT: I don't know if it was after the trial or – I wasn't clear if it was after the guilty part or the sentencing.

THE WITNESS: The day after the sentencing to death. It was like a day later. The trial was over.

THE COURT: Including the sentence?

THE WITNESS: Yes. The trial was over, I believe, when that came.

THE COURT: All right.

MS. PARADIS: Your Honor, the reason I'm offering it is because I believe that it reflects the relationship that the family had with the defense team during the entire process as well as the relationship that the defense team had with the defendant, so much so that any kind of information that should have been brought out and wasn't brought out you'd have to question why based on this letter, based on their feelings toward this defense team.

THE COURT: All right.

MR. NOLAS: Your Honor, so we're clear, that's a letter from Mr. Rompilla's wife. It's not a letter cosigned by several [107] family members. It's not a letter from parents, siblings. It's a letter from the person's wife thanking counsel for the representation. To that extent – I mean, my view is the relevance is limited to that extent. That's what it is.

THE COURT: In other words, it would be limited and should be limited, if at all – and I don't know whether you're objecting or not – to the position of the ex-wife of Mr. Rompilla and no one else.

MS. PARADIS: No, actually she speaks for the family in the letter.

THE COURT: All right.

MS. PARADIS: She speaks for the family in the letter.

THE COURT: Is there an objection?

MR. NOLAS: Not to identifying it, your Honor.

THE COURT: All right. Fine.

BY MS. PARADIS:

Q. Mr. Charles, would you please identify that.

A. This is the letter that was sent to Maria Dantos from Sandra Whitby.

[108] Q. Is there any indication that you were to be a recipient of that, as well?

A. Yes. It's from – Maria showed it to me. This is a copy. I think the original Maria made a copy for me because she thought I would appreciate seeing it.

Q. And is this a letter that you kept as part of the case file?

A. Yes.

Q. Okay. Would you please read that letter to the Court.

A. "Dear Maria. It is the next day, and the pain and word "death" is still alive in my mind, but I had to take the time and write and tell Fred and you what supurb human beings you both are. You fought and felt everything our family did, and when we cried you cried along with us. You left a feeling in me I can't explain, and I want to thank you both for caring and for being there with us all the way. I'm sure I speak for all my family.

"I only hope that some day, as Fred promised, the word "death" can be erased from the sentence so we can live in peace that Ron will be there to write, visit, and talk with. If he [109] should die, a part of us will, too, cause in our hearts we feel he is innocent, and nothing will change that.

"Maria, I know at this point you want to put this matter aside and get on with your work, but I hope you don't give up on Ron, cause he called me and said you woke up feelings in him, and he trusts you with all his heart. We both know that was hard for him to say.

"I can't say it enough that Fred and you are both wonderful, caring people. Thank you again for everything, and please, please help us, and don't forget us.

"Love, Sandra Whitby."

Q. Okay. Mr. Charles, do you feel that that letter represents the type of relationship that you had with the family members?

A. Yes. You had to see Maria Dantos with Ron's son. When I think of this, it's a memory that I'll never forget. Because his son was sitting on the windowsill listening to the radio during the death penalty phase and waiting for, I

guess, the radio reports to come in and give status updates on the case. And Maria asked him, "What are you doing?" and he is saying, "I'm [110] waiting to listen to the radio to see if they're going to kill my dad." And she sat with him, and I know the family was there, and when we heard that, it gagged her. It gagged me. And I can remember her continuously, I mean, if anything. And it was just a sight. We felt for everybody, because this was just difficult all the way around. And to see her handle the family, talk to Nick, talk to the other people who were there, worrying about how Ron's son was doing, yet trying to keep some of the torture of those proceedings – I mean, two days on the guilt phase and then two more days on the death penalty phase, and seeing the effect it had on the family I think had a very strong effect on both of us. And I know she was always moving around trying to make sure, let's see how this person's doing. It was amazing. And like I said, she had a sensitivity for them that I think was drawn out and brought forth during the course of the proceedings, during the course of the whole case, and it really came out while we were going through the closing phase and the deliberation. I thought it was – this letter is very much indicative, and I think that the real – that it should probable [sic] take my name [111] off of it. I think it was really meant for her; and as a sidelight, because I was there, she showed it to me and put my name in. But this is really more of a testimonial to the relationship she had with the family, meaning Maria with the family, and how much she cared and how hard she worked for them.

Q. Okay. And yet never did any one of those family members tell you about any abusive childhood that Ronald Rompilla suffered; did they?

A. No, they never did.

Q. And never confided in you or in response to your questions told you about any problems that he had in his childhood?

A. Never.

Q. Okay. It's fair to say that these siblings of Ronald Rompilla, despite the fact that their brother was on trial for this heinous crime, were still loving and supportive?

A. Absolutely.

Q. All right. And you looked to those siblings to get a feel for the type of relationship this family had; is that correct?

A. Yes, we did; but I think it was more so Maria did than me.

[112] Q. All right.

A. But I talked to them. I knew Nick, and I talked to Nick. And I liked his other brother. I forget what his name was, but I liked him, and I thought he would be a good witness. But I think the person who really did that more than me was Maria.

Q. But what you saw was a lot of love and support?

A. Yes. Yes.

Q. You didn't see indications of a dysfunctional family who had no respect for each other?

A. I wouldn't know what a dysfunctional indication is, you know, again, but I didn't see anybody with any disrespect. I saw a lot of people on our floor that I thought cared very much for Ron, were worried about him, and were there to do – and were going to stay with him and

going to stay there every minute. And even when we said, "Go ahead. We'll let you know," no, they had to be there. They were in the Public Defender's Office and outside the entire time. Almost like a vigil. And it was – I remember the scene, because it was very, very sad. And you had the [113] other family, the Scanlon family, all together also on a different floor. And there you have two families, you know, just fretting and worrying and going through this scenario while we are waiting for the jury to come back with their verdict.

Q. Okay. Thank you. At any time during your interaction with Mr. Rompilla did he give any indications to you that he had any kind of mental impairment?

A. No.

Q. Did he appear to be mentally retarded?

A. No. If – again, I don't know. I don't know that. I wouldn't know, you know, levels of it. He didn't appear to be mentally retarded to me.

Q. Did he have any problem understanding you, expressing his feelings –

A. No.

Q. – telling you things? Anything like that?

A. No.

Q. Mr. Wiseman asked you if you would want your mental health experts to know about some childhood I.Q. test that indicated that he may or may not be borderline mentally retarded. Assuming [114] your experts did ask you for information like that, would you also feel compelled to tell them that at the age of 27 his I.Q. tested at 93?

MR. NOLAS: On a different test, your Honor.

MS. PARADIS: On an I.Q. test.

THE COURT: On a different I.Q. test.

A. I don't know if I felt compelled on the other one. I mean, if they asked me and I had it?

BY MS. PARADIS:

Q. If they asked you for those tests and you had the information and if they felt it was necessary.

A. I would get it for them, yes.

Q. Would you also want them to know that he also tested at age 27 with a 93 I.Q.?

A. I would give them the test and let them make their decision. The same way – either way I wouldn't know whether or not a 93 is important or not any more than a 75. If they wanted the test, I'd get them the test. And I'd let them decide what's important on it and what's not important on it.

Q. Okay. Let me get back – just a couple [115] questions about some questions that were asked of you yesterday regarding your strategy in the death penalty phase in terms of telling the jury that your client played a minimal role. First of all, you already indicated that you submitted a point for charge which was denied on the minimal role.

A. Yes.

Q. All right. Did you have any evidence at all that your client played any role in this? Strike that. Did you

have any evidence from your client or that was part of the defense that your client played any role in this murder?

A. He said he didn't. No evidence that he did. I mean, there was the forensic evidence. There was the evidence testified to that his foot was – you know, the footprint and the fingerprint on the blade. There was no evidence from my client that he had anything to do with the homicide, no.

Q. Nothing at all?

A. Nothing.

Q. Would this have contradicted your entire defense to argue to a jury that he played a minimal role?

A. That he played a minimal role, yes, [116] because our defense was that he played no role in it. Okay. So a minimal role would then have been contradictory, because we were arguing that he didn't have anything to do with the killing.

Q. And as a seasoned defense attorney who has practiced in front of many juries, as you already testified, what strategical advantage or disadvantage would you see in presenting to a jury a totally inconsistent defense at the sentencing phase than what you presented at the trial?

A. My strategy is inconsistent defenses result in convictions. That's what happens. I said it yesterday that you walk out with your hat in your hand. Maybe I should be more clear. If you argue, "He didn't do it. But if he did do it, it was this, and if he didn't do it, it was also that," the end result is inconsistent defenses in my experience result in convictions or in whatever you're going for you're going to lose. And my feeling on this case, you turn around

and you argue to the jury he had nothing to do with it, as Maria did so expertly and said, "You don't know for sure that he did this, so you cannot kill him," that was as good as we could do with the facts. To turn around at that point, after [117] already having the impact when the D.A. gets up and says, "Now, I couldn't tell you this during the case in chief, but I can tell you now. Mr. Rompilla has a prior record. Mr. Rompilla was convicted of rape. Mr. Rompilla was in Graterford up till two months before this. Mr. Rompilla" – when they started – when the D.A. started to do that on the death penalty phase, you could look and see the jury looking at us and looking at us as if we had very much misled them. And you could see that people that you had eye contact with and maybe smiles with or you had their attention during the case in chief, you didn't have it anymore. They looked at you. You could tell by body language. You could tell by facial looks that that alone lost – that alone lost a great deal of whatever credibility we had going into that closing. Okay. And I'll never forget that, because it's kind of like you took – the district attorney one by one told them, "He has a prior record." He was guilty of a rape – an [sic] I think he even said a rape with a knife – and that he's been in prison and all these things, and now he had money. There was testimony that he was spending money all over the place. Yet there – [118] if you brought it up that he was in prison up until right before, then where would the money come from if not from perhaps being there? I mean, it really – you see your whole defense start to come apart, you know, after you're already on the death penalty phase. And what you have to do as a strategy is try and recoup it somehow with a jury that has already rejected your arguments on the guilt phase. And so to then add to that an inconsistent defense and to try and tell them, "Hey, okay, you know, we told you before he

had nothing to do with it, but he did, but it wasn't that much, it was a minimal part," I thought strategy wise was dangerous and inappropriate. Okay. And I thought that the way Maria Dantos handled it and the way we agreed to handle it was in closing. Obviously somebody somewhere had a question about it or they wouldn't have asked the question. And that's where you are going to have to concentrate and hit that on the closing while appealing to for mercy.

Q. Okay. The jury had heard, prior to closing – prior to you putting on your case in chief at the penalty phase, they had already heard the details of his prior rape and burglary. Was [119] there anything about that that confirmed your decision not to proceed with an inconsistent defense?

A. Yes.

Q. Why?

A. The facts of that rape case were just unbelievably on parallel with this case. You have in our case – in the case we had before this homicide took place the Commonwealth put on testimony from a waitress that Ron Rompilla had at closing time had been hiding behind a juke box and that when she uncovered him he said something like, "Boo, the boogyman's here," and he laughed. And she was – she was upset or something. But that he was hiding there. And the D.A. made the argument that that night had he not – this was the standard M.O. She caught him a little too early or what could have happened to her. That was the argument that Mr. Moyer made, the D.A. at that time. He brought those facts up. Then you got into the – and that was even brought up – I believe that testimony came in during the case in chief, but I could be wrong. You

have – the rape case is a bar. Mr. Rompilla is in the bar. Then he goes into the men's room. And in our case [120] there was testimony from, I believe, a Richard Davis that Ron Rompilla right before closing was in doing something with the window in the lavatory. Now, in the Joe's case, the rape case, he's in Joe's bar in the lavatory right before closing. He's in the bar, according to the testimony that's read. The bar closes, and now all of a sudden he pounces upon the victim. There's a knife involved. And that's read to the jury. He slices her with the knife, that type of thing. Those facts and the reading of that transcript also were of such a parallel, I don't think that they were going to hear anything concerning minimal role after hearing that testimony. I think we lost most of them as soon as they heard about his prior record and as soon as they heard about that, you know, "we weren't allowed to tell you till now, but now we're going to tell you these things." When the D.A. did that, I think most of them were gone there. And then the rape case – the rape testimony obviously was harmful. But I still think, in my opinion, as soon as they heard about his prior record and they started piecing things – because Mr. Moyer said in his closing, "He's throwing money around like a [121] drunken sailor," and I objected to that. And then – but where does he get this money from? And I could see that the jury – it wouldn't make that much sense to them then. But now he's in the prison until right before. Where is he getting the $250, $300 to be buying drinks for everybody? The case came together for the D.A. more on the death penalty phase than it ever came on the case in chief, and that was a result of some of the factors that are implicit in the system where you can now go into the prior record and the prior circumstances. So we lost that jury I believe as soon as Mr. Moyer started going into the "what I couldn't tell you

before, but now I can tell you." The rape testimony didn't help, and it was a very similar M.O. to this case. And I think to argue a minimal role would have insulted them beyond belief and lost any chance to appeal to their mercy.

MS. PARADIS: Thank you, Mr. Charles. I have no further questions.

THE COURT: Mr. Wiseman.

MR. WISEMAN: Just a few to follow-up.

THE COURT: All right.

[122] REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. Mr. Charles, did you – did the defense team to your knowledge speak of Mr. Rompilla's father?

A. I don't know if she did or she didn't. I don't know.

Q. Do you know if the defense team spoke to all of Mr. Rompilla's siblings or some of his siblings?

A. I don't know how many siblings he has or who was available. I know we spoke to Nick. We spoke to his sister-in-law. We spoke to his brother.

Q. That would be Darlene?

A. I'm not sure of the name of his sister-in-law. He had a younger brother. I don't know if Nick's an older brother. Nick, the younger brother, and the sister-in-law and his ex-wife or his wife. I don't know if she was ex or current at the time. I think ex-wife.

Q. The last answer you gave to the District Attorney about the penalty phase, as we talked about earlier, you knew the rape transcript was going to be – the D.A. was going to attempt to [123] get the rape transcript before the jury; is that right?

A. Correct.

Q. Okay. The impact that that would have had potentially on the jury didn't come as a surprise to you; right?

A. Well, I mean, the impact – the fact that it had a negative impact wasn't a surprise. But you had to be there. As the D.A. was reading that testimony and recounting the evidence of the rape, I believe that Mr. Rompilla had a look on his face – and I mentioned it to Miss Dantos and to John Whispell – almost like he was reminiscing. And I tried to get him to look down at his paper, and he just sat there looking up into the roof like he was recalling events. It was an erie [sic] sight. I saw the jurors looking at him, and I tried to stop him from doing that. So I could anticipate the reading of the rape testimony to be harmful. I had no way to anticipate the facts as they actually came that Mr. Rompilla would affect jury the way I think he did during that reading.

Q. All right. In your October 14th, '88, plea letter you essentially tell Mr. Rompilla he [124] has a pretty good chance he's going to get the death penalty.

A. I think we said that there's an overwhelming chance, if want my words.

Q. So you knew going in this was going to be a very tough penalty phase if you got to it.

A. Yes.

Q. And that was based, in part, on the rape transcript and other factors, as well?

A. It was based, in part, on the gruesome nature of this murder, on what happened to Mr. Scanlon, on the facts that were here, on 16 stab wounds, three knife wounds that reached the heart from the back, a knife breaking off in two places. There was evidence that he was then lit on fire, because there were charred materials found. So there was evidence of a fire being lit. I thought, notwithstanding whether the rape case got in or didn't get in, there was a good shot of – given the fact that there is a violent history, that there are – certainly the argument could be made that Mr. Rompilla killed Mr. Scanlon to keep him from being a witness in a burglary or robbery case, and I felt that – I felt that there was a great shot that he'd get the death penalty [125] irrespective of whether we could keep those rape transcripts out. I met with my appellate counsel going into the jury selection, and we reviewed what we would have to do to keep them out. We did that at about the same time I wrote that letter, which was leading into when the trial started. The trial actually – we were assembled October 17th. And so that was – we had decided that we were going to try and keep those transcripts out by the way I talked to you about yesterday. But there was no question that – even had the transcripts been kept out of this case, that I thought then as I'm thinking now, there was an overwhelming possibility he would get death given the gruesome nature of the facts of this case and given Mr. Rompilla's prior history and propensity for violence.

MR. WISEMAN: Nothing further.

THE COURT: All right. Anything further?

MS. PARADIS: Thank you. I have nothing further, your Honor.

THE COURT: Thank you, Mr. Charles.

THE WITNESS: Thank you, [126] Judge.

THE COURT: All right. We'll be in recess till 1:15. All right.

MR. WISEMAN: Your Honor, off the record?

THE COURT: Certainly.

(There was a discussion off the record.)

THE COURT: We'll be in recess till 1:15.

MR. NOLAS: Thank you, your Honor.

(An adjournment was taken to 1:15 p.m.)

AFTERNOON SESSION

THE COURT: My apologies, counsel. I had something I had to get done in those 15 minutes.

All right, Mr. Wiseman.

MR. WISEMAN: Sure, your Honor.

Randi Rompilla, please.

[127] RANDI ROMPILLA

was called as a witness and, having been duly sworn, was examined and testified as follows:

THE COURT: You may be seated, ma'am.

DIRECT EXAMINATION

BY MR. WISEMAN:

Q. Miss Rompilla, do you know Ronald Rompilla?

A. Yes.

Q. And what is your relationship with him?

A. He's my brother.

Q. And what's the age difference between the two of you?

A. I'm 44, and he'll be 48. Four years.

Q. And there were other siblings in your family, both older and younger than you?

A. Yes.

Q. Where were you in line?

A. Second youngest.

Q. Now, when you were growing up, could you tell the Court what your family was like?

A. It was abusive. The boys got beat up. We got beaten with belts and brooms. We weren't loved. They didn't buy us clothes. We got [128] clothes from the Rescue Mission. We didn't have no parties, no birthdays. My dad bought a couple gifts for Christmas. But the boys, if they didn't do their duties, in the dog pen. They got – Ronald and Richard got locked in there until my dad left them out, which was a couple hours.

Q. Let me just stop you and ask you a couple of questions about what you just said. Did either of your parents drink at all?

A. Yes, they both drank.

Q. Could you describe for the Court whether they were what you call a social drinker or did they drink to intoxication or something in between?

A. No, they drank till they were drunk. My mom, from the – that was her breakfast. She drank till night-time, because my dad beat her, you know, and he cheated on her. And it was just a very abusive family.

Q. Now, when you say your dad beat her up, could you describe to the Court what you mean by that?

A. Smacked her around. Punched her in the face. She stuck up for herself. She was drunk. She stabbed him in front of us.

[129] Q. When you say "in front of us," the beatings that your father administered to your mother did he do that off in private or did he do it –

A. No, in front of us.

Q. "In front of us" meaning who?

A. Meaning Ronald, my sister Nikki lived there, myself, and my younger brother. All the other older kids ran away or they left home to get married to get away from that. So what we witnessed was our abuse.

Q. Did your father ever lift his hand to any of the children in the family?

A. Yes. I got the broom broken over my back. And Ronald, he got beaten with belts when they came home. He just was drunk, and he just beat him.

Q. Were the beatings – with what frequency did the beatings occur?

A. A lot. There was no love in our family. None. You didn't get a hug. You didn't get "good night." You didn't get a "happy birthday." You got nothing. You just had to do what he said. And if you didn't do it, you got beaten. And my mom over the years drinking, and she was abused by [130] my dad, she just – we were deprived of a mother. We weren't loved. And I blame my father. I hate him. And I wish we would have had a better life so my brothers could have had like a father figure and a mother figure. I didn't have, either, and they didn't. And we were deprived. We didn't get any counseling. We didn't get any help. And when the schools – when we went to school and they said that there was something wrong, we should have, you know, someone talk to us because we went to school being abused, my dad would lie and say, "Nothing happened. Nothing's wrong." So to this day I can honestly say I didn't get any help. I mean, I have the nightmares still.

Q. What are your nightmares about?

A. When the boys got beaten, I used to climb the walls and just scream get me out of here. And to this day I do have the same nightmares, and my husband has to hold me down until it subsides, because I'll never forget it.

Q. Now, when you say that there was no affection, did your mom and your dad ever say nice thing [sic] to you or your brothers and sisters?

A. No. We were stupid. We'll never amount to nothing. The boys, they wanted just a car to [131] work on. I mean, just something to do. No, they couldn't have that. I mean, my dad didn't take them fishing, baseball games, nothing. We couldn't have friends come in like girlfriends and that and invite them into our home. It was school, come home, and nothing else. There was no phone calls. If anybody called us up, it was, "Hang up." We couldn't go to, you know, games, school games or anything. There was just no outside connection with anybody.

Q. Now, when you just said, "We were stupid. We would never amount to anything" –

A. He will say that to this day to us.

Q. If I could just ask the question, ma'am, so the record's clear. When you were saying that, were you saying that those were things that your mom and dad would say to you guys?

A. Yes.

Q. So those were words spoken to the children by the parents?

A. Yes.

Q. Was it more your mother or your father?

A. Father.

Q. Did your mom say those kinds of things, as well?

[132] A. Yes.

Q. You mentioned early on when you began speaking about a dog cage. Can you tell the Court what that's about?

A. We just – on South Fifth Street we had like a dog pen. It was like a wire mesh. And we had two dogs from his brother that he gave my dad. If the boys didn't clean it, which they didn't, he would like lock Richard and Ronald in it, and then he'd just go back in the house. And you couldn't stand in it. You had to be hunched in it. It was big enough that you could walk in and that and clean it, but they were like hunched over or kneeling until my dad left them out.

Q. Was this in the house or outside the house?

A. No, outside in the yard.

Q. When you say it had to be cleaned –

A. Well, the mess, the dog mess. And I mean, you know, it was filthy. I mean, it wasn't nothing nice.

Q. When you say your father would lock them in it, how did he do that?

A. Well, he had one of those big locks and – you know, like a padlock, and he just [133] locked them in until he came out to get them out.

Q. And do you remember how long he'd leave Ronald and your other brother –

A. A couple hours.

Q. And where would he be while they were in there?

A. In the house drinking or doing whatever he did.

Q. Do you have any recollection of Ron or your other brother crying out when they were in there?

A. After they got beaten?

Q. No, no. When they were in the dog cage, did they cry out, yell, or say, "Dad, get me out of here"?

A. No.

Q. They just sat there?

A. They just – you had to follow my dad's rules. If you didn't follow – you couldn't go up against my dad.

Q. Now, you mentioned that you and your siblings, Ron included, would be – were beaten with belts, and I think you mentioned a broom handle. Did your dad use anything else on you that you can recall?

[134] A. No.

Q. What did your mom use? Withdrawn. Did your mom hit you, as, well?

A. Yes, but she just used her hand or fist. It was nothing with a belt or nothing like that.

Q. What was your grandfather like?

A. Oh, grandfather was an evil man. I think – well, my – I think that's why my dad was the way he was.

Q. That was your father's father?

A. Yes. I mean, my mom took care of him. He lost his both legs. I mean, he wouldn't even go to the funeral for his father. He wouldn't take care of him or anything.

Q. When you say he was evil, could you describe –

A. He was very strict with my father. He wasn't loving. He was cold-hearted. And that's exactly how my dad was.

Q. Did he, meaning the grandfather, spend time in your house?

A. Yeah, but I wouldn't go near him. We were afraid of him. He would like – just like be nasty with his voice. And, I don't know, you just couldn't satisfy him.

[135] Q. Where did Ronald have his bedroom in your house?

A. Well, my dad wouldn't give us a bedroom door. He told his brother Rudy to take all the doors off, that we didn't need any doors. And he made Ronald sleep up in the attic. And there was no heat up there. But that was his bedroom. And then if we had to change or something, we'd just like go behind the dresser. Because my dad didn't want to give us any privacy.

Q. Did he ever tell you why he was doing that?

A. Yeah. He didn't want us to have any privacy. He didn't – you know, he just wanted to watch us. He'd go in our drawers. I mean, he was a strange father. He didn't even have a bedroom door on his bedroom. I mean, we could walk by. He was lying there. He didn't care.

Q. Now, you talked about quarrels that your mom and dad had when you were growing up. I think you said something about your mom stabbing your dad?

A. Yes.

Q. Tell the Court what that was.

A. She stabbed him in the leg because he [136] had the gall to park behind our backyard on Fifth Street with Mary, his girlfriend, in the car, and she seen them there. And when he came into the house, she just picked up the

knife and stabbed him in the leg. But, see, my dad was the type of man that, when he cheated on her, he'd come home and brag about it.

Q. Who was Mary?

A. Mary Pletz, his girlfriend.

Q. And did he introduce her as such to friends?

A. Yes, sure. We – well, no, he didn't tell us right way [sic] that was his girlfriend. We didn't even know. He took us over in the afternoons to go play with her kids, and then later we found out that was his girlfriend and her kids. And then instead of us getting the money for the clothes and what we needed for school supplies, he would give it to her kids. And then he had enough gall to tell my mom. And over the years, yeah, I hated him for it, because I knew her kids.

Q. How did it make you feel when you were a child seeing your dad ultimately with this other woman?

[137] A. I used to go with my mom. She used to drag me bar to bar looking for my dad with Mary. And when she used to catch them, she used to attack her and my father. So I can very well say I hate my dad because of what he did to my mom.

Q. How did it make you feel when you were a kid when your dad would hit you?

A. I hated him. I still hate him to this day. He didn't change. I hate him for the fact he – my brother died, Richard. He wouldn't bury him. He wouldn't go see him. They had to drag him up there to see him for the last time. No, I hate my father.

Q. How did it make you feel when you saw your dad hit other children in the family?

A. I was very upset. I told you I had nightmares. I screamed. They had to hold me down when I was a kid. No, I was terrible.

Q. Did you ever feel humiliated or embarrassed?

A. Oh, it was always over the years going to school – I had to go to school knowing that I was beaten at home and then go to school the next day and look at kids with nice clothes, and I had rags.

[138] THE COURT: Do you want to take a break?

THE WITNESS: I'm all right.

THE COURT: There's tissues there, if you'd like, right next to you, if you'd like to – right up here.

THE WITNESS: Oh.

THE COURT: There's water there, too.

THE WITNESS: I'm sorry.

THE COURT: That's all right.

BY MR. WISEMAN:

Q. Tell me when you're ready.

A. No, I'm all right.

Q. Did you ever get locked in the cage, the dog cage?

A. No, no.

Q. Did your dad treat you differently than the way he treated the boys in the family?

A. No. He always said I was like the boys. He hated me like he hated his sons, because I was the only daughter really that – I seen the abuse and the beatings and that, and I would like more like – I don't know. Like how can I explain it? I would stand up to him more. I would maybe open [139] my mouth on something he was hitting me for, and then he didn't like it. So I got hit harder. Where the other sister would just shut her mouth, take the beating, and not question nothing. So, you know, he didn't care for me.

Q. Was there – directing your attention to an incident regarding a paycheck, do you recall that?

A. Yeah. When we – well, we dropped out of school, because we didn't get clothes. I didn't get clothes or supplies. He wouldn't even pay for my cap and gown. So I just like wouldn't go to school and eventually got my mom to sign me out of school. But I got a job, and I got modern clothes. And the rule was, "If you live in my house, you give me your paycheck, and I will give you enough money that I feel fit." So he used to take my check, give me $25, and I had to live on that until next payday. So if you didn't give him the check, well then, you know, you were like beaten. I mean the dollar to my dad was – even when my mom was working she couldn't keep no money in her purse. He wanted all the money, and he would spend it the way he – like on his gambling. He played cards heavily. He drank. He spent it [140] on Mary. He bought her a diamond ring. He gave money to her kids throughout the years. So, really, we were deprived. He didn't put no money in the bank and say, "When you grow up, you can

go to college." No. You were stupid, and you weren't going to be anything. And over the years he said that to the boys over and over again. Then he used to take me and Ronnie and circle around Camp Hill and tell Ronald, "If you don't behave, this is where I'm putting you." And so over the years when we had to do that, when he took us, how could – how could he grow up to be anything like for a father to be proud of when that's all my dad was was abusive with kids? He didn't love us. It was like threats and beatings. We just didn't have a chance, and we had nobody to really go to. And that's how it was, really, in our life.

Q. Did your dad ever choke you or any of the other children?

A. Oh, that's because I wouldn't go to school because he wouldn't give me clothes and that, and he just choked me and said, you know, "Oh, I could kill you for not listening to me." But it was just part of his abusive ways. Now, [141] I'm not saying he would have, but – and then I ran up to my girlfriend's house, and I wanted to stay with her, and which I did for a while. And then he just sent my mom up, and then she smacked me around to bring me home. And I still wouldn't leave that night. But eventually I did go home, but I just ran away a lot. I ran away a lot.

Q. How much older are you than your younger brother?

A. I'm 44. Maybe about six years.

Q. Do you remember when your mom was pregnant with your younger brother?

A. Uh-huh. Yes. I was jealous.

Q. Do you recall whether or not she drank while she was pregnant with your younger brother?

A. Yes. She always drank, always.

Mr. McINTYRE: Your Honor, just for the record, can we have the name of the younger brother?

THE COURT: That's what I was wondering, too.

MR. WISEMAN: I was just about to get to it, your Honor.

BY MR. WISEMAN:

Q. Who is your younger brother?

[142] A. Robert Rompilla.

Q. Now, did you ever talk to the lawyers who represented your brother Ron at the time of the murder trial?

A. No. Nobody approached me or called me, no.

Q. No one? None of the lawyers did?

A. Nobody.

Q. Did you attend – well, where where [sic] you living at the time of the trial?

A. Where I'm living now, 713 South Filmore, Allentown.

Q. Did you attend the trial at all?

A. Yes.

Q. Did you sit off alone, or were you sitting with the rest of your family who may have been here?

A. I was on the side of the brother of the deceased – the son of the deceased. They had us all together.

Q. Now, had you been asked back at the time of the trial or before the trial about the kinds of things you talked about here today, would you have been willing to talk about them back then?

A. Yes. But nobody approached me or asked [143] me or called me.

Q. Just a few more questions, ma'am. Did your grandfather drink when he was at your house? Did you ever see him drinking?

A. No. When my grandfather was at our house, he had his legs taken off. I mean, no –

Q. You said he had his legs taken off?

A. If he drank when my dad was growing up, I couldn't tell you that.

Q. You testified that your father would say things to you and your siblings, Ron included, that you're stupid, you're dumb, you'll never amount to anything. Was that something he'd say once in a blue moon or something he'd say frequently?

A. No, he was always saying it to us.

Q. It was a constant?

A. When we went to school, he would not – neither parent would sit down – if we had trouble with a subject, they wouldn't go over anything. It was like, I don't know, we just didn't have any support in that. We were there just to watch them drink and abuse us. We just didn't have no

– I couldn't even tell you an event, like we all went out as a family and we enjoyed ourselves. We [144] didn't have that kind of lifestyle. We were more secluded. When you came home from school, you stayed in or you were allowed in the backyard. You couldn't bring friends and that. There were many times I had a girlfriend at school I wanted to bring there, but I wasn't allowed. I was invited to their birthday parties and wasn't allowed. I mean, we just didn't have that lifestyle when we were growing up.

Q. When your father would beat Ronald, do you recall if he hit him in particular parts of his body?

A. He just swung with that big leather strap. He didn't care if he hit your back, your head – he didn't care.

Q. So he hit all over?

A. I mean, he was drunk half of the time. And when he wasn't drunk, he still swung. He did not care. I mean, he just did what he wanted to do.

Q. When he would hit, though, would some of the blows land on Ronald's head? Did some of the blows land on Ronald's head?

A. I even got hit in the head a couple of times, yes. My dad was very abusive. He didn't [145] care where he hit. Years ago it wasn't like you talked about it or anything. It was more like if you had abuse in your home, you didn't want nobody to know. You didn't – there wasn't stuff like today. If there was, my dad would be in jail.

Q. When Ronald was beaten by your father, how did he react? Did he stand and take it? Did he try to run away?

A. No, we all tried to run away. And Ronald tried to, you know, get away from the blows and that, but he just cried. We all cried. We cried, we screamed, and he didn't care. He just did what he wanted.

MR. WISEMAN: All right. Thank you, ma'am. I have nothing further, your Honor.

THE COURT: All right. Mr. McIntyre.

MR. McINTYRE: I have some questions. Thank you, your Honor.

[146] CROSS-EXAMINATION

BY MR. McINTYRE:

Q. Good afternoon, ma'am. My name is Mike McIntyre. I'm with the Lehigh County District Attorney's Office.

A. Uh-huh.

Q. All right. Just let me ask you a few questions. Are you parents alive?

A. My mom passed away about just approximately say eight years ago. But my dad's living.

Q. Where is he living?

A. With his girlfriend on over the south side.

Q. All right. Here in Allentown?

A. Yeah.

Q. All right. Is there any contact between him and any of your brothers and sisters?

A. No. He won't – he don't have no contact. The only contact he has is with with my sister Sandy. Because he's like – he can't hardly walk. I mean, he has like a handicap, and he needs someone in charge of his stuff when he – you know, if anything happens to him. But no, not close, no.

[147] Q. I take it he's not very mobile? He can't get out of where he's living?

A. No, he drives. He goes to the horse track and that. But I'm saying he does it with a cane and half crawling. I mean, he has a crippling disease.

Q. All right. Neither you or your brothers and sisters go to see him, though?

A. I seen him like maybe a couple months ago. Well, last night he called to scream at me, because he didn't want me to come here. And I just like stood up for myself and said good-by, and he hung up.

Q. So that there is contact between –

A. Only that he called me up and said don't come up here today.

Q. Well, before that didn't you say – there was the phone call last night. Didn't you say that you visited him recently?

A. No. I said I talk to him once in a while because my sister tells us that he's not well. "What if something would happen to him?" So I call him once in a while. But, no, I don't sit up there. I don't take my dad anywhere. No, she does all that.

[148] Q. All right. Let me see if I can make this clear. Have you visited your father, let's say, in the last year? Have you gone to visit him?

A. Yeah, I went up already like with my sister Sandy, because he can't write. So with his papers and that. But I mean I don't sit there. And you can't sit there and discuss your life. Like he's not going to sit there and say, "Oh, how are you today?" And, "what's up?" He doesn't want to hear about how you are or what your life is. It's just, you know, if he talks, it's about, "Oh, I need this filled out," or, oh, this and that. It's not what – it's not like a family. It's – I don't know how to describe it. There's no love there.

Q. All right. Try to answer the question. I think the question to you was: Have you visited him in the last year?

A. Just to fill out his papers.

Q. How many times would you say you visited him in the last year?

A. Three.

Q. Three. And how about your brothers and sisters? Do they visit him?

[149] A. No. They don't go up at all.

Q. Nick does not. Okay. That's one.

A. Barbara, no.

Q. All right. Barbara, no. What about Darlene?

A. No no, no. My dad don't like Darlene.

Q. All right. Sandy does, though, right?

A. I said she's in charge of all his important papers and that. Yes, he needs somebody, and he picked her.

Q. Okay. And just so that I'm straight on this, were there originally nine children?

A. Yes.

Q. Did one die?

A. Yes.

Q. All right. Who was that? Was that Rick?

A. Richard.

Q. All right. So there's eight children living. Do they live in this area?

A. Uh-huh.

Q. Everybody?

A. Well, no. Paula, she's in Colorado. She went back to Colorado.

Q. Okay. How many of those children were [150] in this area at the time of the defendant's trial back in 1988?

A. Everyone but one, Paula.

Q. All right. So everyone but Paula was here at the time?

A. Uh-huh.

Q. It's fair to say, isn't it, that everyone knew that the defendant was going on trial in 1988? Isn't that true?

A. Well, yeah. By the papers and the T.V., yes.

Q. All right. Well, was there discussion between the family members?

A. About what?

Q. As to what they should do. Well, let me lay some background here.

Do I understand from your direct that your dad treated everyone the same?

A. Yes.

Q. All right. He didn't have a favorite?

A. Oh, my younger brother. My younger brother never got beaten, no. He got everything. If he wanted T.V., he got T.V. Stereo, he got it. Money, he got it. But to this day he will not bother with my father.

[151] Q. Would that be Robert?

A. Yes.

Q. All right. So other than Robert, everyone else was treated the same?

A. No. My sister Barbara, she had it pretty well.

Q. All right. Other than Robert and Barbara, was everyone else treated the same?

A. He did not hit Barbara. My mom hit Barbara.

Q. Robert and Barbara. Was everyone else treated the same?

A. The same.

Q. All right. Do I assume correctly that because of the treatment that you all got, it kind of made you unified, like you grew closer together because –

A. No, were not close together. We weren't brought up to be close together. We were more brought up to be far apart. How can we be close together when we never did nothing as a family together? No, we didn't bond, no.

Q. So I'm incorrect. Because of the treatment you got from your parents, the children did not –

[152] A. We weren't connected.

Q. – were not close at all?

A. No.

Q. All right. Back in 1988 at the time of the defendant's trial were you seeing your brothers and sisters, though, at that time?

A. No. Well, yeah, we were here. But I mean as far as visiting them and going places, no. It was more like we were apart. We live our own lives. It's not the kind of lifestyle like other people have, no.

Q. All right. Did you get together to talk about the fact that your brother was standing trial for murder?

A. No.

Q. That's the defendant.

A. No.

Q. Never spoke to one of your brothers or sisters about that?

A. When we were up here at the trial, yes. But I'm saying we did not – it wasn't like, "Oh, I'm going to call my sister Sandy and talk about my brother." No. We kept more to ourselves what we felt, and we just stayed in our own homes. It's so hard to describe.

[153] Q. Do I understand correctly that you did talk about it but while you were here, quote, at the trial, unquote?

A. Here. Right.

Q. All right.

A. Like when we were into the – for coffee or something.

Q. All right. And who did you discuss this with? Which brothers and sisters were at the trial?

A. Well, Nick was with me, Sandy, Darlene, and myself.

Q. What about Robert?

A. Robert – he did come, but I don't know what part of it he came. But, no, he was here.

Q. All right. And you had discussions with him; isn't that right?

A. Discussions? What do you mean "discussions"? See, I don't understand what you mean "discussions." What did we discuss?

Q. Just tell me if you don't understand the words.

A. I don't understand that. Because we didn't discuss nothing. We were just so heartbroken that this was happening.

[154] Q. Did you speak with Robert?

A. I don't understand.

Q. Do you understand the word "speak"?

A. Yes, I understand "speak." But what are you talking about? What did I say to Robert? We were all – we were all heartbroken about what was happening to my brother. I mean it wasn't like we were sitting around saying, oh, like I think this, I think that. It wasn't like that. It was devastating. I mean, it was something like you see on T.V. You just couldn't believe it. I mean, yeah, we said, oh, it was, you know, like from our bringing up and my dad's abuse and this and that. But, I mean, we didn't, you know, say what if he really did it or anything. I mean, it was just so devastating. And to this day it's devastating. I mean, I carry it in my heart. And I look at him, and it hurts.

Q. Did I understand that you just said that you did discuss the abuse with your brothers and sisters at the time of the trial?

A. No. We said, with him getting in trouble over the years when he was young, could it have been because he got beaten and that? Not – yes, he got beaten. He didn't – we don't know to [155] this day. I'll go in my grave, and I don't know if he did it. Because it's too devastating.

MR. McINTYRE: Your Honor, could I have the witness cautioned to answer the questions that are posed to her?

THE COURT: Well, I think she's –

THE WITNESS: I'm sorry.

THE COURT: I think she's trying to.

THE WITNESS: I'm sorry.

THE COURT: All right.

A. I'm not trying to avoid you. I'm not –

BY MR. McINTYRE:

Q. I think my question to you, ma'am, was: Didn't I hear you just say about – now it's about five minutes ago, that you discussed this abuse, the fact that you had been abused by your parents, at your brother the defendant's trial?

A. No. Because you're taking it wrong. No.

Q. You didn't say that? I misunderstood what you said?

A. You're taking it wrong. You're saying that we said because of his abuse, oh, he did it. [156] No, we did not talk like that. We talked about how we were brought up with no love, no nothing. He was always in trouble because of my father. He was beaten. He wasn't loved. He got nothing. And if he wanted something, "No, you're not getting it." None of us had anything. I'm sorry. But – I don't mean to be rude or anything. It's just that you don't understand what I'm saying.

Q. Are you finished?

A. Yeah.

Q. Who decided which of the brothers and sisters would testify for the defendant?

MR. WISEMAN: Objection, your Honor. I don't know how she would know that, if she knows.

THE WITNESS: No, I can answer that.

THE COURT: If she knows.

A. Nobody – and this is no lie. Nobody – we were not as a close family that we would meet with my sister or somebody and they would say this one would testify or this one. No, we were not even speaking to so-and-so at the time. We were all like apart. And nobody approached me to say, "Would you testify for your brother?" They didn't [157] ask me about our childhood. Nobody – because I live at the same place as I lived when the trial was going on. And nobody approached me. I'm sorry. So, no, we did not discuss who was going to talk. I wasn't even in that discussion if there was a discussion. I just knew my brother was on trial. I came to the trial. I sat with Sandy, Darlene, my brother Nick, and that's all. There was nothing more to it than that.

Q. And your testimony is that at no time did you, Sandy, Nick, Darlene or Robert decide which of you should testify?

A. No. No, we did not decide.

Q. So you have no idea how Nick, Darlene, and Robert were chosen to testify?

A. Well, maybe they were asked. But nobody asked me. And nobody told me that, you know – I guess they were asked.

Q. You were present for their testimony; weren't you?

A. Yes.

Q. All right. You heard what your two brothers and sisters had to say; right?

A. Yeah.

Q. All right. You knew that you could also [158] testify if you wanted to?

A. Nobody asked me to.

Q. Please answer the question.

A. No. But what I'm saying is nobody –

Q. I didn't ask you if someone asked you to.

A. No, you said, "You could have." No, I couldn't have, because they didn't take my deposition – that I didn't have no papers on me like now. No, I couldn't stand up and say to the judge, "Oh, can I go up and speak for my brother?" I could not do that at the time, no.

Q. My question to you was: You knew you could testify if you had wanted to; didn't you?

A. No, because nobody asked me.

Q. All right. You thought that you had to be asked first?

A. Well, yes. My brothers and sisters –

MR. NOLAS: I object.

THE COURT: Just a minute.

A. I guess that they were approached.

THE COURT: Just a minute. Just a minute.

MR. NOLAS: The claim is an ineffective assistance of counsel claim. What is [159] the relevancy of a witness's – I mean a witness is a witness. Lawyers call witnesses. Witnesses don't just show up, get up on the stand, and start talking.

THE COURT: Well, no. I see what the relevance is.

Go ahead.

MS. [sic] McINTYRE: Thank you, your Honor.

BY MR. McINTYRE:

Q. All right. So your answer is no?

A. If you want to ask me would I have if someone would have asked me, yes, I would have.

Q. I don't think I asked you that question.

A. No. I'm saying if you would have or if somebody would have asked me at that day, "Would you go up?" yes, I would, just like I am here telling the truth. I would have went up, sure. He's my brother. I love him.

Q. Do you know why none of your brothers who did testify or sister who testified mentioned anything about this abuse that you've told us about?

A. Nobody asked any of them at the trial when they testified about any of our childhood, [160] no.

Q. Did you ever – is that the reason they told you?

A. No. Nobody ever mentioned – asked questions about our childhood.

Q. Try to focus on the question, which was: Do you know why neither of your two brothers or Sandy, the ones who did testify, didn't mention anything about this abuse?

MR. WISEMAN: Again, she just answered the question.

A. Why would they?

THE COURT: Just a minute.

A. They weren't asked about their childhood.

THE COURT: Just a minute. When I talk, people keep talking. I don't understand.

THE WITNESS: I'm sorry.

THE COURT: That's not how it's supposed to work.

THE WITNESS: Sorry.

THE COURT: All right. I'm sorry, Mr. Wiseman.

MR. WISEMAN: My objection was [161] it seems to me that she answered the question. Her answer was they weren't asked; that's why they didn't talk about it.

THE COURT: I don't know. I think the question was –

MR. McINTYRE: I can live with that. I'll ask another question, your Honor.

THE COURT: All right. Okay.

BY MR. McINTYRE:

Q. All right. How do you know that that's not – that that's the reason that they didn't mention anything?

A. Because I was here, and I know what they asked them, and it was not about our childhood. Because if they had asked what about Ronald's childhood and abuse, they would have spoke, yes, because it's a true fact. We were abused kids. We were beaten. We had no love. That is true. And I would take a lie detector test right today. That is true. And I hate my father today. I hate him.

Q. Did you get this information –

A. No, I got no information, no. This is from my heart.

MR. MCINTYRE: Your Honor, I [162] need some help now. I need to be able to finish my questions.

THE COURT: Ms. Rompilla –

THE WITNESS: I know.

THE COURT: – he didn't finish the question. You didn't know what he was going to ask.

THE WITNESS: I'm sorry.

THE COURT: Just calm down. Take a couple deep breaths and just wait till Mr. McIntyre finishes the question.

THE WITNESS: I'm sorry.

THE COURT: All right.

BY MR. McINTYRE:

Q. Now, what I'm asking is: Did you get the information that you just gave to us that the reason Nick, Darlene, and Robert did not mention the abuse is because they were not asked for it – did you get that from them? Did they tell you that?

A. No. Nobody talked about the abuse at that time, because it wasn't a subject at that time.

Q. Okay. And were you present with Nick, Darlene, and Robert at all times that they were [163] conversing and preparing their testimony –

A. No, I was not.

Q. – with the defense attorneys?

A. No. I was not there, no.

Q. So you wouldn't know what was spoken about that?

A. No, no.

Q. Okay. Do you know why the defendant would tell or answer in an interview form that he had that he was never abused? Do you know why he would do that?

A. I didn't hear it.

Q. You didn't hear that?

A. No.

Q. Do you know why he would answer a question I believe at the time of a counseling session after his conviction in this case, "Have you ever been abused?" and he would answer, "No"? Do you know why he would do that?

MR. WISEMAN: Objection, your Honor. May we know the basis for the question? Is there a a [sic] good faith basis? I'm not sure where he's going.

THE COURT: I don't know how she could possibly know that. How she could [164] possibly know that?

MR. WISEMAN: I would object on that grounds, as well.

MR. McINTYRE: It's based on her direct in which she said, "No, back in those days we never mentioned abuse." Unfortunately, at the time of this question it wasn't back in those days. And this is how I wanted to follow it up.

THE COURT: Objection sustained. That's something she'd have no knowledge of.

MS. [sic] McINTYRE: All right.

BY MR. McINTYRE:

Q. Now, isn't it true, ma'am, that the family members were presented with a little bit of a dilemma at the defendant's trial?

MR. WISEMAN: Objection to form, your Honor.

MR. McINTYRE: I'll make it more clear.

THE COURT: That's pretty broad.

MR. McINTYRE: I would never get an answer with that one.

[165] BY MR. McINTYRE:

Q. All right. See if you can follow me on this. Didn't you say a few minutes ago that you didn't want to make – you didn't want to say something about abuse because that would make it look like he did it, and that was like offering an excuse for him? You didn't say that?

A. No.

Q. Okay. Isn't that true, though, that that's the dilemma that the family faced; and if they came in and said, "Oh, he's an abused person," that would be seen as trying to excuse his conduct, not saying that he was not the person who did this?

A. No. We didn't think that way, because we didn't know to this day if he did it.

Q. Isn't that the position that the family took –

A. No.

Q. – that he did not do it?

A. Well, yeah, we believe he's innocent, of course.

Q. And isn't that what Nick, Robert, and Darlene all said at the penalty phase in this case, "He did not do it. I don't believe he did [166] it"?

A. They never said that. To who –

Q. Did you read the notes of testimony?

A. No, I didn't read it, and I don't know what they said. But –

Q. Well, you were present; right?

A. – they never said – they didn't say my brother didn't do it. They weren't asked questions like that. Nobody asked them. "Oh, do you think your brother did it?" I don't recall that they asked that.

Q. You were present; right?

A. Yes.

Q. And in your opinion they never gave their belief that your brother did not do the crime? Is that what you're telling us?

A. To tell you the truth, I don't remember even what they said.

Q. All right. You haven't been able to read the notes of testimony?

A. I didn't read anything.

Q. Okay. All right. Have the other brothers than sisters ever been accused of murdering anyone?

A. No.

[167] MR. McINTYRE: I have no further questions.

THE COURT: All right. Mr. Wiseman. Mr. Nolas.

REDIRECT EXAMINATION

BY WISEMAN:

Q. You mentioned, Miss Rompilla, that one of your brothers passed away?

A. Yes, Richard Rompilla.

Q. What did he die from?

A. He was a heavy drinker, too. And he died of liver – sclerosis of the liver.

Q. Were other of your siblings also heavy drinkers?

A. They were all drinkers, Ronald, Nick, and Richard.

MR. WISEMAN: I have nothing further. Thank you.

THE COURT: Anything further?

MR. McINTYRE: No, your Honor.

THE COURT: You may step down, ma'am. Thank you.

THE WITNESS: Okay. Thank you.

[168] MR. WISEMAN: Your Honor, I have one more question. I'm sorry.

THE COURT: All right.

MR. WISEMAN: I lost my piece of paper.

THE COURT: Miss Rompilla, I'm sorry, there's one more.

MR. WISEMAN: I have too many papers in front of me.

BY MR. WISEMAN:

Q. You saw your brother Nick today?

A. Yes.

Q. When was the last time saw him before today?

A. In 1988 was the last time I seen him.

Q. And where was that?

A. In here, the trial for Ronald.

MR. WISEMAN: Now I have nothing further. Thank you, your Honor.

THE COURT: Anything further?

MR. McINTYRE: No, your Honor.

THE COURT: You may step down, ma'am. Thank you.

[169] NICHOLAS ROMPILLA, JR.

was called as a witness and, having been duly sworn, was examined and testified as follows:

THE COURT: You may be seated, sir.

DIRECT EXAMINATION

BY MR. WISEMAN:

Q. Tell the Court your name, sir.

A. Nicholas Rompilla, Jr.

Q. And how old are you?

A. Fifty-three.

Q. And do you know Ronald Rompilla?

A. He's my brother.

Q. And where are you in age in relation to him?

A. I think he's around 47. About six, seven years difference.

Q. And where are you in relation agewise to your other siblings?

A. I'm the second oldest.

Q. I want to ask you some questions about what it was like in your house when you were growing up and when Ron was growing up. Tell the Court whether your father drank and, if so, with what regularity.

[170] A. Well, at the time he was drinking every day. He always did. He was abusive and this and that there.

Q. Sorry?

A. I said he was abusive when he drank.

Q. Let's stick with the drinking first. All right? I want to ask you some specific questions. When you say he drank every day, what quantities did he drink if you remember?

A. I couldn't tell you the quantity, but it was pretty much. He drank whisky and beer.

THE COURT: If you can pull your chair up and speak into the microphone, that will probably help everyone to hear. And you can move the microphone.

THE WITNESS: All right.

THE COURT: All right.

BY MR. WISEMAN:

Q. Do you recall if he drank to intoxication?

A. Yes.

Q. Did he do that on a daily basis? Weekly? Monthly? How often did he do that?

A. It was like four times a week.

Q. And did your mom drink at all when you [171] were growing up?

A. She drank every day.

Q. And you say she drank every day. Did she drink to intoxication?

A. Well, she would start in the morning, and she wouldn't finish till she went to bed. And that's seven days a week.

Q. Do you recall when your mom was carrying – was pregnant with any of your younger siblings?

A. Yes.

Q. Do you recall whether or not she continued to drink when she was pregnant with her children?

A. She drank to the day that she went to the hospital. She would drink when she knew she was going – when she was going to deliver. My dad wasn't around. She would drink beer, and then she would walk to the hospital. Sacred Heart, and she would deliver the kid, the baby.

Q. That's the day of the deliverly [sic]. I'm talking about the nine months that she was carrying the child.

A. She drank every day. Every day. She never stopped.

[172] Q. Now, did your mom or your dad ever hit you? Withdrawn. Do you recall specifically if she drank when she was carrying Ron?

A. Yes.

Q. She did?

A. Right.

Q. Do you recall whether your mom or dad ever hit any of the children in the family?

A. Yes, he did. When you were wrong I guess, he did hit you.

Q. When you were wrong. What do you mean by "when you were wrong"?

A. Well –

Q. Misbehaved?

A. If you didn't listen to him. Like if he told to you do something, you know, and you didn't do it, and if he was drinking, he would hit you. He would hit you with his hand, whatever was there, you know.

Q. Do you have any specific recollections of being hit with something other than his hand?

A. With a belt, broom, stick, you know.

Q. You say he would do that when you did something wrong. You wouldn't listen to him. Did he ever hit you for no apparent reason, like when [173] you weren't clear why he was hitting you?

A. Not that I recall.

Q. So you had to do something specifically wrong?

A. Right.

Q. Did he ever hit you for doing something that was wrong that was, in your mind, not a real wrong thing, a little thing?

A. I can't recall.

Q. Okay. Do you recall anything about a cage in your house?

A. Yeah.

Q. What house was that?

A. Where we lived on Fourth Street I think it was, 37 North Fourth Street. We did wrong, and he took me and my brother – he had a box cage. He put us in there, and he nailed slats across. And we ate in there. We slept in there. We urinated in there. And the only time he let us go out – get out is if we had to go do the other thing. And we stayed in there for about a week.

Q. When you say –

A. He would keep us inside. And if it was nice, he would drag us out on the back porch.

Q. So this little cage thing was in your [174] house, in the living quarters?

A. Right.

Q. And if you recall – I know that's a long time ago. Approximately how big a thing was this?

A. Well, it was enough for two people to sit in with their knees bent up, you know, like the position like this. And you got to consider we were young, too. So the box was enough for two just to sit with your knees bent.

Q. Now, when you say "two kids in it," it was you, and who was the other kid who would be in there?

A. My brother. Richard.

Q. Did you ever see him put Ron in there?

A. No.

Q. Did you ever see Ron see you in the cage?

A. If he would remember, you know, because he was born in '48, and this probably was around '49. And he would be just about a kid, a baby, you know.

Q. Was this cage thing something that happened just once or twice, or did it happen over a period of years?

[175] A. It only happened once.

Q. How long did he have you in there on that occasion?

A. If I recollect I think it was about a week. About seven days.

Q. Do you recall what precipitated him putting you and your brother in that cage?

A. Why he put us in there?

Q. Or why he told you he put you in there. Did he tell you a reason?

A. Well, we stole.

Q. You stole something?

A. Right.

Q. Do you remember what it was you stole?

A. The rent money.

Q. How old were you then?

A. Seven, eight, somewhere around there.

Q. Now, you wound up going to reform school at the age of nine?

A. Well, I was in the orphanage for two years. Then I went – after that I went into a reform school in Philadelphia, Saint Gabriel's, whatever they call it.

Q. Do you remember why you were sent to the orphanage?

[176] A. Well, they said I was incorrigible. I was getting in trouble and not listening in school, skipping school, things like that. Stealing. I suppose that was part of it, too.

Q. After the orphanage did you ever go back to school?

A. Well, the orphanage was basically around '46, '47, after the war. It was after the war. And it was me and my sister. We were in there for two years.

Q. Now, when your father wasn't hitting you on those occasions, did he say nice thing to you?

A. No. He was always putting us down. You know, if you didn't do something right, he would call you a nitwit,

whack you across the head. "You'll never learn. You'll be stupid." He done that for years. Even if I would go over there today and talk to him, he says, "You're still stupid." That's the way he was.

Q. Did your father's behavior change when he was sober to when he was drunk?

A. He was always out. The only time I ever seen him is when came in, and that was like in the evening, you know. And we would have to go bed early anyway.

[177] Q. When was the last time you saw your father?

A. I think when my brother died. I think that's about seven, eight years ago I guess, nine years ago.

Q. Is that your brother Richard?

A. It could be seven years ago. Richard, yes.

Q. Do you have any memories of happy occasions in your household?

A. No.

Q. Did your mom or dad ever hug you and kiss you and tell you you were a good boy?

A. No.

Q. Did they ever do that to Ron when you were around?

A. No, not that I knew of. I couldn't tell you that, I mean.

Q. Sorry?

A. I don't remember. I couldn't tell you that. I don't know.

Q. You don't remember it happening?

A. He didn't do anything for the family. He didn't take us nowhere. He didn't do nothing. We were just there. And if we were a bother, we'd [178] be sent to the room or get outside and do what you got to do, play or whatever, you know. It wasn't a close family, you know.

Q. Do you recall what Ron was like when he was still – when you were still at the house?

A. Quiet, drawn back, you know. Something like that, you know.

Q. Now, the house that you grew up in, can you describe the physical – withdrawn. Did the house you grew up in have plumbing?

A. Well, you had plumbing on the outside.

Q. What do you mean?

A. We lived in a cellar. It was converted into a semi-apartment. You had a coal bin, you had one big bedroom, and the rest was kitchen and living room. And the bathroom was on the outside. There was plumbing there. It was a toilet. Because we took a bath in a bathtub. You know, heat the water up, and you took a bath.

Q. Was your family rich or poor?

A. Poor.

Q. Do you remember having lots of toys and things to do when you were a child?

A. We didn't have nothing. We were on our own. We basically did what we wanted.

[179] Q. Do you remember whether or not your father ever had women that he brought around other than your mom?

A. Not around the house – I mean our apartment. But occasionally when I got out – I was on parole, and I wanted to go in town, he would make an excuse. He says, "Well, I'm going to take" – well, he would call me Bumper, my nickname, you know. And he said, "I'm going to take him into town." And he would drop me off. You know, then I knew where he was going, because he took me to a place with a woman that he was dating at that time.

Q. Do you remember her name?

A. I think it was Mary Pletz. I think her last name was Pletz. They lived down on Gordon Street. It's a long time.

Q. So you were aware that your dad was seeing this woman?

A. Well, I was with him on one occasion. And I told him I won't be around that anymore, because he tried to fix me up with another woman, but I didn't want nothing do with it. I was more like, you know, how this can happen, you know. And I wanted to say something to my mother, but I [180] knew they were going to continue to fight, and probably, you know, whatever could have happened I don't know.

Q. Did your mom and dad ever have physical fights?

A. Yes. He would punch her. She would have black eyes. She'd be bruised on her arms and this and that. I've seen it. I was there.

Q. When your dad would hit you and Ronald and the other children, did he have a special place like to hit you on the body, or was it more wherever the blows landed?

A. Wherever his hand reached.

Q. Were you ever hit in the head by your father?

A. Plenty of times.

Q. Did you ever see Ron hit in the head by your father?

A. Did I survive it?

Q. I said: Did you ever see Ron hit in the head by your father?

A. A couple of times.

Q. Now, when Ron got out of jail in 1987, who did he live with?

A. He lived with me.

[181] Q. And during that time was he abstaining from alcohol, or did he drink alcohol?

A. In the beginning he wasn't doing nothing. But I know he was smoking marijuana at the time, you know.

Q. When you say "in the beginning," did it change at some point?

A. Yeah. I'd say like in about a month and a half. About a month after he was there.

Q. What happened? What did he begin to do?

A. Well, he'd drink a beer then if we went out, you know. Like I said, I went to the bar and I played darts there. He would be with me. He played darts. We'd have a beer or two. Then I would leave. Then he'd go on his own. A few times I seen him that he was drunk.

Q. Did Ron drink before he went to jail?

A. Yes.

Q. Before he went to jail in the seventies?

A. Yes.

Q. Did he drink moderately or excessively?

A. Excessively.

Q. What do you mean by that? Tell the Court.

A. Well, when you drink, you know – like [182] he drank mixed drinks basically, you know, whiskey or Seven and soda, something like that. And he would drink it down fast. Before you know it, he had another one. You know, that would be going on and on, you know.

Q. Now, you testified at your brother's trial back in '88.

A. Yes.

Q. Do you remember that? Did you testify to any of the facts that you've testified to here today?

A. No.

Q. Is there a reason for that?

A. Nobody ever asked I guess.

Q. You weren't asked these questions?

A. I wasn't asked these questions, no. It was just during the three months that he was out. That was it. The three months he was out, that's all he asked about.

Q. During the trial?

A. Yes.

Q. Now, when the lawyers asked you before your testimony about testifying, did they discuss with you talking about your childhood or did they discuss with you talking about the three months or [183] something else?

A. The only thing was just about the three months he was out. They didn't ask anything about childhood or anything like that. Because they did have an investigator there, and he never even asked that.

Q. Now, you said that the children were beaten in the family, and you mentioned hands and you mentioned I think a belt. Was there ever anything – I think you said a broom also; is that right?

A. And a broom and a stick.

Q. What kind of stick was it? Do you remember?

A. Could have been part of a broom handle or a brush, whatever.

Q. How often were you and the other children beaten?

A. That's hard. I don't know. Say maybe twice, three times a week, you know, if we did something wrong.

Q. Now, when your dad would beat you, did he go off and do it in private, or did he do it in front of the other kids?

A. In front of everybody. Wherever he [184] caught you at, you know. Maybe at the dinner table. It could be if you were in the kitchen doing something, you know. "I heard you did something wrong at school," and smacked you back of the head, kick you in the ass, give you a punch.

Q. Were there times that you saw Ron get beaten?

A. Not at that time, no.

Q. Sorry?

A. Not at that time. I'm just talking about myself, you know, at that time, you know.

Q. I see. Were there times when you were beaten in front of Ronald?

A. If – I don't know. I don't know if he remembers that or not.

Q. Well, leaving aside if he remembers it, do you remember it?

A. Not that I recall, no.

Q. You testified that your dad would say things like you're stupid, you're not going to amount to anything, those kinds of comments. Did he say those kinds of things to Ron, or were you gone by then?

A. He said it to all of us. You know, it's [185] just the way he was, the way he spoke, you know.

MR. WISEMAN: I see. Just a moment, your Honor.

THE COURT: Uh-huh.

MR. WISEMAN: Nothing further, your Honor. Thank you, sir.

THE COURT: All right, Mr. McIntyre.

MR. McINTYRE: Thank you, your Honor.

CROSS – EXAMINATION

BY MR. McINTYRE:

Q. Good afternoon, Mr. Rompilla.

A. Hi.

Q. I've got some questions I'd like you to answer if you can.

A. Sure.

Q. All right. You are the oldest of the children?

A. The second oldest.

Q. The second oldest?

A. Right.

Q. Who is the oldest?

[186] A. My sister Barbara.

Q. Okay. And what are you, three years older than the defendant?

A. No, about six or seven.

Q. Six or seven. When were you born, what year?

A. I was born in '42, July 17th, '42. He was born I think in '48.

Q. All right. Do you consider your family to be a close one? Not the parents. The brothers and the sisters.

A. No.

Q. All right. Do you have any contact with any of your brothers and sisters?

A. I haven't seen anybody for seven, eight years, sometimes nine years.

Q. Back at the time of the trial, the defendant's trial, did you see your brothers and sisters then?

A. A few.

Q. Did you watch the trial?

A. I was here on some occasions.

Q. And then you eventually testified?

A. Right.

Q. All right. When you were watching the [187] trial, would you have time during breaks and things to discuss your brother the defendant's predicament with your brothers and sisters?

A. No.

Q. You didn't talk to them at all about it?

A. No.

Q. All right. Was there any talk about what the brothers and sisters could do for him, how they could help him?

A. No.

Q. None at all?

A. Nothing.

Q. All right. Do you know how you got to be a witness?

A. Well, because he lived with me, and I was the last one to see him. It was about ten of 1:00 in the morning. And there was another thing about the bank bag, and they said, "Well, you're going to be a witness for this." And they never brought that stuff up anyway, so –

Q. All right. What I meant was more like the procedure. How did you – how did it happen that someone said to you, "I'd like you to testify"? Do you remember that?

A. Well, I think it was – this goes back. [188] Well, it was – their investigator came to the house.

Q. First an investigator?

A. Right.

Q. Not one of the lawyers?

A. Not that I recall. I don't remember. It's too long.

Q. All right. What did the investigator ask you?

A. He just asked about the three months he was out. That was about it, you know, and that was it.

Q. All right. And at some point did you get to speak to your brother's lawyers?

A. Yeah.

Q. All right. And do you remember who they were?

A. George –

Q. How about Fred Charles?

A. Fred Charles.

Q. Do you remember Maria?

A. Maria Santos, yes. I was trying to think of his name.

Q. All right. Before they put you on the stand as a witness did they talk to you, explain [189] to you what the procedure was at that time?

A. Some of it. Not much.

Q. All right.

A. They didn't say anything. They said they were – they were just going to ask me just about the three months he was out. That was it.

Q. All right. Well, let me ask you this. You knew that when you testified he had already been found guilty by the jury; right?

A. Right.

Q. All right. And was it explained to you that the next process was to determine what kind of punishment?

A. Right.

Q. All right. And it was explained to you, was it not, that the defense had the right to offer evidence to get the jury to give him the life sentence rather than the death penalty?

A. Right.

Q. All right. And did you understand that that meant that you were supposed to – or evidence was going to be offered to, as we call it, mitigate, make it less, the charges that he had been convicted on?

A. No, I don't think so.

[189] Q. Let me run that one by you.

A. I think so. I know what you mean, but –

Q. That was never explained to you that the purpose of that hearing –

A. No no, no, no.

Q. All right. You had no idea that that was –

A. No. They only said this next phase was to have – the time I came up to testify was because of that, the mitigating circumstances, aggravating circumstances, or whatever, something like that.

Q. You remember that?

A. They said a few things about it, yes, I remember.

Q. And did you know that mitigating circumstances meant circumstances that would lessen the nastiness of the crime, make it less?

A. No, I didn't know that.

Q. You didn't know that?

A. No.

Q. All right. Did you think at that time, Mr. Rompilla, that this family life that you've evidenced, that you saw for yourself and for your [191] brother, did you think that would be something the jury should know about?

A. I think so, yeah. Because look at my life, I did almost eleven and a half years, you know. The only reason I got away from the situation was I found it better to go to jail. And that's exactly what I did. I didn't have to be with the family. I didn't have to see this. It got to a point where I told my dad I'd kill him, if you want to know. But I told him that when I was like 22, 23. You know, I said, "I should have killed you years ago, because you brought the family nothing but misery." I mean he's my father. I hate to talk like this. But, look, I went through it. A lot of them went through it. My family. That's why we're not close anymore.

Q. Did you ever discuss this family life with Maria Dantos and Fred Charles?

A. No.

Q. All right.

A. They never asked.

Q. Weren't you asked about – a general question about what your brother's family life was like?

[192] A. I can just say at the time it's what I can remember. Because in the period I wasn't around – see, like I was always in jail myself. You know, when I got out, I didn't live there. You know, I got my own place.

Q. All right. My question was: Weren't you asked by your brother's attorneys what his family life had been like?

A. Not that I recall. I couldn't tell you.

Q. Meaning that you could have been but you don't recall?

A. Probably not. I don't remember it. Otherwise, I would have remembered it. I don't think so.

Q. All right. Did you ever volunteer any evidence to the defense attorneys about what your brother's family life was like?

A. Nobody asked. I don't know. I didn't say anything, no.

Q. I take it you were present, though, with both Miss Dantos and Mr. Charles, and you did have the opportunity to speak to them?

A. But they never –

Q. Did you ever – let me finish the question. You did have the opportunity to speak [193] to them; right?

A. But they didn't say anything. They didn't ask me that.

Q. And you never volunteered it?

A. No.

Q. All right. Now, let me just talk a little bit about what was brought up about the family life. This cage incident, you never saw the defendant ever being put into this cage or this pen as we've heard it described; right?

A. Not that I – no.

Q. All right. And do you even know if he ever even witnessed you being put into this cage or this pen?

A. It's a possibility. I don't know.

Q. All right. It's a possibility he never saw it; right? Right?

A. But he was there.

Q. All right. But it occurred one time, as I understand, for a one-week period. Is that it?

A. Right. Right.

Q. And how old were you then?

A. I said between about eight – seven or eight years old.

Q. Which would make him how old at that [194] time? One or two?

A. It could be about two, one or two.

Q. All right. All right. We had heard about your father hitting you, and then suddenly the words changed from "hit" to "beat." When you used the word "beat" or answered questions that had the word "beat" in them, did you use it in the same way you mean "hit"?

MR. WISEMAN: Objection to the word "suddenly," your Honor. That's his characterization.

MR. McINTYRE: I'll take off the word "suddenly."

THE COURT: It's a bit argumentative. Rephrase the question.

BY MR. McINTYRE:

Q. All right. When you used the word or hear the word or answered questions with the word "beat" in it, do you mean that to mean the same thing as the word "hit"?

A. No, because he knocked me out already.

Q. All right. One time he hit you so hard he knocked you out?

A. A couple times.

Q. All right. A couple times?

[195] A. Yeah.

Q. All right. Did I understand you to – did I hear you say that you saw the defendant get hit twice by your father? "Punched" I think the word was.

A. It could be more. It's kinds of hard. It's so many years ago.

Q. But did you say that on direct, "about two times," when someone asked you if you ever saw him get punched in the head or punched?

A. Smacked in the head. Smacked in the head.

Q. Smacked. Does that mean with an open hand?

A. Open hand.

Q. That's not a punch with a closed fist.

A. But when he hit, he hit you hard. You felt it. You flew.

Q. But would you just answer my question. A punch is with a closed fist. A smack is with an open hand.

A. Right.

Q. And you mean a smack?

A. Right.

Q. All right. And did I also understand [196] you to say that your father would hit you when you did something wrong?

A. Yes.

MR. McINTYRE: I have no further questions.

THE COURT: All right, Mr. Wiseman.

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. Just a couple things, Mr. Rompilla. The cage that you described, what house were you living at at that time? What was the address?

A. I think it was 37 North Fourth Street.

Q. Now, your sister Randi testified to a dog cage at South Fifth Street. Is that a different cage than the one you're talking about at 37 North Fourth Street?

A. It's a possibility. But I wasn't there. I don't remember. I don't know anything about that one, you know.

Q. Now, you left the family house for the orphanage or reformatory, whatever it was that you went to, at about the age of nine; is that right?

A. Two years old and when I was nine.

[197] Q. Okay. So when you left at the age of nine, Ronald would have been about two or three years old?

A. Somewhere around there.

Q. Approximately?

A. Approximately, yes.

Q. And so during the time that you were in the house when Ron was three and younger, you recall him being hit two or three times in the head by your father?

A. I seen him hit a lot of them when they was just babies, you know.

Q. Now, the specific questions I've asked you today, "Were you hit?" was that question ever asked of you either before the trial or during your testimony by Ronald's lawyers at the time of the trial?

A. No.

Q. Was the specific question of, "Did your father drink to intoxication?" – was that ever asked of you at that time?

A. I don't think so, no.

Q. Was the specific question about whether your father and mother would have physical altercations in front of you and your siblings – [198] was that ever asked of you at the time of the trial?

A. No.

Q. Was the fact that your father had a girlfriend that you and your siblings knew about – was that asked of you at the time of the trial by Ronald's lawyers?

A. No.

MR. WISEMAN: Nothing further.

MR. McINTYRE: No questions.

THE COURT: Thank you, Mr. Rompilla. You may step down.

THE WITNESS: Thank you.

MR. WISEMAN: May we have ten minutes, your Honor, if that's all right?

THE COURT: I'll tell you what I'd like to – if we can go till about – go another 20 minutes or so, because then I have another matter. I have to take a phone conference, and I'm not sure how long that will be. So I'd like to go that long and then take a break at that point.

MR. WISEMAN: All right.

Barbara Harris, please.

[199] BARBARA HARRIS

was called as a witness and, having been duly sworn, was examined and testified as follows:

THE COURT: You may be seated, ma'am.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. WISEMAN:

Q. State your name, please.

A. Barbara Harris.

Q. And do you know Ronald Rompilla?

A. Yes, I do.

Q. And what is your relationship with him?

A. He's my – I'm his sister. He is my brother.

Q. And what is your age in relation to Ronald's?

A. I'm 54.

Q. So you're about six years older than him?

A. Uh-huh.

Q. Where do you rank in the Rompilla siblings as far as age goes?

A. I'm the oldest.

Q. Now, I want to ask you some questions [200] about your mom and dad when you were growing up. Did your father ever hit you?

A. No.

Q. Did your father ever hit any of the other children in your family?

A. The younger ones.

Q. And did you ever see your father hit your brother Ronald?

A. Yes.

Q. When your father hit Ronald, what did he hit him with?

A. A belt or his hands. The face. He hit him in the face.

Q. Did he ever – did he use anything besides a belt and his hand?

A. No.

Q. When he would use his hand, was it an open hand or closed a hand?

A. Open.

Q. Did he hit him on particular parts of his body or all over his body?

A. Mostly his face, his back.

Q. Did your mom ever hit Ronald?

A. Not as much.

Q. But did she ever hit Ronald?

[201] A. Yes, she did.

Q. How often would your father – how often did your father hit Ronald?

A. Pretty much. He picked on him a lot.

Q. When you say "pretty much," was it something that happened on a daily basis? Once a week?

A. No, I'd say maybe about three times a week.

Q. And how frequently did your mom hit him?

A. Not as much as that.

Q. Were you treated any differently by your mom and dad than Ronald was?

A. I was my dad's favorite. But my mother was very strict with me.

Q. Did your mom ever hit you?

A. Sure, yes.

Q. Did your mom and dad drink alcohol?

A. Yes, they did.

Q. And how would you describe their alcohol consumption?

A. My mother drank from day to night. My dad, not as much as my mother did.

Q. How frequently did your mom drink?

A. Every day, seven days a week.

[202] Q. How frequently did your dad drink?

A. Not seven days week, but he drank.

Q. When your dad drank, did he drink to intoxication?

A. Yes.

Q. And did he do that pretty much every time he drank?

A. Yes.

Q. When your dad was hitting – withdrawn. Did your dad hit other kids in the house besides Ron?

A. My other brothers, Nicholas, Richard, the one that passed away, and the youngest one was a favoritism.

Q. Was what?

A. He was a favorite.

Q. So you were a favorite, and the younger one was a favorite?

A. Yes, we were.

Q. And everyone else in between was treated more or less the same?

A. They were abused.

Q. When you say they were abused, what do you mean? Try –

A. Hit all the time, picked on. They were [203] rough with them.

Q. "They" being your parents?

A. My mother and my dad, yes.

Q. Did your family have a lot of money?

A. No.

Q. Did your mom and dad – withdrawn. Did your dad ever praise you and your siblings?

A. You mean me?

Q. He praised you?

A. I was his favorite.

Q. What would he say to you, what kind of things?

A. Well, they called me Bobbie. They never called me Barbara. They'd say, "Bobbie, do you want a soda? Do you need money? Do you need clothing?" And I got it.

Q. And did you hear him do the same types of things with your siblings?

A. No, they couldn't – no, they didn't get – they had hand-me-downs or they didn't get any money.

Q. Did he ever praise them in terms of, you know, if they did something good he'd say, "Oh, good job. I'm proud of you," that kind of thing?

A. No, not with the boys.

[204] Q. Did you ever hear him say anything affectionate towards the children –

A. No.

Q. – excluding you?

A. No.

Q. Did your mom ever tell nice things to the boys?

A. No.

Q. Conversely, did your mom and dad say nasty things to the boys?

A. Excuse me?

Q. Did your mom and dad say nasty things to the boys?

A. They hollered at them, yes, that they're dumb or that they're not bright or they're stupid.

Q. Did they talk about what future prospects the boys would have for success in life?

A. No.

Q. What did they say about it?

A. They wouldn't amount to anything.

Q. When you'd see you [sic] dad hitting Ron, what did Ron do? How did he react?

A. Well, he cried a lot. He was quiet, kept everything inside. He was very nervous.

Q. As a child?

[205] A. As a child, very nervous.

Q. Now, aside from your mom and dad, did other people in your family drink?

A. My brothers.

Q. All three or four brothers?

A. Richard, Nicholas, Ronald, and my youngest brother, Robert.

Q. And if I use the term "drinking problem," would you say they had a drinking problem or didn't have a drinking problem?

A. I'd say they had a drinking problem.

Q. How did your youngest brother die? Do you know? I'm sorry, your younger brother, the brother that died, how did he?

A. He died from drinking. He had a brain hemorrhage. He had sclerosis of the liver. His kidneys failed. He was in pretty bad shape.

Q. Do you remember a point when your brother Nick left the family home when he was pretty young?

A. My brother Nick?

Q. Yeah.

A. Yes.

Q. Do you know where he went?

A. I think he was put away.

[206] Q. Did that happen to you, as well?

A. You mean in a home?

Q. Yes.

A. We were – me and Bumper were put in a home for two years.

Q. And how old were you then?

A. I don't remember. I was little.

Q. You were a baby?

A. My dad was in the service, and my mom couldn't take care of us.

Q. All right. And then you came back to the family home?

A. My dad got us out.

Q. And then there was a time when Nick was a little bit older. Did he go to reform school?

A. Yes he did. I remember.

Q. You remember that?

A. I don't remember it clearly, but I know he was in one, Camp Hill, something like that.

Q. Do you remember your mom being pregnant with your younger brothers and sisters?

A. Yes.

Q. Did she stop her drinking when she was pregnant?

A. No. My mother drank and smoked.

[207] Q. To the same level even as compared to when she wasn't pregnant?

A. Uh-huh.

Q. Do you remember your mom and dad having fights in front of you and your brothers and sisters?

A. Yes. My mother got beat up, and I had to protect her, come down with a shovel or something to get my dad away from her.

Q. How old were you when that happened?

A. We lived on Fourth Street. I could have been 12, 11, maybe 13. I don't know. Young.

Q. Now, the fighting that your mom and dad did with each other, did they do that off in private, or did they do it in front of the family?

A. In front of all of us.

Q. Do you have a specific recollection of Ronald being among the group?

A. Ron was there, yes.

Q. Now, you were talking about what Ronald was like when he was little. I think you said he was sort of quiet?

A. Quiet, kept everything inside, and he was a very nervous child.

Q. When you say he was nervous, can you [208] describe that a little bit?

A. Well, he always – when he was nervous, he just kept eating and eating and eating, overeating. We had to take him to the hospital because he just stuffed himself so much with eating.

Q. When Ron got out of jail –

MR. WISEMAN: May I just have a moment, your Honor?

BY MR. WISEMAN:

Q. When Ron got out of jail in 1987, do you know who he lived with at that time?

A. My brother Nicholas.

Q. Did you see Ron during that time?

A. Yes, he came to visit me.

Q. Do you know whether or not – withdrawn. Did Ron ever drink before he went to jail in the 70's?

A. I'm sure he drank, yes. I don't know for sure.

Q. When Ron got out of jail in '87, he was living with Nick?

A. Right.

Q. Did he drink at that time?

A. I wouldn't know. He came to visit me [209] one time.

Q. Now, where were you living in 1988?

A. 642 North Lumber Street, Allentown.

Q. Did you attend the trial proceedings?

A. No, I didn't.

Q. What were you doing at that time?

A. I was working at the Sacred Heart Hospital.

Q. Did anybody from – any of Ron's lawyers at that time or his investigator or anybody like that ever come to talk to you about the case?

A. No.

Q. And you didn't come to court at all?

A. No, I didn't.

Q. Did you discuss with your brothers and sisters the trial that was going on? Did you sort of stay abreast of things?

A. No. We weren't close.

Q. Now, if someone had spoken to you back then about the case, would you have been willing the [sic] talk to them?

A. If they came to approach me about it. But nobody ever came to me.

Q. And would you have answered questions in court like you're doing today?

[210] A. Yeah.

Q. When your dad was beating up Ronald or hitting Ronald, did you ever try to intervene, to stop it in any way?

A. I used to tell him to stop it, but he was a big man. I mean, he was bigger than me. So I guess he just pushed me aside.

Q. You physically would try to stop it?

A. Yeah, I tried.

Q. Were you ever present when Ron was present and one of your other brothers or sisters was being hit or beaten by your dad?

A. No.

MR. WISEMAN: I have nothing further. Thank you, ma'am.

THE COURT: All right. Mr. McIntyre.

CROSS-EXAMINATION

BY MR. McINTYRE:

Q. Good afternoon, Mrs. Harris. When were you born, ma'am?

A. May 9th, 1941.

Q. 19 –

A. 41.

[211] Q. – 41. And your brother Nick was born what year?

A. A year behind me.

Q. All right. Now, I believe that you said on direct examination that your mother would drink before every pregnancy of all the younger children. Surely as a one-year-old you don't know that your mother was drinking when Nick was –

A. Not a year old, no.

Q. All right. Now, do you know when the defendant was born?

A. No.

Q. All right. Well, how many years younger than you is the defendant?

A. I'm six years older than Ronald.

Q. Are you telling the Court that as a six-year-old you already knew that your mother was drinking alcohol?

A. Not at six years old, no.

Q. All right. So you don't know if she was drinking at the time that she was carrying the defendant; do you?

A. Well, she drank all the time, so I figured she drank.

Q. All right. Try to answer my question. [212] You don't know that she was drinking at the time that she was pregnant with the defendant; do you?

A. No, I don't know that.

Q. All right. I believe you also said – and I'm going to quote – that your father used to, quote, "hit all the time, hit the boys all the time." All right. But you filed an affidavit back in November of 1995; did you not?

A. Uh-huh.

Q. And you indicated in that – and I am going to try to quote it, but I may be a word or two off. We can get it if we have a problem with it. "He would spank the boys. He would spank us when we got into trouble."

A. Right.

Q. All right. Isn't that the truth, that your father would hit the boys when they got into trouble?

A. Yes, if they talked back or they wouldn't listen.

Q. All right. Not all the time. He wouldn't hit them, quote, "all the time."

A. He had a temper.

Q. Well, I'm trying to decide which it is now. Is it as you put it in your affidavit, that [213] "he would spank us

when we got into trouble," or is it, "He would hit them all the time"? Which is it?

A. When they got into mischief, trouble.

Q. Okay. You were aware that your brother was on trial back in 1988 for murder; right?

A. Yes.

Q. Did you read the newspaper accounts?

A. I don't get the newspaper.

Q. All right. Did you have any source of information as to what was going on on a day-by-day basis of that trial?

A. Yes, go out and get a paper, and I'd read it. I had to go out and buy my own paper.

Q. Okay. So you did follow it in the newspaper?

A. Right.

Q. And I take it there came a time when you saw from the paper that he had been found guilty?

A. Yes.

Q. And you were notified that the jury would then deliberate to decide whether he'd get murder or life in prison.

THE COURT: Get the death penalty or life in prison.

[214] BY MR. McINTYRE:

Q. I'm sorry, whether he would get the death penalty or life in prison.

A. Excuse me?

Q. Let me start over again. Okay.

Did there come a time when you were notified from the paper that a jury was going to go out and consider whether or not to give him the death penalty or life in prison?

A. I wasn't notified.

Q. You never saw that in the paper?

A. I saw it in the paper. I thought you meant was I notified.

Q. All right. Did you at that time, when you saw that in the paper –

A. Yes.

Q. – ever approach the defense lawyers for your brother and say that you had information about his childhood?

A. They never came to me about anything.

Q. Did you approach them?

A. No.

Q. All right. Did you call up any of your brothers and sisters?

A. We weren't close.

[215] Q. All right. Did you know that some of your brothers and sisters were attending the trial?

A. Yes, I knew that.

Q. Did you try to make any attempt to talk to them?

A. No.

MR. McINTYRE: All right. I have no further questions. Thank you.

THE WITNESS: You're welcome.

THE COURT: Mr. Wiseman, anything further?

MR. WISEMAN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. When your brother's trial was going on, did your brothers and sisters know where you were living?

A. Yes, they knew where I was living.

Q. Now, Mr. McIntyre asked you about the statement that you filed or filled out, say, in 1995 in regard to these proceedings. May I ask you some questions about that? In that statement did you say, "Ron was always a different child. [216] He was normally very quiet. He always felt lost and rejected"? Was that true?

A. Yes.

Q. You said, "I believe Ron felt this way because of the way our parents raised us." Is that true?

A. Yes.

Q. Ron was the type of person who would sit by himself and say nothing." Is that true?

A. Yes.

Q. You go on to say that "Our parents would often fight. My dad would beat up my mom. I would try to protect her. My mother was an alcoholic, and a lot of the fighting and abuse stemmed from her drinking." Is that true?

A. Yes.

Q. You then go on to say, "Our parents were very strict. We were not allowed to date. The boys were often treated more harshly than the girls." Is that all true?

A. Yes.

Q. You say, "Our father had a temper, and he would spank us when we got into trouble." Was that true?

A. Yes.

[217] Q. Now, when Mr. McIntyre was asking you about whether he would spank you when you got into trouble or all the time, was it your recollection or is it your recollection that it seemed like the boys were getting into trouble a lot, very frequently?

MR. McINTYRE: Your Honor, that is so leading –

A. Yes.

MR. McINTYRE: – I have to put an objection on the record.

THE COURT: Yes. Sustained.

BY MR. WISEMAN:

Q. How often did your brothers get into trouble?

A. I'd say all the time.

Q. And, therefore, they were spanked all the time?

A. Yes.

MR. WISEMAN: Nothing further. Thank you.

THE COURT: All right.

THE WITNESS: You're welcome.

MR. McINTYRE: No questions.

THE COURT: All right. You [218] may step down, Mrs. Harris. Thank you.

THE WITNESS: Thank you.

THE COURT: All right. Counsel, how many more witnesses do you have?

MR. NOLAS: Well, your Honor, we were trying [sic] get Dr. Crown lined up for today but found that was not going to be possible. So we're talking to Mr. McIntyre. I know Mr. Wiseman's been talking to him. We're trying to sort it out for next week. My suggestion, since we're here anyway, that maybe your Honor can do what your Honor needs to do, and then we can all get together and sort of see where we are, where we're going, and try to work something out.

THE COURT: Do you have any more witnesses today?

MR. NOLAS: No. I'm sorry, no.

THE COURT: Okay. I just meant for today.

MR. NOLAS: I gave you the whole spiel, your Honor. I apologize.

THE COURT: I needed to know that, too.

MR. NOLAS: Sure.

[219] THE COURT: I just meant about today, if we should finish up today. Why don't we do this. We'll be in recess. I'll have you come back in chambers. We'll talk about that. Then I can go to my next matter.

MR. NOLAS: Sure, your Honor.

THE COURT: All right. Then we'll talk about scheduling, but we'll be in adjournment until further notice. I think it will probably be Wednesday morning, 8:30. But we'll talk about our schedule.

All right. We'll be in adjournment.

(The within matter was adjourned.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the hearing of the above cause and that this is a correct transcript of the same.

Date: 10/31/1996

/s/ [Illegible]
Official Court Reporter

The foregoing record of the proceedings upon the hearing of the above cause is hereby directed to be filed.

Date: October 31, 1996

/s/ [Illegible]
J.

COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	NO. 682/1988
Respondent	:	
vs.	:	
RONALD ROMPILLA,	:	
Petitioner	:	

TELEPHONE DEPOSITION
OF BARRY CROWN, Ph.D.

Taken in the offices of Slifer, Voice & Shade, 1228 Walnut Street, Allentown, Pennsylvania, on Tuesday, April 2, 1996, commencing at 9:00 a.m., before Sally A. Slifer, RMR, Registered Merit Reporter.

APPEARANCES:

MICHAEL P. McINTYRE, ESQ.
Assistant District Attorney
Lehigh County Court House
455 Hamilton Street
Allentown, PA 18101
– For the Respondent

MICHAEL WISEMAN, ESQ.
BILLY H. NOLAS, ESQ.
Post-Conviction Defender Organization
437 Chestnut Street, Suite 501
Philadelphia, PA 501 [sic]
– For the Petitioner

* * *

SLIFER, VOICE & SHADE
1228 Walnut Street
Allentown, PA 18102
(610) 434-8588

679 Walnut Street
Easton, PA 18042
(610) 250-0383

INDEX TO WITNESSES

Witness	Page
BARRY CROWN	
By Mr. Wiseman	3
By Mr. Wiseman	114
By Mr. Wiseman	137
By Mr. McIntrye [sic]	63
By Mr. McIntrye [sic]	134

INDEX TO EXHIBITS

Exhibit	Description	Page
CROWN		
1	Dispensary Card	51
2	Declaration of Dr. Barry Crown	129
DEFENDANT'S		
13	Declaration of Darlene Rompilla	51
14	Declaration of Barbara Harris	51
15	Declaration of Nicholas Rompilla, Jr.	51

[3] MR. WISEMAN: The record should reflect we are here for the deposition of Dr. Barry Crown in regard to post-conviction proceedings in the matter of Commonwealth versus Ronald Rompilla.

The parties previously agreed that objections to questions will be made during the course of the deposition. No objections will be reserved.

MR. McINTYRE: That's agreed.

BARRY CROWN, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION ON QUALIFICATIONS

BY MR. WISEMAN:

Q. Dr. Crown, could you tell us what you do for a living?

A. I am a psychologist. I limit my practice to the areas of clinical and forensic psychology and neuropsychology.

Q. And tell us what your educational background is?

A. I received my bachelor's degree from the University of Miami. Master's degree from Florida Atlantic University. My Ph.D. from Florida State University in 1969.

[4] Following that I was a National Institute of Mental Health post-doctoral fellow in clinical psychology at Harvard Medical School, Massachusetts General Hospital.

MR. McINTYRE: Can't we stipulate to his qualifications based on his resume here?

MR. WISEMAN: We can. Let me get a couple points out.

Q. We will do the abbreviated version of your qualifications, Doctor.

Do you have any experience with regard to child abuse?

A. Yes, I do. I was the codirector of the child abuse project at the University of Miami School of Medicine and Jackson Memorial Hospital, which is the county facility here in the Miami area.

At that time, in addition, I was an assistant professor of pediatrics at the University of Miami School of Medicine, with responsibilities for teaching pediatric residents about child abuse.

Q. Just a few questions about your forensic background. Have you testified in the past in capital matters?

A. Yes, I have.

[5] Q. And have you been retained as an expert in capital matters?

A. Yes.

Q. Would that be both for prosecution and the defense?

A. That's correct.

Q. Have you worked as an expert in civil matters?

A. Yes, I have.

Q. Have you worked in state court?

A. Yes.

Q. And in federal court?

A. Yes, I have.

Q. And you have been qualified, I take it, in those courts?

A. Yes, I have. In addition I am a certified forensic evaluator pursuant to Florida statute.

Q. Have you been qualified in the past in Pennsylvania as an expert?

A. Yes.

Q. Has there been an occasion which you have not been granted qualifications as an expert?

A. No, there hasn't.

MR. WISEMAN: Based on the [6] doctor's testimony, and on the stipulation, I would offer Dr. Crown as an expert in psychology, neuropsychology and child abuse.

MR. McINTYRE: I have no questions and agree. I will have some interest, quote, unquote, questions later on.

MR. WISEMAN: Okay.

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q. Doctor, did you have an opportunity to evaluate Ronald Rompilla?

A. Yes.

Q. Did you reach any conclusions with regard to Mr. Rompilla?

A. Yes, I did.

Q. We will get to those conclusions in a while, but were your conclusions reached to a reasonable degree of psychological and neuropsychological certainty?

A. Yes, they were.

Q. I want to talk for a while about what went into your evaluation and the records and things – the records you reviewed and the things you did.

[7] What records did you look at, Doctor?

A. I reviewed a fairly large stack. That includes Mr. Rompilla's educational records related to his early schooling. I have reviewed his packet of materials including medical materials from the Commonwealth of Pennsylvania, Bureau of Corrections. I have also reviewed other medical records relating to his early life, and I have reviewed various reports included within that packet from the consulting psychiatrist at the facility.

Q. Would be that Kate Erwin?

A. Yes. I have also had an opportunity to review some writings of Mr. Rompilla in recent years, and I have also had an opportunity to review documents related to his 1988 trial, some trial testimony.

Q. Let me ask you some specific questions about the documents you looked at.

The Department of Corrections records you indicated that had a medical – there was some medical records in there.

Were there any mental health records in that?

A. Yes, by other records I am referring to [8] mental health records.

Q. Did you also have occasion to review a 1976 transfer petition from the Department of Corrections?

A. Yes.

Q. Did you review any declarations from Mr. Rompilla's family?

A. Yes, I did.

Q. Did you have occasion to review the opinion of the Pennsylvania Supreme Court in regard to Mr. Rompilla's conviction?

A. Yes, I have.

MR. WISEMAN: So the record is clear, Mr. McIntyre, I want to – it's a little awkward because I can't show the witness the records he's referring to. To the extent we can, I would like to clarify, if I could, the records that he's referring to.

Q. The medical records from Mr. Rompilla's earlier life you reviewed, would that have been an entry to when he was about two years old?

A. That's correct.

Q. For the record, those are the medical records that were entered at the hearing before Judge Wallitsch as Defendant's Exhibit 9.

[9] The 1976 transfer petition, is that the document that contains an MMPI, a WRAT, W-R-A-T, score among other information?

A. Yes.

Q. For the record, that was admitted before Judge Wallitsch as Defendant's 7.

Now, you reviewed certain family declarations, is that right?

A. That's correct.

Q. For the record, would that have been declarations by Barbara Harris, dated 11/29/95? Are you there, Doctor?

A. Yes, I am.

Q. Did you hear the question?

A. Yes, Barbara Harris, yes, 11/29/95.

Q. And did you review a declaration by Darlene Rompilla dated 12/3/95?

A. Yes.

Q. Did you review a declaration of Nicholas Rompilla, Jr., dated 11/29/95?

A. Yes, I did.

MR. WISEMAN: For purposes of this deposition, I would like to have the declaration of Darlene Rompilla marked as Defendant's Exhibit 1.

The record should reflect these [10] are copies of the signed declarations that are next to the petition. I would like to have Darlene Rompilla marked as Exhibit 1, Barbara Harris' as Exhibit 2 and Nicholas Rompilla's declaration marked as Exhibit 3.

Q. The school records you reviewed, are those approximately a three-page record that contains a variety of IQ testing from the mid to late '50's and 1960's in regard to Mr. Rompilla?

A. That's correct, when he was a youngster.

MR. WISEMAN: For the record those were previously marked before Judge Wallitsch as Defendant's 8.

MR. McINTYRE: MD 5 is the longer version.

MR. WISEMAN: Right. The reason is I think your colleague required to bring a custodian, we marked them previously. The custodian came in and presented us with the authenticated records which I believe we substituted for the earlier –

MR. McINTYRE: D-8 is the three one you referred to?

MR. WISEMAN: No, D-8 has the additional pages.

[11] MR. McINTYRE: D-8 has all the other –

MR. WISEMAN: The D-8 exhibit contained a breakdown of the IQ test scores themselves.

Q. Doctor, in addition to the documents you reviewed, did your evaluation contain any other components?

MR. McINTYRE: Let me stop you for a second. Could you make clear what he had. Did he have just the three pages or did he have the whole thing?

BY MR. WISEMAN:

Q. The school records you had, is that a three-page document or is it a larger document?

A. The school records that I have are a limited set of materials that – student health records which are actually prior to the education packet of nine pages. Then there's the cumulative record which is two pages and then a small photograph.

MR. McINTYRE: It looks like he had them all.

MR. WISEMAN: He had these two, the health records –

[12] MR. McINTYRE: And these.

MR. WISEMAN: The WISC record form which is what was added.

Q. I was asking if there was any other component to your evaluation?

A. I did test and examine him using neuropsychological testing procedures.

Q. Was there any type of interview done with Mr. Rompilla?

A. That included both interview and formal testing.

Q. Doctor, generally, what is brain damage?

A. Brain damage is very simply a problem in the brain where it is not operating at full capacity.

Q. Is that an organic problem?

A. It is an organic problem. It may be caused by disease or by trauma.

Q. By trauma, what do you mean?

A. I mean some sort of insult, such as a blow, such as poor nutritional exposure, and so on.

Q. What impact, if any, does brain damage have upon a person's personality and function?

A. It gives them limited reserve, meaning that they have very little to fall back on. They [13] most often tend to misconstrue things.

By analogy it's very similar to someone who may be very good at playing darts. Something happens to them and no matter how hard they try, they just can't hit the bull's eye.

Q. Does brain damage have any impact on emotional lability?

A. It has an effect on emotional responsiveness because the individual misconstrues but also misconstrues his own expressions.

Q. Does it have any impact on impulse control?

A. Depending on the location of the damage, the brain controls impulse oriented behavior. As a result of an impairment, impulse control can be severely impaired.

Q. Does it have an impact upon reasoning?

A. It has a significant impact on both reasoning and judgment.

Q. And can you explain?

A. The primary executive functions of the brain are reasoning, judgment, and mental flexibility, the ability to shift smoothly from one idea to another.

As a result of brain damage, those [14] functions may be inoperable or significantly impaired.

Q. Does it have any impact on one's ability to measure future consequences?

A. Depending on the areas that may be impaired or damaged, it may have an effect on the ability to determine the long-term consequences of immediate behavior, yes.

Q. Does it have an impact on cognition?

A. Yes, in the broadest terms, since cognition involves both reasoning and thinking, yes.

Q. Does it have an impact on one's ability to control their behavior?

A. Yes, it does.

Q. And can you explain that?

A. It has an effect on the ability to control because control mechanisms involve reasoning, judgment, and understanding the consequences of one's behavior. In addition, speech and speech patterns may be adjusted and the individual may also misconstrue relationships with others.

Q. Now, Doctor, the potential impacts of brain damage on a person's personality and function that you just went through, is this a new science or [15] a science that's been established for a period of time?

A. This is a science that has been established for many years. Knowledge about the brain and interests of the brain of course goes back well into the period of the introduction of modern medicine in the 1800's.

The interest in neuropsychology and the relationship between brain function and behavior had their origin in dealing with war veterans after World War I and World War II who had suffered head traumas.

So the interest in it has been great and it has been supported, of course, by the federal government.

Q. In particular, the types of impact that brain damage have on a person that you just went through, was that known in 1988?

A. Most certainly.

Q. Now, Doctor, I would like to direct your attention in particular to the testing that you gave to Mr. Rompilla and ask you if you could describe the testing and which tests, if any, he showed clinically significant impairments?

A. Certainly. To start with I administered [16] a test of auditory selective attention. Auditory selective attention is the ability to attend or pay attention to something when there are deliberate distractions.

In real life these are things that occur because of a noise, such as a noisy fan, noise in conversations, such as conversation that might be going on in a busy lunchroom or coffee shop during lunch hour, and also the possibility of someone giving a lecture or a speech. The person is exposed to situations such as this and asked to respond to various things.

Before they are distracted, they are asked to do all the responses without distractions. In Mr. Rompilla's case, I administered the test without distraction and he was able to perform at the 100 percent level.

But when I introduced distractions, he failed depending on the type of distraction to between the first and sixth percentile for a total score placing him at the first percentile which translates statistically into an age equivalency of attending at the age level of someone who would be about 82 years old.

Q. Now, Doctor, just if you could clarify [17] what you mean by percentile?

A. By percentile, very roughly when I say that someone is functioning at the first percentile, what I mean is that 99 out of 100 people can do it better than he can.

If I am referring to the fourth percentile, I am saying that 96 out of 100 people would be more able to perform in a higher level than he could.

Q. When you say that he scored at an age range of about 82 years old, could you explain what the significance is of that scoring?

A. The significance is that in the normative standards of this diagnostic test, looking at statistically normal behavior, it is at the level due to degenerative processes that we would expect a relatively normal, 82 year old to be able to perform and attend, since there are basic degenerative processes that occur in brain function as we age.

Q. Doctor, if at all, does the impairment in this test relate to any of the impact on Mr. Rompilla's function?

A. In terms of his function, he has a great deal of difficulty paying attention to something. In simple terms concentrating on it in laymen's [18] terms, while other things may be going on, being able to carry on a conversation when someone happens to pass by and says something, being able to focus on something when a car backfires or someone drops a book, it's very difficult for him to stay focused on very simply what he ought to be paying attention to.

Q. Now, when I was asking you about brain damage generally, and you went through a list of things that it could impact upon, such as emotional lability, impulse control, reasoning, judgment; does this test have any impact on any of those functions?

A. Yes, it does. It affects impulsivity. It also affects reasoning and judgment.

Specifically because the individual with this type of impairment and deficit is not able to follow something to point A to point B to point C to point D. They may be focusing on point A, and then have to very rapidly eliminate point B and C in order to get to D which may be an outcome which results in an impulsive response.

Q. Could you discuss the next test, Doctor?

A. The next test that was administered was the abstraction section of the Shipley Institute of Living Scale.

This is a test of the ability to [19] engage in abstract problem solving and to engage in language based critical thinking, meaning being able to use language to figure things out. It's what all people do. It's what we begin to learn to do in school when we are roughly about seven

years old when we start to explain things more specifically in language rather than action.

And in that test, Mr. Rompilla scored at an age equivalency of eight years, nine months. So his performance level on this test was very simply the equivalent of someone who is under the age of nine years old, someone who was about at the third or fourth grade level.

Q. And how does this – how does – I take it you consider him impaired in this test?

A. Yes, he would be significantly impaired here.

Q. How does someone with this impairment affected in their lives?

A. In very simple laymen's terms it means he has a great deal of difficulty figuring things out, making sense out of experience.

Q. As far as its impact on his personality, how would it impact?

A. It impacts because of not having the [20] ability to think things through, to reason, he's very likely to reach faulty conclusions, very likely to be pressured by others to reach conclusions and very likely to act impulsively.

Q. Could you discuss your next test, Doctor?

A. The next test was the category test. The category test tests the ability to learn something new and then to be able to apply it in a problem solving situation.

It relies not on verbal activity, not in terms of language, but in terms of relatively simple symbols. There, without the use of language, control of language, he

reaches a percentile rank equivalent of 76 percentile rank equivalent is the opposite of a percentile.

Meaning that in this situation roughly three-quarters of the people taking this test would be able to do a better job than Mr. Rompilla. So he is in deed [sic] significantly impaired even when language is not included.

Q. You said is not included?

A. Right, language is not included. So if – and there were in my mind questions about whether his performance aspects were totally based [21] on language, this test was administered to demonstrate his impairments exist even when language is not important.

Q. Why is that important to know?

A. It's important because we know based on that brain configuration, language activities are primarily in the left hemisphere of the brain, and nonlanguage activities are primarily in the right hemisphere of the brain.

This explains then that what we are looking at is something technically called a bilateral impairment. An impairment that not only impinges on the dominant left language based hemisphere but also on the nondominant, nonlanguage based hemisphere.

Q. And does the bilateral nature of the damage bear on the relevance to the damages impact on Mr. Rompilla's personality and function?

A. Yes, it does. Because it also strongly indicates there are transfer problems between the two hemispheres; in a sense in laymen's terms, information gets shunted back and forth through a tunnel called the corpus callosum, which is a

connecting mechanism between the two hemispheres of the brain, one dealing with nonverbal information, [22] the other dealing with verbal information.

When there's a bilateral problem it means that both verbal and nonverbal information is having difficulty being transferred between the two hemispheres.

In simple terms then, if someone with this type of problem sees the situation, which is a nonverbal, visual situation and then attempts to make sense out of it, that visual image is absorbed and processed initially in the right hemisphere of the brain.

It's transferred through the corpus callosum to the left hemisphere in order to attach language based explanation to it.

With this type of deficit, the transfer becomes a problem so that the actual interpretation in terms of language is very often faulty.

Q. What impact, if any, does his impairment in these areas have on lability, impulse control, reasoning, judgment, ability to predict future consequences of his action?

A. In very simple terms, it short circuits the process because he is unable to logically move through the sequences necessary to arrive at a [23] reasoned response, so instead is most likely to exhibit impulsive behavior and impulsive responsiveness.

In addition, in terms of language, he's most likely to engage in confabulation, which is the nonvoluntary filling in of missing information in order to arrive at something that makes sense to the person.

Q. Could you discuss the next test that you administered?

A. Certainly. I administered the Wisconsin card sorting test. This is a test that is specifically linked to frontal lobe functioning.

In Mr. Rompilla's case, he exhibits a great deal of perseverative behavior, meaning he is most likely to endorse items even when he's told they are wrong and is unable to once again switch gears in order to search for the correct response.

This is a deficit. This is an impairment. This is a form of organic brain damage that is specifically linked to the frontal lobes.

The frontal lobes of the brain are where executive functions are organized and monitored, it's the site or reasoning and judgment [24] and conceptual flexibility.

Q. What is executive functions, Doctor?

A. Executive functions are those aspects of brain function that control our generalized behavior; our reasoning, our judgment, our attempts to make sense out of things around us, our ability to accept the long-term consequences of immediate behavior and also to monitor and assess our own conduct.

Q. How did he score on that test?

A. He scored at the perseverative level and that places him at the fifth percentile meaning that 95 out of 100 people would be able to do it better than he.

Q. I take it that's an impaired level?

A. That is a significant impairment, yes.

Q. Could you discuss your next test?

A. I administered the revision three of the wide range achievement test. This is a test that correlates with grade equivalencies and tests reading ability, spelling ability, and arithmetic manipulation, arithmetic.

Q. How did he score on that?

A. In terms of grade equivalencies, in reading, he was reading at the fourth grade level.

[25] In spelling, being able to perform at the sixth grade level, and in terms of arithmetic, performing at the fifth grade level.

Q. And did you consider his performance on that test to be within normal limits?

A. It is impaired. Clearly he had, by history, gone as far as the ninth grade. He had missed the GED, had failed it, but nonetheless, it. [sic] is impaired functioning.

Q. Did you administer a test called the trails A and B?

A. Yes, I did.

Q. Could you describe that test?

A. The trail making test involves following a sequence of numbers through a logical conclusion and then involves following alternating sequence of numbers and letters; numbers and the alphabet to a logical conclusion.

Q. What does that test measure?

A. It measures concentration, attention, and mental flexibility which are of course related to executive functions and frontal lobe behavior.

Q. And how did he score on that test?

A. He was impaired on form A and he was significantly impaired on the slightly more [26] difficult form B.

So he was impaired on both concentration, attention and mental flexibility.

Q. You said it measured executive function, relating to reasoning, judgment, and ability to measure long term consequences?

A. Well, this test particularly is concentration, attention, and mental flexibility, which is the ability to shift smoothly from one idea to another.

If you can't shift smoothly, you become fixated on a particular idea or closed option, and as a result reasoning and judgment are impaired, yes.

Q. What other test did you administer?

A. I administered the Luria Christensen memory test, which is a broad range test of memory involving both nonverbal and verbal aspects.

In both verbal and nonverbal aspects, Mr. Rompilla was in the impaired range, even when it was corrected for age and education.

Q. And what's the significance of those impairments?

A. It means very simply that he can't store information and then be able to retrieve it in a [27] logical and consistent manner.

Q. What impact does that have on his personality and function?

A. Being relatively confused in terms of stored information and having a great deal of difficulty in retrieving it, once again he's very likely to reach faulty conclusions and act impulsively.

Q. Was there any other significant testing that you administered?

A. Yes. I administered another set of nonverbal memory once again to eliminate all possibilities for language. That was the Rey-Osterrieth, R-E-Y, dash, O-S-T-E-R-R-I-E-T-H, complex figure test.

On this test, he once again fell within the significantly impaired range.

Q. And what does this test measure?

A. This is a test of nonverbal memory and recall, meaning that language is not involved.

Q. And again, what impact does his impairment on that test have on his personality and function?

A. It indicates he has a great deal of difficulty recalling and integrating information, [28] being able to exercise nonverbal memory and reasoning, being able to exercise nonverbal concentration and attention capacities.

It represents the analog, the equivalent of his verbal impairment but on a nonverbal basis controlling for language.

Q. Were there any other significant testing?

A. Yes, there was, I remember the right hand Indiana aphasia screening test.

Q. What does that measure?

A. It's a global screening test developed shortly after World War II as a mechanism for screening veterans, who might have neurologic and neuropsychologic impairment. It tests both executive function and various constructional and language capacities.

Mr. Rompilla's impairments were significant. They indicate a severe impairment, particularly in areas of construction and language capacities.

Q. And how is his impairment on that – what's the clinical significance of his impairment on that instrument?

A. The clinical significance is that even [29] when given simple tasks, he has a great deal of difficulty. He has impairment, not only with complex tasks, but also with relatively simple tasks.

Q. What impact does that have on function and personality?

A. In terms of function, once again it indicates he would have – he would have a great deal of difficulty with both simple and complex functions.

Q. What's the – were there any other significant tests you administered?

A. No, that covers the groundwork. Although I gave aspects also of the Wechsler Adult Intelligence Scale Revised in order to compare to Shipley performance.

I was particularly interested in the similarities subtest of the Wechsler Adult Intelligence Scale Revised and there he scored a scale score of three.

A scale score of three, reflects a percentile equivalent for Mr. Rompilla's age range of just under the second percentile. And that's a specific test for stored information that's used for reasoning and judgment.

[30] Q. And what was the significance of his score on that test?

A. Placing him at the – just under the second percentile statistically. It's somewhat equivalent to the Shipley abstraction score of eight years, nine months.

Q. Were there any other significant tests, Doctor, that you administered?

A. No.

Q. Now, when you administered the test, do you have any way of measuring the validity of the test?

A. They are measured clinically by the internal consistency of the test battery and the test responses.

The research literature indicates that even a Ph.D. trained psychologist cannot successfully fake a battery of neuropsychological tests. It may be possible to fake a test, but not a battery. That's why I gave a number of tests. The internal consistency of these tests indicates that there are no indications of malingering or faking.

Q. In Mr. Rompilla's case that is?

A. That's correct.

Q. Now, we'll talk in a while about other [31] background information regarding Mr. Rompilla, but let me just ask you at this point, were the results on this – of these batteries of tests consistent with other known information about Mr. Rompilla and with his history?

A. Yes.

Q. Could you explain what learning disability is?

A. Learning disability is simply a problem in absorbing and processing new information. It's an awareness problem.

Q. Is learning disability a function of brain damage?

A. Yes.

Q. And did you reach any conclusions as to whether or not Mr. Rompilla is learning disabled?

A. He is learning disabled as a result of his brain damage, yes.

Q. Now, I want to talk specifically about some of the records you reviewed regarding Mr. Rompilla. Why don't we start with the school records.

What significance, if any, did you find in regard to the IQ testing administered in April of 1957, October '59 and again in December of [32] '61?

A. Those test scores show a – first a great deal of consistency. And in addition, they place him within the bounds of mental retardation. I am looking at the WISC score from October of 1959, with a full scale of 64.

Q. What is the statistical cut off for mental retardation?

A. In 1959 the cut off was 69. That was changed approximately four years ago. The cut off is now 74. In any event, he would have fallen within that range.

Q. And how about in regard to the testing in December of '61?

A. December of '61, the achievement test placed him, again, at a consistent – consistently low, low level. Language at 3, arithmetic at 3.5, spelling at 4.1.

Q. I am referring to the WISC score on the next page of the exhibit, Doctor, 12/61 on the bottom of the page towards the left.

A. That 12/61 WISC score gave him a full scale IQ of 69. Again that would be the beginning of the retarded level. So he would have met the criteria for mental retardation at that time.

[33] Q. Referring you to the WISC test of 10/59, there's an indication of a verbal of 61 and performance at 75.

Is there any significance to that disparity?

A. There's a 14 point difference. Technically a 15 point difference is needed for a statistically comparable disparity. His nonlanguage based functioning seems to be better than the language based functioning. That's what is expressed throughout.

Q. Now, is there any significance in your view that he scored in these ranges between 1957 and 1961?

A. I don't understand your question.

Q. Well, is there any significance to the fact that he didn't score in the retarded range on just one test but that he scored in that range on a number of tests over a period of approximately four and a half years?

A. Certainly repeated measures certainly with consistent scores confirm the impairment. There's no – there's no way that a naive subject, a child, can fake performance on a test such as the Wechsler. And this consistency from administration [34] to administration certainly confirms the diagnostic impression.

Q. Now, you had started to discuss, I think, the entry of 6/61 which has the notation stan. ach.

Did you take that to mean standard achievement?

A. Yes.

Q. The scores that follow that, of what significance are they?

A. They show that he's functioning at a consistently low level.

Q. In particular, the reading at 3.3, spelling at 4.1, arithmetic 3.5, those refer to grade levels?

A. Yes; language 3.0.

Q. Language 3.0. Thank you. Were those scores consistent with the achievement scores you administered in 1995?

A. They were consistent in that they show a modest degree of maturation and then very quick plateauing. Mr. Rompilla as a child appeared to plateau at an early age; meaning that that was as good as he was going to get.

Q. During – when you evaluate someone who [35] has consistent IQ scoring in the retarded range, what types of things does that cause you to look into or investigate further, what do you look for then?

A. I am looking for positive factors and also for consistency and also for an explanation.

Q. Where do you look for that explanation in the causative factor, what do you look at?

A. I look at history, and also at the pattern of performance because the pattern of performance across a battery is most often indicative of some type of relationship factor.

Q. What can cause someone to score in the retarded range?

A. Certainly genetics, perinatal problems, neonatal problems, neural developmental problems, external trauma, exposure to disease entities, nutritional deficits at an early age,

Q. It would be fair to say that some of the causes can be environmental?

A. Yes, exposure to lead, the lead-based paint, exposure to lead from old plumbing, from lead piping.

Q. Do you look to see if there are any types of emotional interferences with a patient's [36] ability to score well in such testing?

A. Yes.

Q. Would that include in the case of a child an abusive or dysfunctional family life?

A. Yes, it would.

Q. Why is that, what impact does a dysfunctional or abusive family life have on child's scoring, on an IQ test?

A. It has an impact because it may serve as an external emotional factor in affecting concentration and attention, but also it may evoke problems of trust, problems of being able to communicate out of fear of failure, and as a result of failure being abused.

Q. And are those things, trust and a fear to communicate, are those types of behaviors that abused children frequently display in your experience?

A. Yes, they do. They are more apt to be in agreement. They are more apt to not challenge. They are more apt to give in.

Q. Before we leave the school records, did you see a notation on the school records regarding special education classes?

A. Yes, I believe that there are some [37] notations. Although, it's hard to read.

Q. Now, in particular, drawing your attention to the year '57 through '58 down to '60 to '61 there's a notation of SP under the grade category?

A. Yes.

Q. Are those the notations you are referring to?

A. Yes. That I assume refers to special education and certainly can't reflect spelling.

Q. Is there a correlation, in your experience, between children who do poorly in IQ testing and their placement in special education classes?

A. IQ testing is the basis for special education placement.

In addition, it's likely that someone with this score would be placed at that level. And in addition, for special education placement, the school systems receive additional funding from the federal government.

Q. Is there a correlation between placement in special education and an abusive or dysfunctional family life?

A. It is certainly likely or more likely [38] and probable that someone going through an abusive situation would not be able to keep up with his age mate peers and in schooling would wind up in special education.

Also he was placed in special education beginning at what must have been the fourth grade level. In terms of brain development, that's the time of the secondary development of the frontal lobe.

So he was exhibiting frontal – the precursors to frontal lobe deficits even by school measures at that time, which would have been '57, '58.

Q. If you could now turn to the medical records you looked at.

What interpretation did you have of the medical record from when Mr. Rompilla was two years old?

A. He had some severe gastrointestinal and problems with diarrhea, holding foods, which suggested a significant problem, significant enough for him to be seen at Sacred Heart Hospital.

Q. Did you notice anything in regard to a fever?

A. He had a high fever, going up to spikes [39] of 105.

Q. Taking the fever in conjunction with the diarrhea and the admission caused by them, what significance, if any, did you find in those facts?

A. I thought it was interesting. The diarrhea causing the hospitalization would have to have affected his nutritional balance and particularly the electrolytic balance.

The electrolytic balance is what controls the operation of the nervous system, particularly within the brain. That provides the, in a sense, the fuel for the brain to operate.

Apparently there was an impairment and to that extent, it appears that – today there's a common term – nutritional marasmus would have taken place.

In addition the fever going up to 105 at the same time would also have had an effect on that developing nervous system. We know that children who experience high fevers very well may develop problems concerning brain function and behavior.

Q. And that would be children at the age of two or different ages?

A. Children in infancy, children under the [40] age of three, particularly, and that's the most vulnerable period.

Q. Was that hospital admission, and the facts apparent from the medical record, are those consistent with your test findings and consistent with the school records that you viewed?

A. Yes, they are.

Q. In what way?

A. They provide at least one explanation for his poor performance and also for his ultimate scoring on neuropsychological and psychological testing at impaired levels.

Q. Now, I would like to turn your attention to the – what we have been calling the 1976 transfer petition. That's the document that has achievement test scores and MMPI score on it.

What significance, if any, did you find in his performance on the wide range achievement test that was administered, apparently, on October 24th of '75?

A. I am having some difficulty finding that. I unfortunately had dropped the one packet, and as you know all the papers look the same after awhile.

(Brief recess was had.)

[41] Q. Did you find the material?

A. The only materials I have from the 1970's from the Commonwealth of Pennsylvania are a large stack of misconduct reports.

I have a 1988 –

Q. No. Why don't we read to you the results and ask you your views of them.

The document I am referring to has a section on test status summary. It has a WRAT that was administered on 10/24/75, a reading score in the 32nd percentile, spelling score in the 4th percentile, and arithmetic score in the 3rd percentile.

What significance, if any, do you attach to those scores?

A. Those represent significant impairment and consistent with the earlier IQ scores and with the neuropsychological testing.

Q. You had this material, by the way, at the time of your evaluation of Mr. Rompilla?

A. Yes.

Q. Now, that same document has an MMPI administered on 10/15/75 which you refer to in your declaration.

Do you remember that?

[42] A. Yes, I do.

Q. Of what significance, if any, did you attach to those MMPI scores?

A. That Mr. Rompilla manifested personality deficits also.

Q. Since you don't have the document in front of you, let me ask you a couple of questions from your declaration.

In your declaration you refer to an MMPI handbook by Dahlstrom, Welsh and Dalhstrom?

A. Yes.

Q. You say the MMPI scores according to Dahlstrom, and MMPI score such as that achieved by Mr. Rompilla are present in patients who are unpredictable, impulsive and tend toward a schizoid personality who live nomadic lives and in social isolation.

Are those descriptions of that MMPI profile applicable in your view toward Mr. Rompilla's personality?

A. Yes, most definitely.

Q. Which ones in particular, or all of them?

A. All of them, particularly the impulsivity and the – in terms of schizoid affect, [43] schizoid meaning difficulty in making sense out of reality and that is a distinction between schizoid ideation, and schizophrenia.

But certainly as I explained from a neuropsychological perspective. He has a great deal of difficulty making sense out of experience, most likely often to go from A to D eliminating B and C, and so on.

Q. Doctor, in particular, the scale six on that test, the paranoia scale is at 82 and schizophrenia scale score 8 is at 90; what significance do you attach to those scores?

A. Again as well as reflecting lack of trust, which developed very early, it expresses a basic problem within the personality and a great deal of difficulty figuring things out leading to faulty conclusions and prematurely being suspicious.

Q. Let me go back to the wide range achievements testing, are those percentile rankings consistent with a learning disability?

A. They are consistent with a learning disability, yes.

Q. In Mr. Rompilla's case are they consistent with such a disability?

A. They are consistent, yes, with a [44] learning disability and with organic brain damage.

Q. Now, that same document has a Beta, B-E-T-A, IQ score of 93 also achieved in October of '75

Of what significance is the Beta score of 93?

A. The Beta score – the Beta test is a relatively simple, quick screening test that tends to produce a score roughly between 15 and 20 points higher than the Wechsler individually administered test.

Q. The Wechsler would be the version that Mr. Rompilla scored in the retarded range as a child?

A. That's correct.

Q. Can you see in the DOC materials a later Wechsler that was administered I think in 1988?

A. Yes, I did.

Q. Do you remember what that score was?

A. It was reported as a WAIS score of 79 placing him within the borderline range of mental ability.

Q. So do I understand you to say then that that score of 79 administered by the DOC test is consistent with the Beta score of 93?

[45] A. Yes.

Q. Is the Beta test a full score IQ test or does it have only a performance portion?

A. It only has a performance portion. It's used for rapid screening and classification and not as a mental health instrument.

Q. In Mr. Rompilla's case, did he have some history of scoring better on the performance than on the verbal portions of the full IQ-scale testing?

A. Yes, he did, even going back to his scores in 1957, 1959, he tended to score higher on performance. In fact in 1959 he scored 14 points higher on performance than he did on the verbal portion.

Q. A moment ago you referred to borderline functioning. When you say borderline, were you referring to borderline mental retardation?

A. I was referring to borderline mental retardation, yes.

Q. Now, you indicated earlier that you reviewed the declarations which have been marked in this case of three family members.

In what respect did you find those declarations to have clinically significant information?

[46] A. They were significant in that they paint a picture of a dysfunctional childhood, a dysfunctional life in a relatively large family where there was a great deal of dysfunction in terms of the interaction between the parents and the interactions between the parents and the children, and the interactions between the children themselves.

Q. And if you could provide a little more detail regarding what you mean by dysfunction?

A. There was alcohol use. There was, as I recall, there was also a great deal of physical abuse in terms of punishment, in terms of rule enforcement, in terms of rule

making and in terms of just the general management of the family unit.

Q. Now, when you say alcohol use, is any alcohol use in the family a sign of dysfunction?

A. No. This was extreme alcohol use and Mr. Rompilla himself describes himself as an alcoholic and is very clear where that behavior was learned.

Q. Now, in regard to Mr. Rompilla's mother's use of alcohol as reflected in the declarations, what significance does that have?

A. Her use of alcohol certainly strongly [47] suggests another causative factor in his low test scoring and his neuropsychological impairments. And that is that Mr. Rompilla, in terms of even his physical features, would meet diagnostic criteria for fetal alcohol syndrome.

Q. Of what clinical significance is fetal alcohol syndrome, what is fetal alcohol – what effects does it have on the developing fetus and subsequently on the child?

A. Fetal alcohol syndrome is related to mother's exposure and use of alcohol during pregnancy.

Children who manifest the syndrome tend to have borderline to full level mentally retarded Wechsler scores and performance. They tend to have neuropsychological impairment which are bilateral. They tend to have a great deal of difficulty in dealing with reasoning and judgment. They tend to be impulsive and they also tend to have certain facial characteristics in terms of wide-set eyes.

Q. In regard to the bilateral impairments, impairments of reasoning, judgment and impulsivity, those were

all deficits you found in Mr. Rompilla based on your testing?

[48] A. Yes. Mother's use of alcohol and then Mr. Rompilla as a child, high fevers requiring hospitalization as well as some significant nutritional marasmus would certainly explain much of his behavior.

Q. Did you make any findings with regard to head injury in Mr. Rompilla's case?

A. Yes, he has a history of loss of consciousness. He has a history of a left frontal injury. In fact, there's a scar in the left frontal area of his head.

Q. Let me ask you about that scar. There's been some issue in other proceedings in this litigation as to whether that scar was a laceration or was the result of a more substantial head injury.

Did you draw any conclusion in regard to that issue?

MR. McINTYRE: Note my objection to his qualifications in the medical area. He's not a medical doctor.

Q. In your work as a neuropsychologist, are you called upon to assess routinely the impact of head trauma?

A. Yes, I am.

Q. Its impact particularly on [49] neuropsychological development and function?

A. Yes.

MR. WISEMAN: I would obviously disagree with your objection.

MR. McINTYRE: Nevertheless, it stays.

Q. Doctor, did you make any findings with regard to the nature of the injury of Mr. Rompilla over Mr. Rompilla's left brow?

A. Yes, I believe it's reflective of a left fronto-orbital syndrome.

Q. Why do you say that?

A. Meaning the nature of the healed wound site in of itself indicates there was a blow. He explained that there was loss of consciousness, that he did go to the hospital, and given some findings on the neuropsychological tests, this is an indicator that is consistent with those findings.

Q. Did you review a Department of Corrections document dated November 8th, 1988?

A. Yes, I did.

Q. And did that speak to the head injury at all?

A. It notes that he has a scar above the left eye. I am not sure of which document you are [50] referring to. I am looking at a medical note.

MR. McINTYRE: Can we stop for a moment. I am not sure either, is this something that's in evidence?

MR. WISEMAN: Yes. That was marked – one page document marked Defendant's 12 Department of Corrections medical entry from 11/8/88 noting, among other things, a scar above the left eyebrow.

MR. McINTYRE: Can I see it?

MR. WISEMAN: I don't have it with me in the room.

MR. McINTYRE: I certainly want to see it.

THE WITNESS: That was the note I was referring to.

(Discussion off the record.)

MR. WISEMAN: Why don't we mark the previously marked declarations consistently with the hearing exhibits, so that would make the declaration of Darlene Rompilla Defendant's 13, Barbara Harris Defendant's 14, Nicholas Rompilla, Jr. Defendant's 15, and the one-page Department of Corrections record that's been marked, let's mark that as Deposition Exhibit Number 1.

[51] (Crown Deposition Exhibit Number 1 and Defendant's Exhibits 13 through 15 were marked for identification.)

Q. In any event, now that we found the document that you have been just discussing, you reviewed a Department of Corrections document of 11/8/88 in regard to any visible scars, is that right?

A. Yes.

Q. And what did you see on that document?

A. Scars on the right upper lip and above the left eye.

Q. Doctor, did you reach any conclusion or do you have any view regarding the duration of Mr. Rompilla's organic impairments?

A. Yes, I believe that his organic impairments originated early on, perhaps in utero because of fetal alcohol syndrome, perinatal and neural developmentally and certainly before the secondary aspects of the precursors to the frontal lobes were in the process of developing; what I am saying, they occurred early on.

Q. Earlier this morning, you discussed the effects generally of brain damage upon behavior and then you more specifically related them to Mr. [52] Rompilla.

I wanted to ask you if these effects on impulsivity, lack of judgment, and inability to judge the future consequences of your immediate behavior, do those effects increase if the person is drinking alcohol?

A. Yes, alcohol exacerbates the problems and the impairments.

Q. In your declaration, you refer to the effects of these types of organic impairments increasing under stress?

A. Yes.

Q. I wanted to ask you in particular, the record shows Mr. Rompilla was arrested approximately three months after being released from prison from approximately a fourteen-year incarceration.

Is that something you would consider to be a stressor in your use of the word in your declaration?

A. Certainly.

Q. And could you explain that?

A. Yes. Reorienting yourself to the outside world after fourteen years of confinement is a highly stressful situation, particularly for someone who has very little, if nothing, in terms of [53] reserve and in terms of ability to deal with and figure out the world around him.

Q. Some of the testing that you discussed earlier, Mr. Rompilla had a difficult time in processing information, in – is that type of impairment something that would have an impact upon someone just released from prison?

A. Yes, it would.

Q. Could you elaborate on that?

A. He would have a problem because being re-exposed to what I will refer to as the real world, rather than the limits of the confined world, takes a great deal of adjustment.

Having nothing in reserve and having a great deal of difficulty figuring things out and placing language labels on them, even in the ordinary context, would certainly be more problematic during stressful periods.

Q. Would the effects of the impairments you discussed regarding Mr. Rompilla be exacerbated if he had an abusive or dysfunctional childhood?

A. Yes, they would because there would be psychologically no trust, no acceptance, and difficulties with interpersonal interactions.

Q. Now, the effects of alcohol, the recent [54] release from jail and the dysfunctional and abusive upbringing, is there a cumulative impact or sort of snowballing effect on the impairments that Mr. Rompilla suffers from?

A. Yes, it would be cumulative. It would be a snowballing effect, and as one stressor was placed on another, even any limited reserve would very rapidly diminish.

Q. I take it that would have further impact on impulsivity and reasoning and judgment, the other issues discussed earlier?

A. Yes, the more problematic areas would emerge.

Q. Doctor, I want to turn for a while briefly to the issue of child abuse.

Could you tell us just generally what impact does – first of all, why don't you tell us what child abuse is, clinically speaking?

A. Clinically child abuse is exposure to a situation involving an adult or group of adults and a child or group of children in which they are treated, either physically and/or psychologically, in a hurtful manner.

Q. The mental health professions have recognized child abuse as a clinical phenomena for [55] some number of years?

A. That's been well recognized both in terms of the psychological field, in terms of psychiatry and also in terms of pediatric.

Q. Would that have been true in '88?

A. Yes, it would. In fact the most important psychological and pediatric works were written in the early '70's.

Q. What impact upon the developing child does abuse have?

A. The most salient effect that it has is the introduction of mistrust, the loss of trust, a likelihood of endorsement rather than challenging those of authority or those who are adults who may have some kind of controlling focus on the individual and a general compliance under stress. But at the same time the compliance is very often erroneous because it is based on faulty construction, conceptualization of what life is like.

Q. Now, is there an element of self-esteem in the child abuse dynamic?

A. Yes, there is no self-esteem. Self – self-esteem is eliminated along with trust, and there's also a general feeling of hopelessness in [56] the situation, in that there will be no change. There's both hopelessness and helplessness.

Q. Leaving aside Mr. Rompilla's organic impairments for a moment, would someone who suffered the type of abuse that he suffered have an impact upon their impulse control and their ability to reason and judge things?

A. Having been exposed to a faulty world, with faulty expectation and having been abused in situations where others would not have, that creates a faulty image of what life is supposed to be like.

As a result, when challenged by things that don't fit into that simple mold, impulsive behavior is likely.

Q. If you combine that with the organic impairments Mr. Rompilla has, I take it – well, what impact would the abuse have in terms of exacerbating the impairments?

A. The abuse is another exacerbator, it creates a continuation of more and more problems.

Q. There was evidence in other parts of this proceeding that Mr. Rompilla and his siblings were often ridiculed by his parents, called such things as dummy, you will never amount to anything, things of that nature.

[57] That type of verbal – well, that type of name calling of parents toward children, in the abusive dynamic, what significance are they?

A. It's significant because it addresses the issue of self-esteem. Having been told countless times over and over again you are no good, it creates a self-fulfilling proficiency [sic] in which the person sees themselves as being that way and knows of no other way to act.

Q. Does that happen to feelings of lack of self-esteem and worthlessness that are part of the actual physical aspects of an abusive family?

A. Yes.

Q. In other words, if you get hit by your mom or dad and you are told you are a dummy, they reinforce your lack of self-esteem?

A. The physical abuse reinforces the psychological abuse. It becomes actually a vicious cycle.

Q. Now, we talked earlier about children who scored in the retarded range on IQ instruments, also being put in special education classes.

Does a child's low scoring and placement in special ed. also tap into the lack of self-esteem?

[58] A. Yes, because the child is clearly identified as being different, being different in terms of the relationship with his age mate peers, people of the same age.

Q. Leaving aside the family declarations in this case, just looking at the testing that you have seen, your – the historical testing, your testing, the MMPI, the placement in special ed., the mental retardation range scores on the IQ instruments, do you find support for a conclusion in this case that Mr. Rompilla had an abusive childhood?

A. Yes.

Q. If you add the family declarations to those test scores and other material, does that confirm your finding that there was an abusive upbringing in this case?

A. Yes, it does serve as a confirmation.

Q. One more question about abuse and dysfunctional upbringing, what effect does it have on the formation of cause and effects in a child?

A. It creates a notion of cause and effect because the rules are not always consistent.

Q. Of what significance is that?

A. It's a greater likelihood of carrying that into acting impulsively or what appears to be [59] impulsively, because you never learn how you are in actuality supposed to be behalf [sic].

Q. Doctor, if you could focus for a moment on the scores from Mr. Rompilla's elementary school years, in particular the WISC, W-I-S-C, scores, the achievement scores from that period of time, the 1975 DOC wide range achievement scores and the MMPI profile, and the medical

record that you looked at in this case; if you were evaluating Mr. Rompilla with just that information, what avenues would you explore in your testing?

A. I would, in my testing, I would want to look at his ability to process information, his ability to concentrate, reason, exercise judgment. I would want to look at verbal versus nonverbal behavior, and I would want to look at precursors to various forms of behavior.

Q. Those all fall into the category of looking for organicity?

A. Yes, all of that would be looking for organicity. These scores taken in and of themselves are red flags for an organic impairment.

Q. Is there any question about that or is that your particular style of perceiving or is that something generally accepted in the field of [60] psychology and neuropsychology?

A. There's no question about it.

Q. Doctor, I am going to ask you some specific conclusions and please assume that I am asking all of these to a reasonable degree of psychological and neuropsychological certainty.

Does Mr. Rompilla suffer from an organic brain – from organic brain damage?

A. Yes, he does.

Q. Is that organic brain damage of longstanding?

A. Yes, it is.

Q. Does it relate back to at least childhood?

A. Yes, it does.

Q. And could it go back to in utero causation?

A. Yes.

Q. Does he suffer from a learning disability?

A. Yes.

Q. Does this learning disability also date back in its origins to either in utero or early childhood causation?

A. Yes, it does.

[61] Q. Did Mr. Rompilla suffer from organic brain damage and learning disability in 1988, at the time of the commission of the offense?

A. Yes, he did.

Q. Did you reach a conclusion as to whether or not Mr. Rompilla was an abused child in a clinical sense as the term is used clinically?

A. Clinically, yes.

Q. Did this background in your view exacerbate the impact of his organic deficits on his function and personality?

A. Yes, it did.

Q. Now, at the time of the commission of the offense, was Mr. Rompilla under the influence of extreme mental or emotional disturbance?

A. Yes, he was.

Q. And what would that be?

A. He had recently been released after fourteen years of being incarcerated. He was attempting to readjust to the world, and also he was drinking.

Q. Was Mr. Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired in 1988?

[62] A. Yes.

Q. Why do you conclude that?

A. First borderline levels, he had great deal of difficulty with reasoning, adjustment and understanding the long-term consequences of his immediate behavior. He had difficulty figuring things out.

He was exposed to multiple stressors, both in terms of the environment and in terms of chemical stressors, and as a result he was significantly impaired.

Q. Did Mr. Rompilla's brain damage impair and undermine his functioning?

A. Yes.

Q. His judgment?

A. Yes.

Q. Reasoning?

A. Yes.

Q. Cognition?

A. Yes.

Q. Mental flexibility?

A. Certainly, yes.

Q. Emotional lability?

A. Yes.

Q. And his ability to control his behavior?

[63] A. Yes.

Q. Is Mr. Rompilla's brain damage an extreme mental disturbance?

A. Yes, it is.

Q. Does Mr. Rompilla's brain damage cause an extreme emotional disturbance?

A. Yes.

Q. And did it in 1988?

A. Yes, it did.

Q. Is brain damage a mental disease or defect?

A. Yes, it is.

Q. And in Mr. Rompilla's case is that true?

A. Yes, it is.

MR. WISEMAN: I have nothing further. Thank you.

* * *

CROSS-EXAMINATION

BY MR. McINTYRE:

Q. Good morning, Doctor.

A. Good morning.

Q. My name is Mike McIntyre. I work for the Lehigh County District Attorney's office.

A. Yes, sir.

Q. How are you today?

[64] A. Okay.

Q. Doctor, you're a psychologist?

A. That's correct.

Q. You are not a medical doctor?

A. That's correct.

Q. Do I understand that you have four years undergraduate?

A. Yes.

Q. You got a degree from where?

A. University of Miami.

Q. And then you went to Florida State and got your Ph.D.?

A. That's correct.

Q. And then you went to various – I'm sorry, Florida State was one year, right?

A. No. I went to Florida Atlantic University, received a master's degree there, that was an one-year program, received that degree, and then the Florida State program I was there for roughly two and a half years.

Q. When did you graduate from Miami?

A. June of 1965.

Q. I see Florida State you got the Ph.D. in '69?

A. That's correct.

[65] Q. Then you were a postdoctorate fellow at Harvard for a year, is that right?

A. That's correct.

Q. Do you have to do anything to be an expert in neuropsychology?

A. Do you have to do anything? No. Have I done something? Yes.

Q. What have you done?

A. I am a diplomate, board certified in neuropsychology by the American Board of Professional Neuropsychology.

Q. And how did you get that certificate?

A. I received that certificate having taken a written exam, a review of selected samples of my work, and then an oral examination.

Q. I guess I am assuming from what you have testified so far and from your declaration, that basically the bottom line is that there's certain things in evidence that you can apply in mitigation of capital offenses, is that right?

A. Yes.

Q. And basically is that what you do now?

MR. WISEMAN: Objection to the form.

A. Is that what I do now?

[66] Q. Yes.

A. I don't understand your question.

Q. You say in your declaration you have frequently been called upon to apply mitigating circumstances as a psycho-legal concept.

Do you recall saying that?

A. Yes.

Q. Are you doing that now?

A. I do do that. But I also teach and I am also on the medical staff of six hospitals and regularly assess and diagnose people with neurological and neurosurgical complications.

Q. How many times would you say before 1988 were you called to give expert testimony in applying mitigating circumstances as a psycho-legal concept in capital cases?

A. Before 1988?

Q. Yes.

A. Perhaps three to six times.

Q. Did you do any of that here in the Commonwealth of Pennsylvania?

A. No.

Q. Where did you do that?

A. In Florida.

Q. And can you name the cases that you [67] were – you acted as an expert in those cases in Florida?

A. No, I can't. I really don't store that information. That would be from about ten years ago.

Q. And was that all for the defense?

A. I believe it was primarily in terms of the defense, yes. The defense would be the only group interested in mitigation.

Q. Could you tell me how many times you have testified in the Commonwealth of Pennsylvania on this same issue since 1988?

A. Since 1988, I have testified in the Commonwealth on three occasions.

Q. What were those cases?

A. Commonwealth v. Logan, Commonwealth v. Henry, and this matter.

Q. This is the third?

A. I believe so.

Q. Is it correct the other two you testified for the defense?

A. That's correct.

Q. Can you tell me, Doctor, how many times you testified for the government on this issue of applying mitigating circumstances as a psycho-legal [68] concept in capital cases?

A. I don't recall. I know in the past few months I was retained by the United States in the first capital prosecution here in the Southern District of Florida but it didn't reach that level in the proceeding.

Q. I think my question was, how many times have you testified for the government?

A. I have not in recent times.

Q. Well, did you testify for the government prior to 1988 on this issue?

A. I believe that I did, yes.

Q. I'm sorry, I didn't hear your answer.

A. Yes, I believe that I did.

Q. You are saying that you believe that prior to 1988 you testified for some government agency on the issue of applying mitigating circumstances in a psycho-legal concept?

A. It wasn't in applying the mitigators, it was, in a sense, speaking to the lack of mitigators.

Q. And can you name that case?

A. I do not recall the name of the case. It was over ten years ago.

Q. Can you tell me the government entity that you testified for?

[69] A. I do not recall whether it was in the area of Fort Lauderdale or Miami, but somewhere in south Florida.

Q. Doctor, how many cases are you involved in right now in which you're testifying for the defense in the application of mitigating circumstances?

A. At this time I haven't been asked to testify in any other proceeding.

Q. All right. So just so we are on the same wavelength, when I say that, I am asking and make it a broader sense, in how many cases have you been retained to give the type of testimony that you are giving in this particular case?

MR. WISEMAN: Objection to the form, type of testimony.

Q. You may answer.

A. I have been retained in perhaps a dozen cases.

Q. In how many of those have you been retained by the defense?

A. In all of them.

Q. And how many times have you been retained by the Pennsylvania Post-Conviction Defender Organization?

[70] A. Perhaps five or six.

Q. Are those all pending right now?

A. They are in various stages, yes.

Q. Is there a similar organization to the Pennsylvania Post-Conviction Defender Organization in Florida?

A. There is a governmental agency, state agency, yes.

Q. Is it a defender organization?

A. Of sorts, yes.

Q. Am I assuming correctly that in the other cases that you are retained by the defense now, that it does not include the ones you have mentioned for the Pennsylvania Post-Conviction Defender Organization, you would be retained by that Florida organization?

A. Yes.

Q. When did you see Ronald Rompilla?

A. On November 21st of 1995.

Q. Where did you see him?

A. I saw him at the correctional facility in Pittsburgh.

Q. And how long did you spend with him?

A. Approximately four hours.

Q. So that all the testing that you have [71] described on your direct examination were done in those four hours?

A. Approximately four to five hours, yes.

Q. I'm sorry. In those four to five hours?

A. Yes.

Q. And that included an interview?

A. That's correct.

Q. How long did the interview take?

A. I really don't know. I don't keep a time schedule. And I – I start off with a basic interview process and then

intersperse additional interview throughout the course of the testing.

Q. Aren't you paid by the hour?

A. No, I am not.

Q. How are you paid?

A. I am paid by the day.

Q. By the day?

A. Or by the evaluation actually.

Q. Which is it?

A. Well, I am paid by the evaluation.

Q. So that if you do more work in one evaluation than the other, it doesn't matter, you still get paid the same?

A. That's correct.

Q. So if you could do your work quicker in [72] one case than in another, you still would get the same amount of money?

A. In theory, yes.

Q. Did you make notes of your time spent with Mr. Rompilla?

A. No. I don't keep time notes or time sheets.

Q. You did do an interview of Mr. Rompilla though, right?

A. That's correct.

Q. When you do an interview of a person like Mr. Rompilla, I take it you have to rely on what that person tells you?

MR. WISEMAN: Objection to form.

Q. You may answer.

A. I have to rely on it at least subjectively, yes.

Q. Subjectively, I take it, that would hold true for the declarations you received from the family members?

A. Yes.

Q. Do I understand from your direct examination that those declarations were significant?

A. I said that they confirm things that he [73] related and that I had learned from those other sources.

Q. Try to answer the question, Dr. Crown. Did you use the word significant in referring to those declarations?

A. Yes.

Q. And am I correct in assuming that by significant, that means that it is something that you relied upon in reaching your opinion?

A. As to abuse, yes.

Q. Part of that abuse, you were told that Mr. Rompilla was placed in a cage when he was disciplined by his father, that was in the declarations, wasn't it?

A. Right.

Q. So you relied on that?

A. Yes.

MR. WISEMAN: I want to object. That's a mischaracterization of what's in the declaration.

Q. That's in your declaration, isn't it?

A. Yes.

Q. Let me see if I can find that.

When I say your declaration, I am speaking of the one dated November 29th, 1995, that [74] has fourteen paragraphs.

A. As I recall, yes.

Q. Do you have that with you right now?

A. No, I don't. Unfortunately I left it at home on my desk when I came to the office in the morning.

Q. Does this sound familiar, I am going to read from paragraph eight: The family accounts also reveal that Mr. Rompilla was reared in a dysfunctional family. His parents drank alcohol in excess. They fought constantly. Mr. Rompilla and his siblings were subjected to extreme corporal and other bizarre punishments, including caging the children in their underwear when they misbehaved.

Does that sound familiar?

A. Yes, it do does.

Q. What's your basis for that conclusion in your declaration, do you remember where you got that from, that information?

A. As I recall it was from statements from the family members.

Q. Did you also in your declaration – and let me find this. This is in number seven of your declaration: The accounts of his family reveal that his mother engaged in heavy alcohol consumption and [75] cigarette smoking during pregnancy. Do you recall that?

A. Yes, I do.

Q. That is significant, is it not?

A. Yes, it is.

Q. And you relied upon that information?

A. Yes.

Q. Would you tell me what the basis for that was, basis for your conclusion in your declaration, what did you rely on for that?

A. Statement from family members.

Q. Do you remember which family member told you?

A. No, I don't.

Q. Do you know that the oldest sibling was six years old at the time that Mr. Rompilla's mother was pregnant with him?

A. I recognize that.

Q. You don't believe a six year old would be able to say whether or not her mother was drinking alcohol excessively at a time of pregnancy, do you?

A. I think a six year old can remember if their adult caretakers are drunk and acting strangely, yes.

[76] Q. You think a six year old can recognize heavy alcohol use?

A. Retrospectively, yes.

Q. Let me ask you two questions about the – your conclusion of this head injury. What's your basis for the conclusion that you make that Mr. Rompilla suffered head injuries in the past?

A. He related to me the left frontal injury with loss of consciousness, and then also told me he would often drink to the point of falling and black-outs.

Q. Don't you actually list three separate head injuries that Mr. Rompilla told you about in your declaration?

A. Yes.

Q. They all came from him, right?

A. Yes.

Q. On your direct, didn't you mention one of the head injuries you thought there was a hospitalization?

A. Yes.

Q. You got the hospital records, right?

MR. WISEMAN: Objection to the form.

A. At some point, yes.

[77] Q. You don't see any hospital records in regard to a head injury, do you?

A. I don't know if I have all the hospital records. I only know he related he went to the hospital and I know that he has a scar over the left frontal orbit.

Q. But in answering my question, do you have any hospital records which support any episode of head injury?

A. No.

Q. You are relying on Mr. Rompilla for those statements, correct?

A. Yes, I am.

Q. Do I understand there's some document that you saw from the prison that indicates he has a scar on his lip, his right upper lip, and a scar above his left eye?

A. Yes.

Q. Do I also understand in the statement you took from Mr. Rompilla, he said he got both those injuries in the same episode?

A. Yes.

Q. He was somehow hit by a rock or something?

A. Yes, as I recall.

[78] Q. You're not a medical doctor, right?

A. That's correct.

Q. But can you tell me how he would get an injury on his left upper lip – strike that, his right upper lip and his left eyebrow with one rock without having significant injury to his nose?

A. I can't explain the physics or mechanism. Nor have I seen the shape of the rock or object.

Q. You would agree with me it would have to be a rather large rock, right?

MR. WISEMAN: Objection. The witness said he can't discuss the matter.

A. I don't know.

Q. Well, if you know that it injured his right upper lip and his left eyebrow at the same time, it would have to be large enough in circumference to engage both those body parts, correct?

A. Or it could have bounced.

Q. It could bounce from one of his – from his lip to his head?

A. Or it could have fallen from his head to his lip.

Q. And you imagine that would have enough [79] force after the first impact to cause the second impact?

MR. WISEMAN: Doctor, don't answer that question, until I make my objection. I object because the witness already indicated he does not know the physics of how that could happen. I think you are questioning him in a line he already told you he has no answer for.

Q. Would you answer that question, Doctor?

A. I have been instructed not to.

MR. WISEMAN: No, no. Until I made my objection. You can answer now.

A. I don't know. I do not know the physics or the mechanism, but it is as likely the object may have been descending rather than ascending.

Q. How would you be able to tell from a scar whether or not there was brain injury?

A. Looking at the scar itself, you can't. Looking at the neuropsychological data, the neuropsychological data indicates that there are left frontal problems. He also has the manifestations of an external left frontal problem. They may be related, but they may not.

Q. So you work backwards? Let me make that clear what I mean. You took the fact you believed [80] he had some brain injury from your test and then worked back and said, well, one of the possible explanations is he had some trauma, is that what you did?

A. That was one of the possibilities, yes.

Q. Certainly the test results that you got in this case didn't guarantee or make with certainty the fact he had head trauma, does it?

A. There are no neuropsychological tests that would definitively state someone had head trauma. The only thing that the neuropsychological tests can do is state that someone has brain damage.

Q. So the answer to my original question, from the scar alone, you certainly don't know whether or not there was brain injury, do you?

A. That's correct.

Q. Because a scar is exactly that, it's damage to the tissue of the skin, is that correct?

A. Yes.

Q. We don't know from that whether or not there was a penetrating force into the brain, do we?

A. Not for a certainty.

Q. Dr. Crown, did you have as one of the things you relied upon prior to doing the declaration, a report from Dr. Paul K. Gross?

[81] A. Yes, I have the Gross report.

Q. Now, did you rely on that in formulating your opinion?

A. No.

Q. You did not?

A. No.

Q. Why not?

A. My opinion is based on my assessments, not Dr. Gross's assessments.

Q. Well –

A. In fact Dr. Gross did not actually do assessment with testing, as I recall.

Q. Dr. Gross took statements, though, back in 1988 from Mr. Rompilla, right?

A. Yes.

Q. And you relied on statements that Mr. Rompilla made to you back in November of '95, correct?

A. That's correct.

Q. Doesn't it matter to you if the statements that Mr. Rompilla told you in November of '95 are contradicted by statements that he told Dr. Gross in 1988?

A. Not necessarily, no.

Q. Why is that?

[82] A. Because Mr. Rompilla has difficulties with his reasoning and judgment, is likely to confabulate because of his confusion, and as a result everything that he says indeed may not be consistent.

Q. I take it you can't really rely on anything he tells you?

A. As I said earlier when you asked me, I relied on it in terms of subjective information.

Q. All the information on the head injury came from Mr. Rompilla, right?

A. That's correct.

Q. All of the information on these alleged alcoholic black-outs came from Mr. Rompilla, did it not?

A. That's correct.

Q. And to be clear on that, you also had a report of that from Dr. Erwin who also relied on Mr. Rompilla for the alcohol black-outs, right?

A. Yes.

Q. There's no objective evidence of alcoholic black-outs, is there?

A. I did not follow him around, that's correct.

Q. Nor did you read any reports of anybody [83] who actually saw him in an alcoholic black-out, did you?

A. I don't recall.

Q. Now, Doctor, isn't it fairly common for a person in prison after being convicted of a capital offense to come up with a story of alcoholic black-out?

MR. WISEMAN: Objection.

Q. You may answer.

A. I don't know that that's necessarily typical, no.

Q. You haven't seen that on a fairly regular basis?

MR. WISEMAN: Objection to the form.

Q. You may answer.

A. I have seen people who have histories of alcoholism. I haven't seen people who have fabricated that history.

Q. You have never once in your experience seen a person who you believe was just – just coming up with a defense mechanism to assert that they had an alcoholic black-out at the time of his crime?

A. I have seen that in other circumstances, [84] yes.

Q. What do you mean by other circumstances?

A. I am a consultant to the Florida Bar and evaluate attorneys who are subject to grievances, that's a very common thing.

Q. It's certainly possible Mr. Rompilla is doing the same thing that I just mentioned, isn't it?

A. It's possible but not probable.

Q. Well, in deciding whether it's possible or probable, did you consider the fact that when Dr. Gross examined

him and evaluated him in '88 he denied ever having any alcoholic black-outs?

A. Yes, he said he drank on weekends and didn't consider himself an alcoholic is what Dr. Gross reported. But he did say Mr. Rompilla attended AA meetings.

Q. Try to focus on the question.

MR. WISEMAN: I object to that. He is focusing on the question. It's your opinion he's not.

Q. The question was did you consider the fact that in Dr. Gross's report he states that Mr. Rompilla denied ever having any black-outs?

A. Yes.

[85] Q. Did you consider the fact he told Dr. Gross, and I am quoting Dr. Gross's report, he, Rompilla denies any head injuries –

A. Yes.

Q. – did you consider the statement in Dr. Gross's report that, quote, he, Rompilla, also denies that alcohol made him do any violent behavior?

A. I read that, yes.

Q. Did you rely on –

A. Do I rely on what Dr. Gross says?

Q. No, do you rely on what – did you rely on what Rompilla told Gross in 1988?

A. No.

Q. Dr. Crown, you have testified in mitigating phases of capital cases, right?

A. That's correct.

Q. Have you been involved in cases in which a jury then reached a verdict on the penalty phase?

A. Yes.

Q. How many times have you testified in that type of situation?

A. In trials, at the trial level, is that what you are asking?

Q. That's correct.

[86] A. Under a dozen times in the last twenty years.

Q. I take it – and I appreciate your making that clear. When I asked you before about the number of cases you are involved in right now for the defense, are all those cases in which a person has already received the death penalty and now we are post trial as we are in this one?

A. Yes.

Q. So in your entire career then there were twelve other cases in which you actually did testify at the trial on the mitigating phase – or in the mitigating phase?

A. Yes, roughly, roughly about a dozen in the last twenty years.

Q. I do understand from your earlier answer to my question, only about three of those were before 1988?

A. No. I pretty much stopped doing criminal trial work and have not done much criminal trial work in the last six years.

Q. Well, help me with what I thought you said; that isn't it true that of those twelve you said there was only like three you had done before 1988? I think you said, to be honest three and then [87] you said three to six in the state of Florida?

A. Yes.

Q. Can you – let me ask you this, Florida had the death penalty – has had the death penalty for how long, do you know?

A. Since it was reinstated. That would be roughly twenty years.

Q. And they have been executing people for the last twenty years?

A. Close to it, yes.

Q. Am I right – are you aware of what is happening in the state of Texas as well?

MR. WISEMAN: Objection to the form.

Q. In regard to the death penalty, Doctor?

A. I know that Texas has the death penalty, yes.

Q. And are you aware that for years, although the state of Pennsylvania had the death penalty, no one was being executed?

A. Yes, I am aware of that.

Q. All right. Do you know, Doctor, whether or not this type of testimony that I started off asking you about, testimony in regard to mitigating in a capital case, do you know whether or not [88] anybody was testifying on that issue in the Commonwealth of Pennsylvania as of 1988?

MR. WISEMAN: Objection to the relevance.

Q. You can answer.

A. I have no idea of what people were doing in the state of Pennsylvania in terms of testimony in 1988.

Q. You know what I mean when I ask you about the state of the art?

MR. WISEMAN: State of what art? Objection.

Q. Doctor, you did not know enough to answer that question?

A. The state of the art is such that, yes, there are certainly professionals from the mental health field that could and could have in 1988 testified as to sexual abuse, as to child abuse, as to neuropsychological impairments, as to alcohol problems, as to drug problems.

Q. They could have. But were they in the Commonwealth of Pennsylvania prior to 1988?

MR. WISEMAN: Objection. Asked and answered.

Q. You may answer.

[89] A. I have no idea what people were doing in the state of Pennsylvania.

Q. All right. Now, how about in the state of Florida, prior to 1988, what was the state of the art in regard to the defense offering an expert on the issue of mitigation, prior to 1988.

MR. WISEMAN: Objection to the question, in terms of the form, use of the words state of the art.

Q. You may answer.

A. I know in Florida there were mental health professionals who were testifying in '88.

Q. How about before 1988?

A. Yes, there were people who were testifying before '88.

Q. Can you give me their names?

A. Not offhand. I can recall Dr. Arthur Stillman, S-T-I-L-L-M-A-N.

Q. You were sure he was giving that type of testimony prior to 1988 in the state of Florida?

A. Yes.

Q. Certainly – and we will leave this area, certainly I believe you have testified you don't know of anyone who was doing that in the Commonwealth of Pennsylvania?

[90] A. I do not, no.

Q. Now, I got a little bit off the track, Doctor. In the times that you did testify on the mitigation phase or in the mitigation phase of a trial, did you ever have the opportunity to talk to the jury after the evidence was presented and the case was over?

MR. WISEMAN: Objection to relevance.

Q. You may answer.

A. No, I didn't .

Q. Have you ever studied any tests of jury verdicts which indicate how a jury accepts or handles this type of mitigation evidence?

MR. WISEMAN: Same objection, it's irrelevant.

A. No, I haven't.

Q. Do you have any idea, have you ever thought of how a jury will handle some of the things you have brought out about Mr. Rompilla?

A. No.

Q. Let's talk a little bit about those things, the tests you did, the neuropsychological tests you did.

By the way, before we do that, so [91] that I don't forget, were there tests that psychologists did back in '88, not of the neuropsychological variety, in order to determine mitigating factors?

A. I am sure there would have been, yes.

Q. Do you know what an EEG is, right?

A. An EEG?

Q. Yes.

A. Yes.

Q. And then just for the record, what is that?

A. Electroencephalogram, it's a measure of the electrical activity of the brain.

Q. That's a test for brain damage, is it not?

A. It is a test of electrical activity of the brain which may indicate damage or it may not.

Q. It's about 30 percent effective, is it not?

A. Yes.

Q. Are psychologists still using that test?

A. Some psychologists are, yes.

Q. You still use it, don't you?

A. Yes, I do.

Q. What other type of tests were there [92] back in '88, psychological tests?

A. There were and are tests of cognition. There are tests of vocational ability and aptitude, tests of achievement, and there are tests of interpersonal interaction.

Q. The WRAT test is one of them you are talking about when you talk about achievement?

A. That's correct.

Q. There is the MMPI test?

A. That's correct.

Q. Do you know if any of those tests were done in this case back in '88 for Mr. Rompilla?

A. I don't know that they were done, no.

Q. Did you ever hear or look at any test results from tests done by a Dr. Gerald Cooke?

A. No, I don't recall that.

Q. And were you aware that there was a psychiatrist involved in 1988 by the name of Robert Sadoff?

A. No. I know Dr. Gross.

Q. You have no other information for any tests that may have been done on Mr. Rompilla back in '88?

A. That's correct.

Q. Your test, the neuropsychological [93] test –

A. Yes.

Q. – I believe you identified about nine of them?

A. I didn't count them, but that sounds about right.

Q. Well, first question, were all of those tests performed back in '88 by neuropsychologists such as yourself?

A. Those tests or earlier forms of those tests were available and were used by neuropsychologists in '88.

Q. Let's not talk about earlier forms of the test. Let's talk about the exact test you did in '95, were they all being done by neuropsychologists in '88?

A. Every one of the tests was available in '88, except for the WRAT Three, it was the WRAT Revised that was available in '88. The WRAT Three became available in 1993.

Q. So if you had been retained by the defense in '88 you would have performed all those tests with that one exception on Mr. Rompilla?

A. I would have given the earlier version of the WRAT, yes.

[94] Q. I believe the first test you said was the auditory selective attention?

A. Yes.

Q. How long did that take?

A. I don't keep a time sheet for those things, sir.

Q. Can you tell me in laymen's terms what you do and what Mr. Rompilla does in that test?

A. I run through a sequence of items on a story board, asking him to make choices, and point to them.

Q. Can you give me an example?

A. There's a story board that has a person wearing a wig – a wing, a key, and some peas in a pod.

Q. Just pictures?

A. Pictures.

Q. Do you ask him to do what?

A. I ask him to point to a particular thing. For example, I might ask him to point to the wing.

Q. You show him a picture of various objects and you ask him to point to one of them?

A. Yes.

Q. Is it the object of the test to see [95] whether he knows what the object is that you are asking him to point to?

A. The object is to clarify and to teach him in case there's a problem about what the objects are.

Q. And the first time you do the test, you don't distract him?

A. That's correct.

Q. The next time you do it, you distract him?

A. Yes. There's a sequence. The sequence involves about a hundred pointing exercises.

Q. How do you distract him? Give me an example.

A. I distract him by playing a standard distraction tape on a tape recorder.

Q. While the tape recorder is playing, you ask him again and see if that's affected his ability to do it?

A. No, the tape also does the asking, so it's at the same decibel level.

Q. I am not sure I follow that. You mean you never ask him personally, it's just a tape doing that?

A. That's correct.

[96] Q. On both versions, and the second time around, while asking him, there will be other noises on the tape?

A. That's correct.

Q. Did I understand you to say that the results of this test – let me rephrase that.

That this test shows abilities that are subject to degeneration?

A. Our attending abilities degenerate along with our brain processes as we get older.

Q. I think you said Mr. Rompilla tested as if he were 82 years old?

A. That would be the equivalent, the statistical equivalent, yes.

Q. Is it true that test – those test results may have been much different seven years ago, in 1988?

A. I believe that they would have been consistent although, yes, they would been different because he was in a different age category.

Q. And since his results get poorer as he gets older, he's seven years older now, right?

A. That's correct.

Q. The Shipley abstract problem solving test?

[97] A. Yes.

Q. What – how long did that take?

A. Once again, I don't keep time sheets. It involves completing sequences.

Q. What exactly do you do and what does the subject do?

A. I ask him to complete sequences for example, A, B, C, D, what comes next. And it gets more complex.

Q. That's pretty easy, right?

A. That's correct.

Q. Give me the complex example.

A. A complex example?

Q. Yes. If you started with the easiest one, give me the hardest one, if you can.

A. T-W-O, W; F-O-U-R, R; O-N-E, O; T-H-R-E, and then there's a dash.

Q. You stumped me, doctor.

A. Write it down.

Q. That's okay. That's the example of the hardest one?

A. Yes.

Q. And what does that test, his ability to solve problems, I take it?

A. Abstract problem solving using language.

[98] Q. He had the ability of a nine year old?

A. Eight years, nine months.

Q. I'm sorry, I thought you said nine years old?

A. Eight years, nine months.

Q. The category fluency test.

A. It's the category test.

Q. Isn't it called the fluency test as well? I don't hear you.

A. No.

Q. You don't know how long that takes so I won't bother asking you anymore. You don't know how long any of these tests took?

A. No, I don't.

Q. What do you do, what does the subject do?

A. He's shown a series of boards with geometrical figures on them. The geometrical figures relate to a number between 1 and 4, and he's asked to determine what number the figures relate to. Each time he's told whether he's correct or incorrect.

Q. And that measures whether or not he's impulsive or not?

A. It measures the ability to take new [99] learning, new information, and then apply it in a problem solving situation, because the decision making rules change.

Q. Didn't you say though that his results indicated that he was a person of impulsive behavior?

A. Yes.

Q. The Wisconsin card sorting test?

A. Yes.

Q. His results, Mr. Rompilla's results, indicated he was unable to choose the correct response and that he can't monitor his conduct?

A. Yes, he engaged in what I believe I referred to as perseverative behavior.

Q. The WRAT test was the next test you did. That just basically tests his reading, writing and arithmetic skills?

A. That's correct.

Q. The next test I lost, had something to do with the word, I think, trail was in it?

A. Trail making test, forms A and B.

Q. All right. What does that test?

A. It's a test of concentration and attention and conceptual flexibility.

Q. And that tests his ability to switch [100] from one idea to another?

A. Conceptual flexibility is the ability to switch from one idea to another, to move smoothly from one idea to another.

Q. That Luria Christensen memory test –

A. Yes.

Q. – was the next test you did?

A. That's correct.

Q. And I believe you said that that's – the results from Mr. Rompilla is another indication he acts impulsively?

A. This is a test of memory and recall.

Q. Did you say that the results, though, indicated he acts impulsively?

A. There is some impulsiveness in his responses because he's quick to respond, yes.

Q. How about the Ray-Osterrieth test?

A. Yes, that's a test of nonverbal memory and recall.

Q. Does that again – do his results show he has a tendency to act impulsively?

A. This is a test of memory and recall. He has a tendency to have problems with memory and recall.

Q. Nothing about impulsive acting there?

[101] A. No.

Q. And that right hand Indiana aphasia screening test, the result of that is he can't even do simple tasks?

A. That's correct.

Q. Now, here's the question I wanted to ask you, Doctor, you remember I was asking you about whether or not you ever were able to, either by talking to a jury or seeing studies, have any idea of how this information will affect a jury who has to decide between death or life imprisonment, correct?

A. Yes.

Q. Have you ever sat down and thought about how a jury would be affected by evidence, number one, that the defendant acts impulsively?

MR. WISEMAN: Objection. It's irrelevant.

Q. You may answer.

A. No, I haven't.

Q. I think it was when you were referring to the tests that he had been given in 1976, MMPI and WRAT test –

A. Yes.

Q. – that you said, tell me if I am wrong, [102] these test results show he was unpredictable, schizoid, and impulsive?

A. Mr. Wiseman read those things to me and I was in agreement, yes.

Q. Have you ever thought or reflected upon what a jury considering life or death would do with that testimony, that Mr. Rompilla was unpredictable, schizoid and impulsive?

MR. WISEMAN: Hold your answer for a moment, Doctor. So I don't have to keep interrupting your examination, I object to all questions that call upon psychologists to answer as to whether a jury would find something significant. That forces a determination for attorneys to make.

Q. Can you answer that, Doctor?

A. Only to the extent that, no, I don't know.

Q. As an expert who testifies in applying mitigating circumstances as a psycho-legal concept in capital cases, have you ever given any thought to the quote, unquote, bad things that can be developed from your testing in regard to a jury's decision?

A. No, I haven't.

Q. Do you agree there are some bad things that could come out of it?

[103] MR. WISEMAN: Objection to the form of the question, bad.

A. I haven't considered that.

Q. We'll call those, so we are all clear, negative things, things that a jury could rely upon to vote for the death penalty over life imprisonment.

MR. WISEMAN: Are you referring, Mr. McIntyre, to aggravating circumstances?

MR. McINTYRE: I am talking negative things.

MR. WISEMAN: I object. There's no such thing in the law of death penalty as negative things. They are either aggravating or mitigating.

Q. Doctor, can you answer that question?

A. I don't know.

Q. I think basically what I did was told you what I meant by bad, quote, unquote, the negative things, okay.

MR. WISEMAN: Objection to what you told him.

Q. Do you understand that, Doctor?

A. I think I know, but I don't know for certainty.

[104] Q. For example, a lot of the MMPI results can indicate antisocial behavior, correct?

A. It's possible, yes.

Q. Well, do you remember going over the test, the MMPI tests that were done in 1976 for Mr. Rompilla?

A. I remember going over the scores of an MMPI test that was done at some point. I believe it was in the '70's, yes.

Q. There are scores that indicate antisocial behavior on behalf of Mr. Rompilla, correct?

A. Yes.

Q. Do you know what an [sic] sociopathic is?

A. Yes.

Q. Those scores indicate sociopathology in Mr. Rompilla, don't they?

MR. WISEMAN: Objection to scores.

A. They assess the validity of the MMPI.

Q. If you accept the validity, that's what they indicate, right?

A. That's what they would indicate, yes.

Q. Have you ever reflected upon what a jury would do with that information?

A. No.

[105] Q. Doctor, have you ever reflected upon the strategy decision that a defendant must make in the mitigating phase to attempt to, number one, excuse his conduct by using the evidence which experts like you present, or by maintaining his innocence?

A. No, I haven't.

Q. You never once thought about that?

A. No.

Q. Would you agree with me it is a strategic decision involved there?

A. I believe there's a decision involved that involves lawyering, yes.

Q. You know people as a psychologist, you know people and how people think, don't you?

MR. WISEMAN: Objection to form.

Q. You may answer.

A. I know how to assess people, yes.

Q. Have you ever done any studies of juries in an attempt to assess a jury?

A. No.

Q. Did you notice in Mr. Rompilla's school records that he seems to do okay in seventh, eighth, and ninth grade?

A. That he seems to do okay?

MR. WISEMAN: Objection to form.

[106] Q. Yes. Do you have that in front of you?

A. Yes.

Q. - It's on page two, I believe, of the school records.

A. Yes.

Q. 1961, '62, he's in the seventh grade, '62 and '63 he was in the eighth grade?

A. Yes.

Q. And '63, '64 he was in the ninth grade?

A. Yes.

Q. I don't see any SP indicating any kind of special –

A. I don't know the way that that school system did their special education. I don't know. I don't know what the numbers mean, and I don't know what type of classes he was in. I don't know whether the grades are based on an expectation. I don't know whether it's a comparative base. I have no idea where the numbers come from.

Q. You see when he's in seven grade, number one, he doesn't miss a day of school, does he?

A. No, sir, he didn't.

Q. He passes everything, right?

A. Correct.

Q. In eighth grade, he missed two and a [107] half days of school, right?

A. Yes.

Q. And again he passes everything?

A. Yes, he does.

Q. And, in ninth grade, I believe he misses, I can't make this number out, it looks like five and a quarter days or five and half, would you agree with me?

A. Five and a half, yes.

Q. Again he passes everything?

A. Yes, he does.

Q. Then do I understand the history you got, he left school in order to get a job and work?

A. Yes.

Q. At least from the school records there's no indication of any problem in the seventh, eighth and ninth grade, is there?

A. Again, I don't know what classes he was in, what the basis for the classes were, nor do I know the basis for the scoring.

Q. Would you agree with me that based on the school records alone, there's no indication of any problem in those three years?

MR. WISEMAN: You are referring to the grades?

[108] A. Grades themselves, the grades are satisfactory.

Q. Wouldn't that indicate the grades that weren't satisfactory in the earlier years, wouldn't that indicate that was a temporary situation, the earlier years?

A. I am hard-pressed as a psychologist to know how someone would get smarter between the sixth and seventh grades.

Q. Are poor grades also connected with how smart a person is, aren't they also connected with effort being applied?

A. May be connected to effort, could also be connected to the benevolent teachers, also based on incidents, scoring and grading, meaning that the person serves as their own control. There are many possible explanations.

Q. You have no idea which is the correct one in this case, do you?

A. That's correct. The only thing I am aware of is that this is a person who had a full scale IQ in 1961 of 69.

Q. Doctor, do you really believe, this hospital treatment for Mr. Rompilla when he was two years old and had a, I guess, a 105 fever, had [109] anything to do with his present condition or his condition at the time of the commission of this offense in 1988?

A. It may have been a contributor to his organic brain damage.

Q. Now, let me ask you if you can use a word stronger than may. You don't have any opinion to a reasonable degree of medical certainty that this had anything to do with his condition, do you, Doctor?

MR. WISEMAN: He's not a medical doctor. You asked to a medical certainty. Objection.

MR. McINTYRE: I regard psychology as a form of medicine.

MR. WISEMAN: I still object.

Q. We have an objection being placed. We change it to a reasonable degree of psychological or neuropsychological certainty. Can you answer that question?

A. I believe that that incident contributed, yes.

Q. And you hold that to that degree, correct?

A. Yes.

[110] Q. Do you have children, Doctor?

A. Yes.

Q. Isn't it fairly common for a child to have a fever of 105?

A. Yes, it is.

Q. I mean, we don't like it as parents, we get very upset and scared with it, but it does happen?

A. Yes, it does.

Q. Obviously every child who had a temperature of 105 doesn't develop brain defect, do they?

A. No.

Q. Well, how can you say then that this contributed to some kind of brain defect that Mr. Rompilla has?

A. Because the manifestation was not only the fever but it was also the diarrhea.

Q. What does diarrhea have to do with it?

A. I am concerned about the child's electrolytic balance.

Q. Isn't that another common occurrence among children, they have diarrhea when they have a fever?

A. No.

[111] Q. It is not?

A. No.

Q. 1988 Wechsler score of 79, not retarded, right?

A. That's correct, that's in the borderline range.

Q. Does not indicate mental retardation, does it?

A. No.

Q. Doctor, at some point you gave an opinion as to the effect of Mr. Rompilla's child abuse on his, I guess, thought processes in 1988 at the time of this offense, and the question was framed to you in a way that asked you not to rely on what family members told you, and asked if you had an opinion nevertheless, and you said, yes, you did. Do you recall that?

A. Yes, I do.

Q. My question to you, if you are not relying on family members, what is your basis, what is the basis for your conclusion that Mr. Rompilla was the victim of child abuse?

A. I relied on those accounts that absent the specific account – that was phrased to me, I don't recall how it was phrased, but certainly I did [112] rely on what I was told. I wasn't there.

Q. Your conclusion he suffered from child abuse has to be based on the declarations of those family members, isn't that constrict [sic]?

A. Yes.

Q. Doctor, you testified up here in Northampton County, which is our neighboring county, in the case of Commonwealth versus Henry, correct?

A. Yes, I did.

Q. Your conclusions in that case were based on alleged head trauma that Mr. Henry suffered, isn't that correct?

A. Yes.

Q. And you didn't have any hospital records for those head – that alleged head trauma, did you, in the Henry case?

A. I don't recall. I don't believe so.

Q. And your opinion was also based in part on the allegation that Mr. Henry's mother had some prenatal problems?

A. Yes.

Q. And that again was not based on any hospital records, was it?

A. That's correct.

Q. Dr. Crown, what is your position in [113] regard to the death penalty?

A. I am in favor of it.

Q. You are?

A. I support it, yes.

Q. Have you ever been called on to or been in any position where you had to act on that, that you acted to show that you were in favor of it?

MR. WISEMAN: Objection to the form.

A. I have expressed it when asked.

Q. In all the cases though that you talked about that you have been retained now by either this Pennsylvania Post-Conviction Defender Organization or the Florida counter-part, you have been retained in an effort to avoid the death penalty for the defendant, is that correct?

A. I have been retained to do assessments and provide testimony if asked.

Q. In all these cases, though, the position which you are advocating is that the death penalty should be removed, as for this particular defendant, correct?

A. I give my testimony based on my findings. I leave it to the lawyers to make the kind of argument you are talking about.

[114] Q. Would you answer my question?

MR. WISEMAN: I think he did I [sic]?

A. As to the ultimate outcome.

Q. The ultimate outcome would be that the death penalty would be set aside?

A. Yes.

Q. You don't see yourself as an advocate for that position?

A. No, I see myself as presenting my findings.

Q. Is there any case right now in which you have been retained in which you are advocating the position that the death penalty should be imposed?

A. Not at this time.

MR. McINTYRE: Thank you, Doctor. Have a nice day.

MR. WISEMAN: Doctor, I have a little bit of follow-up.

* * *

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. As you indicate on direct exam, you found the presence of organic deficits in Mr. Rompilla's testing, is that right.

A. That's correct.

[115] Q. Do those conclusions regarding his organic impairments stand independently of your evaluation of whether he had head trauma?

A. Yes.

Q. Do they stand independent of your evaluation of whether he was abused as a child?

A. Yes, they do.

Q. Do they stand independent of the medical records regarding his hospitalization at the age of two?

A. Yes, they do.

Q. Do they stand independent of your review of the school records from when he was in elementary and junior high school?

A. Yes.

Q. Do they stand independently of the 1975 and '76 MMPI and wide range achievement testing administered by the Department of Corrections?

A. Yes, they do.

Q. Now, once you reached your conclusion that there was organicity in Mr. Rompilla's case – well, withdrawn.

Does your conclusion that you expressed on direct that these deficits are long-standing and relate back to childhood and [116] perhaps earlier, do they stand independently of all the things I just mentioned?

A. Yes, they do.

Q. Now, once you reached the conclusions that he had organic deficits that were longstanding in nature, did you then set out to attempt to identify possible causes for these deficits?

A. Yes, I did.

Q. And is it there that you then relied on the family history?

A. That's correct, yes.

Q. And the testing that we just discussed?

A. Yes.

Q. The school record testing and the DOC testing?

A. Yes.

Q. Is it then that you looked at the history of head trauma?

A. Yes.

Q. And the medical records from age two?

A. Yes.

Q. If you took away all the collateral information, other than your testing of Mr. Rompilla, do you still have an opinion as to whether or not he suffers the organic defects you discussed [117] in your direct exam?

A. Yes.

Q. What's that opinion?

A. He remains with organic brain damage.

Q. That is objective science?

A. Yes.

Q. Has nothing to do with your opinions under the death penalty?

A. That's correct.

Q. It has nothing to do with who has retained you in the past?

A. That's correct.

Q. Now, regarding your involvement in Pennsylvania cases, I think you mentioned Ronald Logan?

A. Yes.

Q. Was that a case related to mitigating factors or was that a case related to competency to be executed?

A. That related to competency to be executed.

Q. Do you remember what Judge Ribner of the Court of Common Pleas ruled in that case?

A. Yes.

Q. What was his ruling?

[118] A. His ruling was that Mr. Logan was not competent to be executed.

Q. And was your opinion he was not competent to be executed one shared by the court appointed – by the court appointed psychologist, Albert Levitt?

A. Yes, sir.

Q. Was it shared by a defense retained psychologist, Dr. Dudley?

A. Yes, it was.

Q. Have you ever been retained by the defense in a capital case regarding mitigation and have not testified?

A. Yes, I have.

Q. Have you ever made findings that you shared with the defense that were not helpful to the defense?

A. Yes.

Q. And in those circumstances, were you told your services were no longer required?

A. Yes, I was.

Q. So would it be fair to say then just because you are retained you don't come and be a mouthpiece for any defense theory or proposition they wish to put forward?

[119] A. That is correct.

Q. You testify and give your reports based on your testing, is that right?

A. That's correct.

Q. Now, to the extent you relied on things Mr. Rompilla told you in searching for causes of this organicity, would you agree that – or disagree with the statement that what he told you was consistent with what you found on your testing?

A. Yes, I would agree, it was consistent.

Q. Is there anything he told you that caused you to pause and that was inconsistent with your testing?

A. No.

Q. Now, Mr. McIntyre asked you about whether or not your opinion was based on the fact that Mr. Rompilla himself was caged by his father as opposed to other members of the family siblings, but not Mr. Rompilla.

Assume for the moment that the facts before you are that Mr. Rompilla was not caged, but his two older brothers were placed in a cage in the family's living room for a week.

Would the – assuming that fact to be true, would that type of treatment of Mr. [120] Rompilla's siblings have a clinically significant impact on him as a developing child?

MR. McINTYRE: I have to object unless you put in the age of Mr. Rompilla at the time.

MR. WISEMAN: You can do it on recross.

Q. Do you have an answer?

A. Yes.

Q. What is your answer?

A. It would have a chilling effect.

Q. Explain that.

A. Having witnessed that, he certainly would have recognized that on some other occasion it could have happened to him or something even worse could happen.

Q. Would it add to the abuse dynamic?

A. Yes, it would.

Q. Now, assuming that that happened and that his father did not receive massive psychotherapy or other mental health treatment; in your experience with child abuse would a parent that subjects siblings to that type of behavior probably treat his other children in a similarly abusive fashion?

[121] A. Yes.

Q. Even if the cage itself wasn't used?

A. Yes.

Q. Now, Dr. Gross in his report, is there any indication in his report that he relied on any neuropsychological testing?

A. No, there is not.

Q. Is there any indication that he relied on any neurological testing?

A. No.

Q. Did he rely in his report or make any mention of psychological testing?

MR. McINTYRE: Objection. The report speaks for itself. Why are you wasting our time?

MR. WISEMAN: No, I'm not.

MR. McINTYRE: Yes, you are.

Q. We didn't get an answer to the question about psychological testing.

A. No, he did not.

Q. Was there an indication – withdrawn.

Would you agree the report appears to be primarily based on self reporting of Mr. Rompilla?

A. Yes, I would.

[122] Q. Is there any collateral source at all cited in that report?

A. None.

Q. Mr. McIntyre questioned you at some length regarding what was going on in Pennsylvania with various death penalty cases.

Are you aware in 1984, the case of Commonwealth –

MR. McINTYRE: It's objected to as leading. You can't lead him like that. I am going to have to put a stop to it. Objection, leading. Rephrase. Please.

MR. WISEMAN: I think in the context of examining an expert witness in view of your cross, that the form of the question is proper and I am going to ask the Doctor to answer.

MR. McINTYRE: I object to the form.

MR. WISEMAN: You can object to it.

MR. McINTYRE: Fine. I did.

MR. WISEMAN: Do you want to object again?

MR. McINTYRE: No. Once is –

BY MR. WISEMAN:

[123] Q. Doctor, my question is are you aware in '84, Commonwealth v. Duffey, the defense presented evidence of child abuse?

A. I am not specifically aware of it, no.

(Discussion off the record.)

Q. You were asked about the use of EEG's. Is that a test that psychologists administer?

A. It's a test that psychologists developed but neurologists have adopted.

Q. Who actually gives the test?

A. The technician.

Q. Now, you were questioned about the auditory selection test and I think the question had to do with would your opinion have been different if you – would the result of the test have been different if you had given the test seven years ago, do you recall that question?

A. Yes.

Q. Did I understand you to say that the result would have been different because he would have been seven years younger?

A. It would have been an age appropriate difference.

Q. Would your opinion as to whether or not he was impaired had been affected at all by the [124] chronology of when the test was administered?

A. No, it would not have.

Q. Why is that?

A. Because the normative standards take into account age, so the statistical difference would have been the same, the equivalencies would have been different based on age.

Q. Mr. McIntyre questioned you regarding whether certain tests showed impulsivity, problems with judgment, problems with reasoning, problems with predicting future consequences.

What is the relationship between impairments in organic testing – I should say impairments – on testing for organic impairments and the presence or absence of impulsivity, judgment, reasoning, ability to judge future consequences?

A. They are very closely related, particularly in terms of assessment of frontal lobe and executive functioning.

Q. So for example, if a test shows that a person can't pay attention, it's not – withdrawn.

If a person can't pay attention as indicated on a particular test, it's not the test qua test that makes out the impulsivity but the [125] person's inability to pay attention that leads them to be impulsive by example?

A. Underlying function, not the test.

Q. Now, Doctor, Mr. McIntyre questioned you about Mr. Rompilla's performance in the seventh grade, in particular the grades.

Is the WISC, the Wechsler, Intelligence Scales for Children, is that a standardized test?

A. Yes, it is.

Q. Is the wide range achievement test a standardized test?

A. Yes.

Q. The WRAT?

A. Yes.

Q. Are grades in school standardized?

A. No, they are not.

Q. In your experience do they obviously vary from teacher to teacher and school to school?

A. Yes.

Q. As a psychologist and neuropsychologist, do you rely – do you find standardized testing to be more reliable or find grades to be more reliable?

A. Standardized information is much more reliable.

[126] Q. You would consider grades, is that right?

A. Yes.

Q. But you would consider the testing to be more reliable?

A. Certainly.

Q. You were questioned about the diarrhea and the fever.

Is it the presence of diarrhea in a child and a fever in a child of 105 degrees that you found significant, or was it the presence together and the severity of the conditions that you found significant?

A. It's the combination and the severity which takes it out of the ballpark of the typical at home sick child.

Q. So many, many children have fevers?

A. Yes, certainly.

Q. And many children have diarrhea?

A. Yes.

Q. You don't think necessarily that leads to organic impairments?

A. Yes.

Q. It was the severity of it you felt in this case was a possible explanation for the [127] organicity you found in the testing?

A. Yes.

Q. There's an increase in the IQ testing Mr. Rompilla had in grade school with that that he achieved as an adult in the Department of Corrections, is that correct?

A. Yes.

Q. That would be the 79 on the WAIS and the 93 on the Beta, is that right, Doctor?

A. The difference between a full scale score of 69 and full scale score of 79 is not statistically significant, there really is no difference.

As for the Beta score, the Beta test produced scores that are inflated over the Wechsler scores.

Q. Assume for the moment there was a statistically significant increase, which I understand you are saying wasn't present in this case, you testified earlier that when you see a low IQ score, among other things, you consider emotional interference, is that right?

A. Yes.

Q. Would removal of emotional interference such as child abuse explain an increase from [128] childhood testing to adult testing?

A. It could, yes.

Q. Now, you were asked both on direct and cross regarding removal from your consideration of the family declarations.

My question is, is scoring in a mentally retarded range as a child consistent with an abusive upbringing?

A. Yes, those children from an abusive upbringing very typically score low, yes.

Q. And is, as we just discussed, the increase from childhood to adult in IQ testing, is that consistent with the removal of emotional interference such as abuse?

A. Yes.

Q. Is placement in special ed. consistent with abuse?

A. Very typically, yes.

Q. Is Mr. Rompilla's 1976 MMPI consistent with an abusive profile?

A. Yes.

Q. By the way, that 1975 profile, is that the profile of an antisocial personality disorder?

A. No.

Q. The spike, I believe, is 48, is that [129] correct?

A. Correct.

Q. And as you indicated in your declaration 48 shows schizoid personality, isolation, nomadism, inability to achieve?

A. That's correct.

Q. We spent a bit of time trying to figure out how the rock hit Mr. Rompilla.

Although – well, withdrawn.

Is it possible that he was hit by more than one rock on that occasion?

MR. McINTYRE: Objection.

MR. WISEMAN: Your questions were just about as silly.

Q. Could you answer the question, Doctor?

A. Yes, it's possible.

MR. WISEMAN: So the record is clear, since the doctor didn't have his report in front of him, I would like to mark a copy of his declaration. I guess we are up to 16.

So the record is clear, the report has his CV attached to it.

(Crown Deposition Exhibit Number 2 was marked for identification.)

Q. Was the dynamic or the – was child [130] abuse as a clinical diagnosis something that was available to mental health practitioners in the 1970's and '80's?

A. Certainly.

Q. Was it available in your experience to capital attorneys that you worked with?

A. Certainly.

Q. In other words, you work with capital attorneys who talked about that as a possible mitigating defense –

A. Yes.

Q. – in a penalty phase?

A. Yes.

Q. Would that be true for organicity and brain damage as a – obviously that was known to mental health professionals in the '70's and '80's?

A. Yes, it was.

Q. Was that something in your experience you saw and heard capital attorneys consider as a defense during that time period?

A. Yes.

Q. All the collateral information in this case that we have talked about regarding the elementary school tests, the MMPI from the mid '70's, mid '70's achievement tests, the medical [131] records, are they all things that if you had as a neuropsychological – as a psychological evaluator you would have used in evaluating Mr. Rompilla in 1988?

A. Yes, that's correct.

Q. I think you said earlier it would have led you to do neuropsychological testing?

A. Yes, it would have.

Q. In your experience, as a forensic psychologist, and neuropsychologist, have you been retained by the prosecution in competency issues?

A. Yes, I have.

Q. Insanity issues?

A. Yes.

Q. Assessments of brain damage?

A. Yes.

Q. Have you ever been court appointed as an expert on any of these issues?

A. Yes, I have. And most typically that's the way that I have been involved.

Q. Has a Judge ever told you that your views on the death penalty disqualify you from being an expert as a court appointed expert?

A. No.

Q. Does the prosecution in your experience [132] generally retain experts to do mitigation evaluations?

A. No, they do not.

Q. Just to wrap us up here, in Mr. Rompilla's case, was the brain damage an extreme mental disturbance?

A. I'm sorry, could you repeat the question.

Q. In Mr. Rompilla's –

MR. McINTYRE: Objection. Asked and answered.

MR. WISEMAN: You impeached him – or tried to impeach him on cross.

MR. McINTYRE: How does it change what was said before?

MR. WISEMAN: We will still have his opinions after your cross-examination.

Q. In Mr. Rompilla's case, was the brain damage you found – did it constitute an extreme mental disturbance?

A. Yes.

Q. Does Mr. Rompilla's brain damage cause or did it cause an extreme emotional disturbance?

A. Yes, it did.

Q. Did his brain damage impair his capacity [133] to appreciate the criminality of his conduct?

A. Yes.

Q. Does Mr. Rompilla's brain damage and did his brain damage impair his capacity to conform his conduct to the requirements of law in 1988?

A. Yes, it did.

Q. And is brain damage and mental damage a defect?

A. Yes.

Q. At the time of your defense – withdrawn.

At the time of the offense, did Mr. Rompilla suffer from an extreme mental or emotional disturbance?

A. Yes.

Q. And at the time of the offense was his capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of law substantially impaired?

A. Yes, it was.

Q. Do you hold all those opinions to a reasonable degree of psychological and neuropsychological certainty?

A. Yes, I do.

MR. WISEMAN: Nothing further.

[134] * * *

RECROSS EXAMINATION

BY MR. McINTYRE:

Q. Just a few more questions. I promise they won't be lengthy.

You were just asked whether or not the government generally employed experts such as yourself on mitigation issues and your answer was no, correct?

A. That's correct.

Q. My question to you is, did the defense bar generally employ persons like you on the mitigation prior to 1988 in the Commonwealth of Pennsylvania?

MR. WISEMAN: How about Lehigh County?

A. Again, I don't know what the standard was in Pennsylvania at that time.

Q. Do I understand one of the first questions you were just asked on redirect is whether or not your opinion would be the same if you just had your test results and none of the background information that was given to you?

A. Yes.

Q. And your answer was yes, it was – yes, [135] it would be?

A. Yes.

Q. So you really didn't need any of the background information to reach your opinion?

A. As to brain damage, no.

Q. Doctor, what cases have you been retained by the Pennsylvania Post-Conviction Defender Organization in the last five years in which you have given them negative reports and not been asked to testify, would you please name those?

MR. WISEMAN: I would like to clarify the record. There was no Pennsylvania Post-Conviction Defender before July of 1994.

MR. NOLAS: For the record, Dr. Crown – Billy Nolas as litigation director of the office, I am instructing you not to answer the question. It's privileged information that may hurt other clients. We will take it up with the Judge. Do not answer.

Q. Dr. Crown, will you answer that question?

MR. NOLAS: I am instructing you not to answer that question, Dr. Crown.

A. I am unable to answer that not only based on Mr. Nolas's instruction but also under the [136] ethical provisions of the American Psychological Association.

Q. There's some requirement there, a regulation in that regard?

A. There's a regulation not to disclose information that may not be of public record, yes.

MR. NOLAS: So the record is clear, I am asserting privilege. I am asserting the eighth amendment rights of these other individuals. I am asserting the fundamental fairness in having information that may harm someone else's case elicited from a doctor that has not been disclosed in those cases.

Q. Whether or not you have done that or how many times you issued negative reports, we are not going to find out, is that right, Doctor?

A. Yes.

Q. The fact the person has a low IQ does not mean they were abused, does it?

A. No.

Q. I believe you brought out on direct there's many reasons a person could have a low IQ?

A. Yes.

Q. Genetics is one of them?

A. What's that?

[137] Q. Genetics is a possible explanation?

A. Yes.

Q. And there's many other?

Yes.

MR. McINTYRE: We don't have to go through them. All right. I have no further questions. Thank you.

* * *

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. One question, Dr. Crown, the background information that you – that we have discussed earlier regarding the collateral, you have mentioned collateral as to the testing.

Leaving aside the testing for a minute and looking at the collateral information, is that collateral information a red flag or does it constitute red flags that an evaluator would look to in their initial assessment of a forensic patient in a capital setting?

A. It's a red flag indicating that further objective evaluation is necessary.

Q. Just so the record is clear, we are talking about the abusive background, the mental retardation scores, the 1975 MMPI, the medical [138] records, the history of head injury, all those things?

A. Yes.

MR. WISEMAN: Nothing further.

MR. McINTYRE: No questions.

(Deposition concluded.)

[139] 4/7, 1996

I hereby certify that the evidence and proceedings are contained fully and accurately in the notes taken by me of the testimony of the within witness who was duly sworn by me, and that this is a correct transcript of the same.

/s/ Sally A. Slifer
Sally A. Slifer, RMR
Registered Merit Reporters
Notary Public

The foregoing certification does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.

33

4830

(5)

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME V, PAGES 939 TO 1279

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Relevant District Court Docket Entries 1

Notes of Testimony (11/1/88, penalty-phase)..... 2

Notes of Testimony (11/2/88, penalty-phase)..... 120

Notes of Testimony (11/3/88, penalty-phase)..... 211

Pennsylvania Supreme Court direct appeal opinion, *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) 241

Court of Common Pleas post-conviction opinion 257

Volume II

Pennsylvania Supreme Court post-conviction opinion, *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998)..... 269

Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 5) 288

Commonwealth's Response to Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 9)..... 441

Volume III

Relevant District Court Exhibits (District Court docket entry 17):

Notes of Testimony (3/28/96) 456

Volume IV

Notes of Testimony (3/29/96) 653

Deposition of Dr. Barry Crown 824

TABLE OF CONTENTS – Continued

Page

Volume V

Deposition of Dr. Carol Armstrong 939

Deposition of Dr. Paul Gross 1015

Deposition of Dr. Gerald Cooke 1057

Deposition of Dr. Robert Sadoff.....1102

Deposition of Dr. Frank Dattilio.....1162

Lodging

Sacred Heart Hospital Records on Ronald Rompilla ... *L1

School Records on Ronald Rompilla..... L11

Pennsylvania Department of Corrections Records (Initial Transfer Petition and Initial Classification Summary) L31

Juvenile Court records on Ronald Rompilla L41

Juvenile Court records on Nick Rompilla L49

Police reports provided to trial counsel through discovery L111

Reports and Commutation Recommendation prepared by Dr. Kate Erwin (1995) L121

Volume VI

District Court Opinion 1280

Third Circuit Panel opinion and dissent 1325

Third Circuit *en banc* ruling and dissent 1448

* Items paginated with L numbers are bound in a separate volume.

COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	NO. 682/1988
Respondent	:	
vs.	:	
RONALD ROMPILLA,	:	
Petitioner	:	

DEPOSITION OF CAROL L. ARMSTRONG, Ph.D.

Taken in the offices of Slifer, Voice & Shade, 1228 Walnut Street, Allentown, Pennsylvania, on Tuesday, April 2, 1996, commencing at 1:00 p.m., before Sally A. Slifer, RMR, Registered Merit Reporter.

APPEARANCES:

MICHAEL P. McINTYRE, ESQ.
Assistant District Attorney
Lehigh County Court House
455 Hamilton Street
Allentown, PA 18101
– For the Respondent

MICHAEL WISEMAN, ESQ.
BILLY H. NOLAS, ESQ.
Post-Conviction Defender Organization
437 Chestnut Street, Suite 501
Philadelphia, PA 501 [sic]
– For the Petitioner

* * *

SLIFER, VOICE & SHADE
1228 Walnut Street
Allentown, PA 18102
(610) 434-8588

679 Walnut Street
Easton, PA 18042
(610) 250-0383

INDEX TO WITNESSES

Witness — Page

CAROL ARMSTRONG
By Mr. Wiseman 3
By Mr. Wiseman 79
By Mr. McIntyre 57
By Mr. McIntyre 90

INDEX TO EXHIBITS

Defendant's Exhibit — Description — Page

16 — Curriculum vitae — 9
17 — Evaluation — 10

[3] MR. WISEMAN: The record should reflect this is a deposition of Carol Armstrong, Ph.D., in regard to the post-conviction proceeding in Commonwealth versus Ron Rompilla.

The parties have previously agreed to make all objections on the record and not to reserve any objections.

CAROL L. ARMSTRONG, having been duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION ON QUALIFICATIONS

BY MR. WISEMAN:

Q. Dr. Armstrong, could you tell us what your occupation is?

A. Neuropsychologist.

Q. And whom are you employed by?

A. University of Pennsylvania Medical School.

Q. And can you tell us something about your educational background?

A. Well, I have a bachelor's degree in psychology from Vasssar [sic] College. I have a MA and a Ph.D. in psychology from the Wright Institute in Berkeley, California.

Then I did two post-operative [4] fellowships in the subspecialty of neuropsychology both in Ohio.

Q. And for how long have you been employed at the University of Pennsylvania?

A. For six years.

Q. Have you published in the area of neuropsychology?

A. Yes, I have.

Q. Approximately how many articles?

A. Ten or thirteen, something like that.

Q. Have you ever given any talks or presentations on neuropsychology to professional groups?

A. Yes. Quite a number.

Q. Can you just give us a sampling of who you have given such talks to?

A. I have given talks to international neuropsychology societies, neurology, professional organizations, head injury foundations, brain injury rehabilitation conferences, and trial lawyer seminars, probably covers most of them.

Q. And have you been qualified in the federal Court in Pennsylvania as an expert in neuropsychology?

A. Yes.

[5] MR. WISEMAN: At this time I would tender Dr. Armstrong as an expert in psychology and neuropsychology.

MR. McINTYRE: Subject to using her resume as an exhibit? You said that off the record before we had her resume.

MR. WISEMAN: I didn't say – I will ask her questions.

Q. When did you graduate from college, Doctor?

A. 1975.

Q. And from college you went where?

A. To the Wright Institute.

Q. And you got a Ph.D.?

A. Yes.

Q. In psychology?

A. Yes.

Q. When?

A. 1981.

Q. And after Wright – when did you get your Ph.D. there, what year?

A. 1981.

Q. Then what did you do?

A. Then I went to Ohio and did a post-doctoral fellowship at Western Reserve [6] Psychiatric Rehabilitation Hospital, and then another – then another one at – that was in Cleveland. Second one was at – for the Ohio Industrial Commission, Rehabilitation Division, in Columbus.

Q. When was that completed?

A. Those were both in neuropsychology. Let's see. Well, I think 1983.

Q. And when did you join the staff at the University of Pennsylvania?

A. That was in late '89.

Q. What did you do between '83 and '89?

A. I was chief of the neuropsychology lab, assistant director of psychology at Bryn Mawr Rehabilitation Hospital, which is a – actually award winning brain injury rehab hospital.

Q. For those six years?

A. Yes.

Q. Did there come a time when you began or have you ever begun testifying in the area of mitigation issues in capital cases?

A. I have done one previous capital case.

Q. What case was that?

A. Clifford Smith.

Q. Is that a Commonwealth of Pennsylvania [7] case, is that a Pennsylvania case?

A. It was a federal case.

MR. NOLAS: Do you want me to clarify.

A. I don't know if I can clarify that.

Q. Is that the case that was brought out on direct that you have been qualified as an expert?

A. Yes.

Q. That's a federal prosecution?

A. No, its not.

MR. McINTYRE: Clarify.

MR. NOLAS: Federal habeas corpus proceeding arising out of a Commonwealth of Pennsylvania conviction and death sentence.

Q. It is a Commonwealth of Pennsylvania case. And in that case, the defendant's name was what?

A. Clifford Smith.

Q. I take it he had been convicted?

A. Yes.

Q. And a petition was filed on his behalf?

A. Yes.

Q. Alleging ineffective assistance of counsel in the mitigation phase?

A. I don't think I can well represent how [8] it was presented and the issues that were presented. I would like to defer legal questions to the lawyers who were involved in that.

Q. Is that the only time you had been qualified as an expert?

A. Well, I think I probably have been qualified as a, medical expert in a number of other cases, both in Pennsylvania and probably – well, probably all in Pennsylvania.

Q. You had only mentioned one. That's why I am asking, were there other cases here in this Commonwealth you have been qualified as an expert?

A. Yes, I believe so.

Q. And – none other than this Clifford Smith case though on the issue of mitigating damages, I take it?

A. That's correct.

Q. In capital cases?

A. That's correct.

MR. McINTYRE: I have no problem. We will agree she can render an opinion.

MR. WISEMAN: Off the record I indicated to Mr. McIntyre we did not have a copy of Dr. Armstrong's CV. I will provide one and would like to have it preemptively marked, if we could, I [9] guess we are up to Exhibit 16.

(Defendant's Exhibit Number 16 was marked for identification.)

* * *

DIRECT EXAMINATION

BY MR. WISEMAN:

Q. Doctor, did you have occasion to evaluate Ronald Rompilla?

A. Yes, I did.

Q. And do you recall when that was?

A. It was on March 5th, 1996.

Q. Where did your evaluation take place?

A. At the state correctional facility at Greene, in Pennsylvania.

Q. And approximately how long did you spend with Mr. Rompilla on that occasion?

A. Must have been five hours.

Q. And in that five hours, did you do any type of testing?

A. Yes, I did. I did neuropsychological testing?

Q. Did you do any psychological testing?

A. What do – you are saying psychiatric testing.

Q. Psychological as opposed to [10] neuropsychological, straight psychological tests?

A. No, I didn't.

Q. Did you do anything with Mr. Rompilla on that occasion other than administer neuropsychological tests?

A. I interviewed him to get personal history.

Q. We'll get to your conclusions in a little bit, but would it be fair to say you reached some conclusions with regard to Mr. Rompilla?

A. Yes.

Q. And were those conclusions reached to a reasonable degree of psychological and neuropsychological certainty.

A. Yes.

MR. WISEMAN: Why don't we mark a copy of your report for the record. This would be Exhibit 17.

(Armstrong Deposition Exhibit Number 17 was marked for identification.)

Q. I want to talk, Doctor, about some of the testing that you did and the results and the conclusions that you drew from that testing.

In your report you have a category, sensory and motor functioning, what is [11] that?

A. That category includes tests of tactile perception and motor functions which are helpful in measuring specific brain regions, the behaviors of specific brain

regions as well as are sensitive to the presence of brain injury.

Q. Now, did Mr. Rompilla score an impaired range in any of that testing?

A. Yes, he was severely impaired in the test of manual praxis which basically means the, ability to coordinate and program motor movements, hand movements in this case.

Q. Now, what exactly did that test entail, what did you do in that test?

A. The items in the test were derived from a standardized battery that are used to measure dementia as well as brain injury, other type of brain injury.

The items are for hand movements that are done with both hands. Two of the movements involved movements of the hands in an alternate fashion. The other two also required alternate movements of the hands but more rapid.

For example one of them involved tapping twice with one finger and once with the [12] other and repeating that pattern. (Indicating.)

He had quite a bit of difficulty on that, an unusual degree of difficulty certainly – well, frankly in anyone of any age, even older people do not make many errors on that test. One side tended to fail to make a movement when it was supposed to in the sequence.

There are also impairments – he was unable to achieve the correct position of the hand even though I would bring it to his attention, see that he could do it, but

then when we he would carry out the movement he would revert back to the incorrect position.

He also would make what we call perseverations, if you are supposed to tap two times, if there's discontrol in a motor area of the brain, an extra tap will come out. That's called perseveration. You can't stop yourself from a behavior or a movement. So those are the types of errors – he made all those types of errors. Those are the three main categories of errors you can make. His right side was worse than his left at least on that test.

Q. What does severe impairment on that particular test tell you about Mr. Rompilla's brain?

[13] A. Well, it suggests impairment probably in – the test measures impairment of the frontal parietal areas, both of them are involved in movement control.

The parietal area is involved in spatial and visual control of movement and the frontal directly controls movement.

I would say by the nature of errors that he made there is probably evidence of both areas being injured or damaged.

Q. If we could go down to the section of your report that deals with attention, what is the significance of attention in your evaluation?

A. I'm sorry, why did I give him attention tests?

Q. Why do you give people attention tests?

A. Attention is thought to be primarily again controlled by the parietal lobe, also by the frontal lobe once again.

We look for medulla effects. That means how well the person is able to attend to visual information versus auditory information. And how well they are able to sustain their attention and things like that.

And in one test of visual [14] selective attention, selective simply refers to an automatic process, that means it doesn't involve a lot of effort or shouldn't – doesn't involve effort.

A process of selecting a target on a piece of paper in front of the person, a piece of paper only 8 and a half by 11 piece, not a very large piece and he has to scan and find the belts on it.

And he, you know, according to the published norms on that test, he missed too many of the targets. There's an example of him looking at his environment and not being able to automatically identify what he's looking for.

The problem on the reversal tests can be thought of –

Q. Reversal of verbal patterns and visuospatial patterns?

A. That's where you are given a series of numbers spoken to you where you watch some pointing movements and then you have to perform those digits or pointing movements in the backwards order. That backwards order is thought to tap spatial properties as well as memory. Because you have to hold the stimuli in order to create spatial pattern to [15] reverse it from.

So again, as I said, that would involve both memory and some kind – it involves sustained attention.

Q. And how did Mr. Rompilla score on the visual selective attention test?

A. Mildly impaired.

Q. On the reversal of verbal patterns?

A. Mildly impaired.

Q. Reversal of Visuospatial Patterns?

A. Moderately impaired.

Q. Is moderately more or less than mildly?

A. Moderate is more. I use the nomenclature average, low average, borderline, mildly impaired, moderately impaired, and severely impaired.

Q. Your report also has a section on language. What is the purpose of testing for language?

A. To look at basic functions of the ability to understand words, understand sentence structures, to read words, to write one's thoughts and retrieve words for writing.

Then the fluency tests are a kind of language production test in that you have to [16] produce language under different conditions within a restricted period of time. So it's – the main functions – main neurological ways of testing language are being able to understand and express language.

Q. Now, did you administer a particular auditory encoding of syntax and grammar test?

A. Yes. That's called the token test.

Q. And what does that entail?

A. That entails putting in front of the individual tokens. These are little plastic pieces in the shapes of circles and squares. There are large circles, small circles, large squares, small squares. They are of five different colors.

Then the individual has to listen to a sentence that I state to him and perform what I said. He has to do what I say.

The questions are as simple as pick up the red circle or point to the two green squares, and the most complicated is pick up the red circle and – I'm sorry, touch the red circle with the green square, because there is implied syntax there that individuals sometimes have difficulty with.

That's the type of error he made, [17] being able to interpret syntax. It's not specific to a particular type of brain injury, but I thought it was notable.

Q. Did he – I notice in your report you don't have a conclusion as to what his score was on that test. Is there a reason for that. You just felt errors were made?

A. Yes. The full items weren't administered. I couldn't yield a score.

Q. Did you give him a reading and word recognition test?

A. Yes. I gave him a reading test, yes.

Q. And how did he perform on that?

A. He performed at the ninth percentile which is equivalent to the beginning of seventh grade.

Q. And what does that tell you about Mr. Rompilla?

A. It demonstrated his difficulty in recognizing whole words.

Q. He has problems reading?

A. Yes, he had difficulties – reading is done in various ways and what I could identify – it's not a problem of him understanding the sounds of the words, but in terms of recognizing what they [18] look liked [sic], his problem was at that level.

Q. In written expression – withdrawn. You administered a written expression test. How did he do on that?

A. He was quite impaired on that. I would consider it significantly abnormal. He left out grammatical terms in the sentence – I would have to – or I could give you an example of the type of error he made. If he would say, I want to go to the store, he would say – he might say, I want go the store. Something like that, where he would leave out important points of grammar.

He also made errors in selecting letters, those are allographic letters, letter images, and he also wrote in a spatially strange way, in terms of the shapes of the letters, in terms, of repeating certain forms of the letters.

This sounds highly detailed but this is how we go about analyzing language from a neurologic perspective.

So it allows me to be specific about whether the behavior being shown are errors that many people make because after all normal people make errors when writing as well. It helps me to sort out what's a normal type of error from [19] what's an abnormal error.

Q. Abnormal you mean one with neurological indications?

A. Yes.

Q. There's another category in the report, verbal learning and memory, what's the purpose of administering that battery?

A. The purpose of that, that's a test that gives me a lot of information about a person's memory. It allows me to see how well they are able to encode information into their permanent storage. How well they are then able to retrieve it from that storage. Whether they are able to improve the learning, if they are giving repeated presentations of something, as well as how well they are able to discriminate what they do have in storage.

He was impaired in various aspects of that test, to the point of getting a score at the first percentile which is – gets the rating of severely impaired.

Q. Let's take each of the batteries individually that he scored in the impaired range.

First let's start with the semantic sequential working memory span, how did he score on that test?

[20] A. Borderline – borderline impaired.

Q. What does that test entail, what do you do?

A. That involves repeating backwards in the same way you hear them. The normal span is five words. That's a fairly reliable performance by normal people. He never achieved five words. He was usually unable to consistently achieve four words.

Q. Semantic associative memory test, what is that test and how did he score?

A. He was severely impaired on that test.

Q. What does that test do?

A. The nature of that test is a learning task. The individual is given a list of known words, familiar words, fifteen. They have to try to recall them in any order.

They are given the list five separate times with recall given after each presentation. They are given a list of 15 separate words, to simply distract them from the previous learning so there isn't anything still being rehearsed.

Then they are asked to retrieve the first list again. There you have measures of [21] retrieval only.

Then there's a recognition portion to the test in which the target words are mixed in with the distracter words, that extra list, as well as words that sound similar to the target as well as words similar in meaning to the targets. These words, the words – distracter words which they just previously heard, the semantically related, sound related words are all called foils, attempts to confuse our memory.

Q. And how did he score on that test?

A. He was severely impaired.

Q. What percentile?

A. First percentile. He was impaired in how well he could learn and code the words. He had lots of intrusions which are considered highly abnormal. He was unable to benefit from the repeated presentations. He did not learn more as he heard it each time. He was impaired in retrieving

the words and he was impaired in discriminating them from the foils.

Q. Now, from a neurological perspective, what significance is there that he was in the first percentile in this test, what does that tell you about Mr. Rompilla's brain?

[22] A. I have done a number of research studies on this test, which is one reason why I use it, one reason why I am speaking a lot about it.

I have published also on it, and I know exactly what's a normal and abnormal pattern on it.

What's abnormal are the things that I have mentioned. It means that he's – when he's listening to information in the environment, he's not getting a normal amount of it into his memory.

It means that what he does have – in memory he's not able to retrieve accurately or normally. That is he can't retrieve enough of it. What he's retrieving is also marked by confused information, unrelated information.

And even when you make the task easy for him, which is to just let him recognize whether he heard the word or not, he still continues to be unable to recognize the word accurately and he mixes it up with unrelated information.

You can see how that would be functionally problematic for someone who needed to rely on their memory. They are not going to recall things accurately – They are going to be confused [23] about it, and they are not going to learn new information very well.

Q. The next test you have listed is retrieval after interference. Could you explain what that is about?

A. That's part of the test I described. I break out the different components. Semantic associative memory, retrieval after interference, retrieval after delay, and recognition memory are all indices from that test.

Q. And how did he score on the retrieval after interference?

A. He was severely impaired.

Q. What percentile?

A. At the first percentile.

Q. And in recognition memory how did he score?

A. If I may back up, the negative recency problem that he demonstrated, without going through a big explanation, and I have associated it with frontal lobe dysfunction. The frontal lobe has a special role in measuring – I'm sorry, in guiding our behavior to be done in a certain time. It has to do with time.

That negative recency reflects a [24] problem with time coding. The retrieval after delay was normal. That means that what he has learned doesn't deteriorate over time.

He may not retrieve it for other reasons, not just because of forgetting. Then recognition memory was severely impaired in his case as well. He was unable to separate the target words from the distracting words.

Q. The next group of tests are the visuospatial processing and memory, what exactly are they designed to measure?

A. Various aspects of visual perception, spatial perception, integration of perception, and aspects of visual and spatial memory.

Q. Why is that something you measure in a patient?

A. There are known – fairly known relationships between general brain regions and these various tests, certainly because brain regions and types of visuospatial perception. It's an important area to examine as it's impaired in a number of neurological diseases as well as gives you some insight into how a person's functioning within their environment, whether they are likely to be oriented, you know, find their way around, get lost, [25] remember what they see and so on.

Q. How did he score in the facial perception test?

A. He was mildly impaired on that.

Q. What was the percentile?

A. Eighth percentile.

Q. On the mental spatial rotation test?

A. He was severely impaired on that in the first percentile.

Q. The last grouping you have is intellectual processes, what's the importance of measuring those?

A. It's – these are measures of problem solving.

Q. In particular, logical deductive reasoning tests of that group, what does that measure?

A. That measures the ability to create a conceptual understanding of something; to be able to switch from one conceptual understanding to another conceptual understanding.

It reflecting the ability to use information from the environment to guide your behavior. It also reflects the ability to hold information in mind while you are reasoning, and [26] it's been well associated with the frontal lobes, and I have also published on that.

Q. Now, the cognitive flexibility and written calculation test, he scored in the borderline range?

A. Yes.

Q. What do those measures?

A. Cognitive flexibility is another index from the – what's called here the logical deductive reasoning test. That reflects whether a person continues to answer something in the same way, even though they are being told that's incorrect.

Or whether they are able then to take that information and look at a problem in a new way. So he was borderline impaired on that. The written calculation is just what it sounds like, it's working out arithmetic problems.

Q. Based on the testing you gave to Mr. Rompilla, did you reach any conclusion to a reasonable degree of neuropsychological certainty as to whether or not he has any organic brain impairments?

A. Yes. In his case it's not just a matter of a number of severely impaired scores, it was the nature of errors he made that made it very clear to [27] me there was organic brain injury involved and the cognitive deficits were basically all of the domains that I tested, almost all the domains I tested, they were in control of movement, in attention, memory, reasoning and in visuospatial perception.

Q. Now, did you draw any conclusions as to the presence or absence of learning disability in Mr. Rompilla?

A. Well, the quality of his reading and of course the low score, also the low score in arithmetic, was suggestive of a learning disability problem, because you rely on your previously stored abilities to perform those tests, they are just achievement tests. That's one pretty good indication right there.

Q. Indication of?

A. Of learning disability. There's also his explanation to me of his – how he was called a dummy as child, that – there's not a lot he remembers about his childhood. He remembers, he says, nothing about his early childhood.

I was unable to gather any more information about his early learning history. He remembers being called a dummy. That is something that is salient for him.

[28] I took that as a red flag that that probably characterized his childhood; that he behaved as a dummy; that people saw him as being incompetent.

And he also didn't perform well in school according to him and didn't go very far through school and never had any work that was beyond semiskilled by my estimation.

These are all – this lack of achievement is often underlied by limited capacity.

Q. Is learning disability a function of brain damage?

A. Learning disability is thought to reflect developmental damage, so it is usually the result of neurological damage at some point in development.

Q. When you say development, what do you mean, childhood development or –

A. Well, the damage in development can occur anytime from the fist [sic] trimester of embryo development to early childhood.

Q. Just in terms of years, where is the cut off for early childhood?

A. Well, I guess frankly if you're going to talk about injuries that can affect development, you [29] would have to extend that from beyond early childhood to adolescence as the brain doesn't actually mature until the 20's.

Q. Did you reach any conclusions as to whether or not the testing you gave Mr. Rompilla was valid?

A. Yes, I also included a test, a widely – I shouldn't say widely used but a well accepted test called the symptom validity test which means that you present the individual with a learning task that is so easy that virtually all normal individuals will do well on it.

But you present it in a way that suggests, you know, maybe it isn't so easy and you will understand if he has a problem on it. It looks like a lot of information. But it's inherently organized, which makes it very easy to learn.

He performed normally on that. I also had no other evidence from watching him take the test and seeing the results to think that he was not responding in a valid way.

Q. In a number of the tests you administered he scored in the normal limits and scored average or high average.

What does that tell you about the [30] validity of the test?

A. It tells me he wasn't deflating his scores or his performance across the board; that he has the capacity to do well and was showing me that capacity in some areas. It shows that – I think I have said it.

Q. The test that you administered to Mr. Rompilla – withdrawn.

Neurological and neuropsychological evaluations, for how long historically have they been available to the mental health practitioners?

A. Neuropsychological evaluations I will say – neurological evaluation of behavior is hundreds of years old. Much it became very popular in the 19th century and before that time.

Neuropsychological evaluations, battery of tests, began – beginning after World War I but really took off after World War II because there were so many solders [sic] that came home with head injuries, and the batteries that used to be in primary use, Halstead-Reitan and Luria Nebraska, neuropsychological batteries were both developed during that time, the '40's.

Q. The testing you gave to Mr. Rompilla, [31] was it available and widely used in 1988?

A. Yes. Those tests were developed in the '60's and '70's, of the 20th century.

Q. Did you reach any conclusions based on your testing as to whether the impairments Mr. Rompilla has affected his impulse controls or impulsivity, if you will?

A. I think that the impairments he showed were demonstrated most in the area of reasoning; not – not directly in the area of impulse control. That's not to say that I disproved impulse control but I don't think that was what the testing was telling of.

I think they most demonstrate reasoning difficulty and inability to respond appropriately to the environment and to think something through in just a reasonable fashion.

Q. Obviously the tests that you have – that's called logical deductive reasoning, I take it measures reasoning ability. Were there other tests that also measure reasoning and – that measure reasoning?

A. Arithmetic test measures reasoning. I mean, it depends on what you mean by reasoning. If you mean being able to put your thoughts into [32] language, there's some other measures I gave him that I didn't describe in the report that also measure reasoning, that he – perhaps I could use an example from it.

When asking the individual questions, the answer to which are people don't know, you can sample any group of people and they won't know them. For example – I'm sorry, and so you have to make a guess. Basically you want to

see if the guesses are appropriate, whether they are guesses that most people would make, and you can see something more. You can also see whether there are some logical inconsistencies to the answers they gave. That's where his problem lay.

When asked how tall is the tallest building he gave reasonable answers. He said 200 stories. When asked how tall is the tallest mountain in the world, he estimated it was a little bit taller than the building, 300 stories. That's an illogical kind of answer to give.

When asked how long is a man's spine, you know, when you don't know how long a spine is but you make a reasonable guess as to how long the spine is in relation to the whole length of the man, for example, only the legs are not part [33] of – you know, are not part of the length of a spine, and his best guess is that the spine was one foot long.

I know from research in this area, from having read research in this area, that those answers are in the severely impaired range. Those are some examples of a reasoning problem he has.

On the logical deductive reasoning test, his problems were that if he did get – the test is actually not difficult at all. It's very easy. Even old people do well on the test. It's not influenced by depression. It's a test that a normal brain should be able to do.

He – in the test you are given cards, four cards, four master cards, that have four different colors – I'm sorry each card may be one of four colors, each card may have on it one of four shapes, and there may be anywhere from one to four of the shapes on the card.

Then you take another set of cards and you have to match them either to the color or to shape or to number now. If he ever chanced upon or got an idea as to how a card would match and I would tell him, yes, that's correct, even if he got it correct two or three times, he would forget it.

[34] So he – can you could think, telling himself, all right, I understand, it's color now, let me match it by color. Do it two or three times and then he will start doing something else. That's what unable to maintain mental set means. He's unable to keep that train of thought.

He has a big problem with distracters as showed up on the memory test all over the place. So his thoughts are constantly being interrupted and he's not able, I believe, to follow a train of thought which is necessary to solve problems. To solve a problem you have to hold one thought to connect it with another thought. That's why I say what I think is mostly evident from these tests are in his inability to think, to solve a problem, to make accurate estimations, to hold a thought, to have memory long enough to hold a thought, to not be confused by other distracters.

Q. Do his deficits in those areas also impact upon judgment?

A. They necessarily impact upon judgment because he would be making judgments with basically invalid information or incomplete information because he wouldn't remember it.

Q. Do his deficits in this area impact upon [35] his ability to measure the future consequences of his behavior?

A. Yes, it would, because he's unable to integrate feedback. He's unable to adjust what he's doing based on the information he's getting from the environment. He's unable to make a plan that would take into account, you know, if you have a problem thinking through something, that then you are not going to get to the point of knowing the consequences of something. You will not have thought that far through it.

I am certain he wouldn't be able to think of all the implications of an action. He'd [sic] probably did act based on what was just immediately apparent, which based on his cognitive impairments might change from moment to moment.

Q. I take it from that answer you determined he had cognitive impairments?

A. Yes.

Q. Do the impairments you just described have an impact on his ability to control his behavior?

A. I only tested his cognitive behavior. The impairments he demonstrated certainly affected his cognitive behavior. If I can interject, if it's [36] relevant, if it's not that's fine. He also demonstrated – he told me about an incident where in prison, where he lost his temper while playing cards with someone, and seemed to have no thought process that would have intervened between punching the guy out which caused him, I forgot how many days in solitary, I think he said two months in solitary confinement, and, you know, over some scuffle over cards.

When I asked him – well, I didn't actually inquire a lot. But I listened to what had happened, and he, you

know, didn't have any thought process that he went through that might have, you know, given him a reason to stop himself.

So I think there's a pretty good example of an impulse control problem and functioning and behaving based on what's immediately in front of you and not in terms of consequences.

Q. Your conclusions that Mr. Rompilla suffers from the organic impairments you described, was that based on your testing or was it based on what he told you about punching someone out?

A. It was based on the test patterns, the test scores and the test patterns.

Q. Do the organic impairments you described [37] have any impact on his emotional lability?

A. On his emotional lability?

Q. In the sense –

A. Yes, in the sense that his reasoning is impaired.

Q. Explain that, when you say in the sense?

A. We all function with the same primitive brain to motivate us. The part of the brain that motivates us, and drives us and gives us emotion is the oldest part of the brain that's present in all mammals. Of course some components are present in lizards too but to stick with the parts we are more familiar with, the motivational aspect is present in all mammals.

That means it requires a more advanced part of the brain to control it. That is we have developed more

monitoring, reasoning capacities than other mammals do. We use them to control our emotions because we live in a very crowded society with – under many stressful conditions that cause us to feel emotional. And we use our cognitive abilities to control and monitor and mediate that emotion.

Cognitive abilities are very important for all components in a person's life; [38] their social behaviors, their family behaviors, certainly their emotional behaviors, their work behaviors, even their recreational behaviors are affected by their cognitive abilities. Does that answer your question?

Q. Yes. I believe so. Thanks.

I want to ask you about some conclusions that you may have reached with regard to your testing, just your testing. I am not interested in other collateral information you may have used.

Based on your testing, does Mr. Rompilla suffer from organic brain damage. Assume I am asking these to a reasonable degree of neuropsychological certainty.

A. Yes. I strongly believe that these results are not the product of – how do I – well, I don't believe they are the product of poor motivation. He's very motivated.

I don't believe they are the product of faking of any kind. I have evidence of that. They are not the product of poor education, because many of these tests are not tests of education ability.

Q. Not achievement tests?

[39] A. No. And they don't correlate with education. I have done research on this. They don't correlate with education.

They are tests of the – how well different parts of the brain are communicating with each other. And I strongly believe again, not just on scores that are low, but on the types of errors he made, and due to his impairment on some scores that are only – some ability is only impaired when there's brain injury, such as the manual praxis, that taken together all his performances there's a very clear picture of brain damage.

Q. By the way, I am not sure I heard the answer, you said there was no evidence of faking or evidence of faking?

A. I have evidence there was no faking.

Q. Let's put it in the affirmative. Was there evidence of faking?

A. There was no evidence of faking.

Q. Did you reach a conclusion as to whether or not Mr. Rompilla suffers from a learning disability?

A. Yes, I think that he probably does suffer from a learning disability.

Q. Did you reach a conclusion as to whether [40] he's suffered from this organic – these organic deficits in 1988?

A. Based on my knowledge of his history, these deficits were in all likelihood there in '88.

Q. Could you date the deficits to childhood to a reasonable degree of neuropsychology [sic] certainty?

A. Yes, based on the pattern of deficits and his history, I would date some of the deficits at least to childhood.

Q. Now again based just on your testing, at the time of the commission of the offense in 1988 was Mr. Rompilla under the influence of an extreme mental or emotional disturbance?

A. The emotional – extreme mental emotional disturbance is neurological brain damage and cognitive impairment, yes, he did have that.

Q. Do you consider them to be an extreme mental emotional disturbance?

A. Yes, I do.

Q. At the time of his arrest in 1988 was Mr. Rompilla's capacity to appreciate criminality of his conduct or to conform his conduct to the requirement of law, substantially impaired?

A. Yes.

Q. That's based on your testing?

[41] A. Yes, it is.

Q. Now I would like to put your testing aside for a while. Did you review other materials provided by counsel in regard to Mr. Rompilla?

A. Yes.

Q. Did you review school records from his elementary school?

A. Yes.

Q. For the record, these records have been previously marked. The school records were marked before the Judge as Defendant's 8. I want to put in front of you school records related to Mr. Rompilla and direct your attention to the Wechsler Intelligence Scale for Children test that was administered in October '59.

What was his score in that test?

A. In October of '59 it was 64.

Q. That's a full scale?

A. Yes, that's the full scale IQ.

Q. And 64 is what you said?

A. Falls into the mildly mentally retarded range.

Q. And before that, there's a partial test that was administered, partial WISC, verbal portion in April of '57?

[42] A. Yes.

Q. He scored a 75?

A. Which is borderline mentally retarded range.

Q. In December of '61 there's another WISC that was administered?

A. Yes.

Q. How did he score in that?

A. 69 which is below that 70 cut off for mental retardation. Once you get a score in that range, the state – you become eligible for mental retardation services so it's a formal cut off.

Q. In June of '61 there's a standard achievment [sic] test administered?

A. Yes.

Q. Do you see the results of that test?

A. Yes.

Q. How did he score on that?

A. His performances were largely at the third grade level, and, let's see, in '61 he was thirteen years old, which would put him at about the seventh grade. That's very significantly below what he should have achieved at that time.

Q. I identified the WISC as the Wechsler intelligence scale for children. What is that?

[43] A. It's a set of eleven or twelve tests based on the idea that intelligence is not one capacity, such as reasoning, but made up of many different mental capacities.

It's the best intelligence test and most widely used intelligence test used today. Only intelligence test used by schools. It's the test they use to identify learning disability.

Q. How do his scores on these intelligence tests and on the achievement tests either support or refute your conclusions regarding his organicity?

A. They certainly supported my suspicion he had a learning disability and what it does is in my report I indicated that if the learning disability could be documented in childhood it may be that even more of his deficits are due to that. Because the most prominent, let's

say, source from what we know about him of learning disability is his mother's drinking while she carried him.

Now, drinking during pregnancy is very dangerous to the fetus. Often causes mental retardation. Now, whether he's showing chronicity or not, the pattern of dyslexia, nonlearning versus learning disability or any specific learning disability he shows a generalized problem to the [44] point of being basically retarded.

I think that says that in fact his – the deficits I find today, you know, a good number of them let's say may have been present from childhood, or at least from seventh grade, if not earlier.

Q. Leaving aside for a moment the potential causes for the learning disability and/organicity, the question I have is do the test scores from his elementary school support your finding of organicity?

A. Yes, they do.

Q. If you see a patient with the scores in the mental retardation range, is that a red flag for you there may be organicity in the case?

A. Mental retardation is organicity.

Q. I guess it's a red flag then?

A. Yes.

Q. The record indicates that Mr. Rompilla was in – after grade three placed in the SP class. Assuming that means special ed., does his placement in special ed. support your findings on the testing of organicity?

A. Yes.

Q. Why?

[45] A. Because only childrens [sic] with significant, learning disability are placed into that – are taken out of the main stream classroom and given a lower level of educational stimulation because that's all they can handle and because they are supposedly trying to help them gain some basic academic abilities like reading and writing even though it may not be successful. It means that the impairments in reading, writing and arithmetic that I found, whether they were also existent back when he was in school.

Q. If you looked at the grades that Mr. Rompilla appeared to achieve, grades seven, eight, and ninth which for the most part seem to be passing grades, do they add to or take away from your conclusion there was organicity based on your testing?

A. No, it doesn't take away from the organicity picture. He was in special ed., and special ed. doesn't mean that – the child gets graded in relation to other children in special ed., not in relation to the main stream group. These scores of 75 for example or 70, scores are almost all in the 70's –

Q. Let's assume he wasn't in special ed. [46] Let's assume he was in regular classes then.

A. I don't think he achieved those scores in regular class. I don't think he could.

Q. Based on your testing?

A. Based on my testing and these – this information. these IQ's.

Q. IQ tests, are they standardized?

A. Yes, they are standardized among children.

Q. Are grades in schools standardized?

A. Not on a larger population norm. They are only – national test scores are, but if you just mean the grade in the classroom, no, that's based on the teacher's view of that class. Local norms let's call it.

Q. Did you have a chance to review some test data from approximately 1975, from the Department of Corrections?

A. I believe I did.

Q. Let me put an exhibit in front of you. For the record that's Exhibit 7 that's been marked before the Judge. Directing your attention to the wide range achievement test scores, 32nd percentile in reading, fourth percentile in spelling, third percentile in arithmetic; what does that either add [47] to or detract from your conclusion of organicity?

A. It's pretty consistent with my test scores. He was in the average range in reading at that time. While we both used the wide range achievement test, they used – this psychologist used an earlier version of it and so there could be some difference in the norms that existed.

But the overall picture is of someone who has probable – possible learning disability or retardation, depending on what their IQ measured as.

In other words, is there some specific learning problem just in perhaps spelling or arithmetic or is there more

generalized cognitive impairment or did the person fail to learn how to spell and do arithmetic because they were never exposed to spelling and arithmetic. That's a third explanation.

But he did go through school. He did receive special ed. They did give extra attention to his reading and arithmetic abilities. You have to exclude the possibility it's based on no exposure to reading and arithmetic. You have to go back to the other ideas, that he has a special learning disability, a particular learning [48] disability, or he has widespread mental problem – problems with his mental capacity.

Q. Again, if you were to review a WRAT score such as the one Mr. Rompilla had in '75 would that raise any red flags for you as an evaluator as to organicity or learning disabilities?

A. It would raise red flags.

Q. And would you explore that further?

A. Oh, yes, I would.

Q. Have you had occasion to review a medical record of Mr. Rompilla at the age of two? For the record that is Defendant's 9.

A. I believe I have.

Q. Directing your attention to the entry when he was age two?

A. Yes.

Q. What does that record indicate that his condition was when he was admitted to the hospital on that occasion?

A. Diarrhea due to undetermined cause.

Q. Does it say anything about fever?

A. His temperature was 105 degrees, I presume that's Fahrenheit.

Q Taking the factors that he had a hospital admission based on diarrhea and a fever of [49] 105, do those facts add to or detract from your testing conclusion that he suffers from organicity and a learning disability?

A. Would you repeat that?

Q. Sure. Are these facts, regarding this hospital admission, consistent with and supportive of your conclusions from your testing that he has organic brain damage and a learning disability?

A. I don't know whether this condition caused his problems or not. It would not be inconsistent with it but it's a health problem of undetermined cause with a high degree of fever that can cause brain injury in a young child. But I don't have a lot of information here.

Q. Assuming that the diarrhea was of some duration, can diarrhea and dehydration lead to any problems in the development of a child?

MR. McINTYRE: Note my objection. I don't think there's evidence of any duration of diarrhea.

A. Prolonged high fevers or repeated high fevers can cause electrical and chemical imbalances in the brain and

can lead to seizure disorder. Dehydration can cause metabolic disturbances that can lead to brain injury.

[50] Q. Did you have occasion to review declarations signed by members of Mr. Rompilla's family?

A. Yes, I did.

Q. Do the assertions contained in those declarations portray a clinically significant profile to a psychiatrist?

A. Yes.

Q. Significant in what way?

A. Significant in terms of the indications of physical child abuse as well as the maternal drinking during pregnancy.

Q. Let's take them separately. Why is the abuse significant to a psychologist?

A. Well, to a psychologist – depends on what the psychological issue is. Are you asking specifically neuropsychologically?

Q. Yes.

A. Okay. The abuse is significant neuropsychologically, one, because you need to know how severe the abuse was and whether there could have been blows to the head or shaking of the child, both of which cause a very high rate of brain injury, very high rate.

There's a secondary, for my [51] purposes anyway, a secondary importance reflects on how the person then views themselves in terms of their self-confidence and how likely they are going to overcome problems in the future. That kind of behavior toward a child permanently injures

their concept of themselves and permanently detracts from their ability to resolve problems in the future and leads to, I would say, depression.

Q. Now, from a neuropsychological perspective, is what you are saying the abuse leads to a potential origin for the organicity?

A. It's a potential origin for the organicity.

Q. Again, if you were evaluating a patient and you saw abuse like that contained in the affidavits that you reviewed, would that raise a red flag for potential organicity?

A. Yes.

Q Did you draw any conclusions with regard to head injury as a potential explanation for Mr. Rompilla's organicity?

A. He had one incident – he's had a few times that he's had serious blows to his head but one time resulted in loss of consciousness which brings up a good possibility of there being at least [52] a concussion and possible more severe brain injury. And that was when children playing, I don't remember - well, I have it in my report. Let me check his age.

MR. McINTYRE: Twelve.

A. Thank you. He was twelve, the cliff, the rock –

MR. McINTYRE: Yes.

A. Anyway, children somehow at the age of twelve threw – I don't know how old the person was that threw the rock, but threw a large rock on to him from the cliff,

hit his left eyebrow and right lip. He showed me the scar he still had.

The first thing he remembers after that accident is his brother apparently carrying him either to the hospital or home. I am not sure at the moment.

Q. Did you have occasion to notice the scar before he pointed it out to you?

A. No. Frankly I don't do a physical exam, a visual physical exam.

Q. Why is that?

A. Because I am focusing on the cognitive processes.

Q. Testing?

[53] A. Yes. I am focusing on what they are saying to me and how they are reacting and behaving.

Q. Did the collateral information you reviewed, and by that I mean the school records, IQ testing, the Department of Corrections, wide range achievement testing, the family declarations, and the medical record that you reviewed; do they – are they supportive of your conclusion that the organicity is of longstanding and dating back to early childhood?

A. I think they do, yes.

Q. Could you elaborate on that?

A. There's nothing inconsistent with all of these points of data. There's evidence of learning disabilities so severe to represent mental retardation on multiple IQ tests. It's not like it was found once. It was found multiple times at different ages. So there's evidence of mental

retardation, early on, carry – carried out or I should say manifest his problems in schools such that he couldn't be mainstreamed in class.

He's very dissatisfied with school. He doesn't remain in school after the ninth grade. He never achieves a high level of education. All of this is consistent with limited capacity, [54] cognitive reasons.

I understand both his parents drink. And there is family report that his mother drank while she carried him. As I said before, that's a very, very serious – it yields – it's damaging to the infant, and the degree of damage is going to depend on how much drinking occurred but alcohol to a fetus is damaging.

Then there's his performance at this point in time demonstrating the learning disability and other cognitive impairments in reasoning, and memory. People with mental retardation are impaired in reasoning and memory consistently a hundred percent, part of the definition of their dementia.

They also have other cognitive impairments. He has them in cross domains, the fact he has impairment in cross domains indicating broad range impairment that is severe in some areas, mind you, he wasn't – all right, I have tested more severely retarded individuals and they have more severe scores across cognitive domains.

This fits the picture quite well. He has a learning disability. He is not a hundred percent severe impairment but that he didn't have [55] severe mental retardation documented early. He has mild mental retardation, considered more correct is educably retarded, which he was, and his vocational achievement level fits that.

I would say that my test results fit that by demonstrating, you know, impairment across all cognitive areas.

Q. The last area I wanted to talk to you about just briefly was Mr. Rompilla's use of alcohol throughout his life. Why don't you tell me about that.

A. I'm sorry, what did –

Q. What did he tell you about that?

A. He told me that he first began sneaking drinks around at the age of 15 to 16 because his uncle owned a bar, and he spent a lot of time there. It was available.

That at about the age of 17 he began drinking – he began bingeing, that is drinking wine until he passed out. That became his pattern; that whenever he drank, he drank until I suppose he couldn't drink any more.

He stated before 1988 when he was in, I guess it would have been, county jail, I can't remember whether it was county jail or state prison, [56] he would be able to access – well, they would make wine there. He's even drank when he was in prison.

So that adds up to a significant amount of drinking.

Q. Is there any significance as a cognitive factor of his organicity that he drank to that degree?

A. Yes. The effects of alcohol are defined by how much, how often, and how frequently – I'm sorry, how much, how frequently, and over what period of time the drinking occurred.

How much is very high. He drank a lot. How often, we have here at least three times a week at the age of 17 and

probably more after that. And then for how long, from the age of 17 to about the age of 40 he would drink whenever he could.

Then there's the idea that in neuropsychological testing, the effects – the damaging effects, the evidence of alcohol having damaged the brain is usually not seen until about the person's forties. Well, that's also the age that he was in when I saw him.

So there is – then there's the nature of the abnormal performances he gave me, a number of which were consistent with brain injury [57] due to alcohol. That becomes another potential etiology or cause for his cognitive impairments. But as I say, with his – well, I think I probably answered your question.

Q. Last question I wanted to ask you about alcohol was does alcohol consumption exacerbate the effects of the organic impairments Mr. Rompilla has?

A. Yes, there is research to support that definitely.

MR. WISEMAN: I have nothing further. Thank you.

* * *

CROSS-EXAMINATION

BY MR. McINTYRE:

Q. Dr. Armstrong, just a few questions. Your report of March 15th, 1996, you have a part on page three called background information?

A. What date?

Q. March 5th. On this page it says March 15. The first page says date of testing March 5th?

A. The report is typed March 15th.

Q. On page three, background information,

A. Yes.

Q. That was all gotten from Mr. Rompilla?

A. No, also statements from family [58] members.

Q. Just so that I am clear, at the time you did this report, did you have all the other information which Attorney Wiseman asked you about today?

A. No.

Q. What did you have, did you have the declaration of family members?

A. I had that. I did not have – I had the 1975 – I had had the 1975.

Q. Prison records?

A. Records, yes, and from the testing done then. I didn't have any of the testing done during school. And I had a statement by – of the 1988 testing.

Q. 1988 testing?

A. Yes. I didn't have the testing itself, I only had a statement with it. I didn't have it in any detail.

Q. This statement here, other review of his history reveals his mother drank probably during pregnancy with him?

A. Right.

Q. That is what you got from the family declarations?

[59] A. What I got from the family declaration is she drank during pregnancy. It's my conservatism to say she probably drank during pregnancy.

Q. Do you know from what sibling or family member you got the information?

A. If I could look at the records of course I could tell you. I remember two, one was a brother and one was the wife of the brother.

Q. A brother and a wife of a brother?

A. Yes.

Q. Do you know how old the brother was when the mom was pregnant with Ronald Rompilla?

A. I don't recall.

Q. Did you ever attempt to verify that information by obtaining the mother's records for hospitalizations –

A. No.

Q. – in regard to her pregnancy?

A. No, I didn't.

Q. How about the information you have in your report about the episodes when he had alleged head injuries, did you ever attempt to verify that with hospital records?

A. Well, I would say, yes, because I always ask for these records.

[60] Q. You attempted?

A. Attempt becomes valid.

Q. Did you succeed?

A. No.

Q. Do you know of any hospital records that support any type of head trauma?

A. No, but I don't know whether he went to the hospital then or not.

Q. If he had some type of head injury, it wasn't serious enough that it resulted in a hospitalization?

A. No. You can't conclude that. Even today, but certainly back at that time, children's head injuries were not considered to be important. People were just – first of all, his family may not have been the kind to care for their children very well. They may not even, for all I know, have known what happened to him.

Q. There's not hospital records to support that history?

A. We can't conclude it wasn't severe enough.

Q. When were you retained by Mr. Rompilla's lawyers?

A. Sometime, I would say, a week or two [61] before March 5th.

Q. Now, can you tell me how you came to be retained in this case?

A. I can't, no, I just got a call.

Q. And did you know the person who called you from a prior occasion?

A. I didn't know Mr. Wiseman, no. I knew Mr. Nolas.

Q. Did you know him from the Clifford Smith case?

A. Yes.

Q. Did you actually give testimony in that case?

A. Yes.

Q. And when was that?

A. That was February.

MR. NOLAS: December of '95.

Q. And I think I understand from your earlier answers to my questions that that was the first time that you ever testified in this area in litigation in a capital case?

A. That's correct.

Q. You were in Philadelphia, I take it, from '83 through '89?

A. From '84 through '89 – well, I was in [62] the region, I wasn't in Philadelphia, I was in the region.

Q. Were you aware of any of your colleagues giving testimony in a capital case –

A. Never.

Q. – Commonwealth of Pennsylvania during those years?

A. No, I've never known anyone to give testimony in this type of case.

Q. You know now that type of testimony is being offered in these capital cases?

A. Yes.

Q. How did you become involved in the Clifford Smith case with Mr. Nolas?

A. There was an attorney from a private law firm whose father was a famous surgeon at the University of Pennsylvania. He called a psychiatrist. This lawyer called a psychiatrist, well-known psychiatrist, in the, area of depression at the University of Pennsylvania and asked him for the name of someone. The psychiatrist, Dr. Stinett, gave him the names of two neuropsychologists, one from the department of psychiatry and myself in the department of neurology, and the one from psychiatry wasn't in town, so he got me.

[63] Q. So you got the job?

A. Yes.

Q. Did you have a report from Dr. Paul Gross, have you ever seen that report?

A. Yes.

Q. It's been offered as an exhibit in this case. I think it's Defense 1.

A. Where is the date on this?

Q. I can tell you it's June 4th, 1988. You won't see it on the notes attached to it. You will have to take my word for it.

Have you ever seen that?

A. I don't believe I have.

Q. Did Mr. Rompilla in the interview, and I don't see it on your report that's why I am asking you, did he ever describe to you episodes of alcoholic blackouts?

A. I asked him, and I believe he said, he hadn't had any.

Q. Is there a distinction between an alcoholic blackout and what you described earlier as he used to drink until he passed out?

A. Yes, there is a distinction.

Q. The hospital records indicate when he was two years old he had a temperature of 105 and [64] diarrhea.

Do I understand, is it fair to say, you're not saying that that shows any brain damage at that time, you are not making the connection, are you?

A. I am saying it could potentially cause injury, but without more information on the duration and severity of the problem, I couldn't make a more probable statement about it.

Q. It possibly could have done it because we know sometimes fevers can do that, but you would need to know the duration of the diarrhea and the fever?

A. Exactly.

Q. On these prison records from 1975, did you take into consideration the Beta IQ test done at that time? Do you see the scale of 93?

A. Yes. I have to tell you I am not sure what the Beta scale of 93 means.

Q. You see the word average in the same column?

A. Yes.

Q. Is that an average person's average Beta score in –

A. I believe it's the low end of the [65] average score range.

Q. You said something interesting about all the neuropsychological tests you did. Correct me if I am wrong, that they have been around from the 1960's and '70's?

A. Particular ones I used have been around that long.

Q. Does that mean in the last thirty years, that the field of neuropsychology hasn't come up with any new tests?

A. Well, some of the tests they have come up with are tests I have made, and some of those are in here, but most of these tests derive from the '60's and '70's.

I am in an experimental environment where new tests are being developed all the time. You can't take – new tests are designed to explain certain specific hypotheses, that makes them less than useful. For a neuropsychological battery you have a frankly limited period of time, for us it's a very limited period of time to test the people.

You have to – I believe any neuropsychologist would want to use the two tests with two qualities, specificity and sensitivity.

[66] Sensitivity means what proportion of people who are impaired will be picked up. Specificity means how often can you detect a specific type of brain injury from the test.

So I have honed in on a battery of tests that I believe serve both of those purposes best, and they happen to include tests that are from the '60's, '70's, and also the '80's, just most of them go back that far.

Q. My question though is had you been retained back in 1988, for the issue of offering mitigating evidence at Mr. Rompilla's trial, would you have been able to do all these tests you did in 1996?

A. Let me see if there were any of them that weren't around then.

All of ones he was impaired in were around at that time. There's semantics sequential working memory test is one I developed or used in multiple sclerosis. It's based on an older paradigm. Auditory selective attention test is one that I developed. It's based on an older paradigm. It's just that the tests are improved and so on.

Number one, everything he was impaired in was around at that time, and all I can [67] tell you, the vast majority of the tests were also around at that time.

Q. I probably was not listening, I apologize. What does WNL mean, when you have that?

A. It means within normal limits.

Q. Did you testify that way before or did I –

A. No. That didn't come up before.

Q. Do you have experience, have you given these tests that you gave to Mr. Rompilla to many other persons?

A. Yes, I have.

Q. Have you given them to many people who are in the state penal system?

A. No.

Q. What type of people have you given these tests to before?

A. I have been giving them to people at the age of about 14 or 15 to the age of 94 might be the oldest. I have given to those people who are normal and have come in for neurological exams.

The people that come in as part of their neurologic work up are people who have various types of dementia, learning disability, attention deficit disorder, head injury, multiple sclerosis, [68] toxic exposure. I have probably the widest range of patient types of any neuropsyche lab in the city, because it's a neurology department.

I also take the referrals from psychiatrists. I do have people with psychiatric – primary psychiatric diagnoses who I give the tests to as well, psychologists. That probably answers your question.

Q. Your review of the prison records, I assume, has led you to conclude that Mr. Rompilla has had a long life of incarceration, correct?

A. Yes.

Q. And crimes when he's not incarcerated?

A. Yes.

Q. But just so I am clear on this, you haven't given your test to other similarly situated people?

A. Well, aside from Clifford Smith, no, not to people with long histories of crime.

Q. Are you in any position to say whether or not you were surprised by these results, these wouldn't be typical with a person with his prison record?

A. Let me just say that there is research on neuropsychological testing of people who are [69] violent, and basically that research says that there is not much neurocognitive deficit in that population, with the exception of impulse control. They don't do that poorly on neuropsychological tests.

Q. Except for impulse control parts?

A. Yes, which may be qualitative in nature. There are not many tests of impulse –

Q. Is it your opinion Mr. Rompilla is an impulsive person?

A. See, I guess it's – what's going on in my mind is the definition of terms, what do you mean by impulsive. There could be a range, all of us can be impulsive. It's not normal to be impulsive. There's all the way down to impulsivity of a severe kind due to damage to specific structures in the brain. Then there's everything in between.

I think there are certainly conditions when he becomes angry by something, when he becomes very impulsive. For example, during my testing, he didn't display an unusual degree of impulsivity.

My concern about him and impulsivity has to do more with the knowledge, the thoughts he has that he bases his actions on. I [70] think that's where he's most limited is the information he uses to look at something, to think about something, and then to make a decision or to act on something is probably very, very restricted or limited.

Q. You talked about a card game incident he related to you on your direct examination. I believe, if I am not mistaken, I think you said he does have the tendency to act violently without thinking.

Did you say that?

A. I used that as an example of him doing that, yes.

Q. Well, do your test results, are they consistent with that conclusion, he's the type of an individual who will act violently without thinking?

A. I didn't provoke him. I can't use my test results directly to test his response to provocation or stress.

Q. None of the tests you did analyzed that?

A. No.

Q. Ability –

A. The only aspect was his performance on the problem solving test when he was unable to hold his train of thought. That could be construed as a [71] type of impulsivity because your mind shifts to something else

before you process something. That – it's a matter of terms. That's a norm of impulsive or poorly controlled thinking. It's mainly what you are thinking of as impulsivity.

Q. So I am clear, you never did formulate the opinion he was the type of a person that would act violently without thinking?

A. I guess what I am saying, I didn't assess him for that. I could have an opinion on it. It would be not the same kind of opinion as my opinions on the test results.

Q. Now, are your tests 100 percent foolproof?

A. What does foolproof mean?

Q. You indicated on direct there was some evidence that you had that Mr. Rompilla was not faking?

A. Um-humm.

Q. What I want to ask you, are you incapable of being fooled by a person who is taking your test?

A. You are asking a question that is a double bind for me because you are asking me to make a subjective assessment which is inherently [72] nonobjective. So I can't – either way I answer, I am going to be wrong.

Q. I don't follow that at all. The question is pretty simple, Doctor. Can you be fooled?

A. If I say yes, I can be fooled, then of course that means I am not doing a very good job.

Q. I don't want you to answer with regard to what the results or how we will think about it. Just the honest answer.

A. My opinion is I am not fooled when I test patients, that's my honest opinion.

Q. The question is can you be fooled?

MR. WISEMAN: I object to the form of the question.

Q. You may answer: Can you be fooled?

A. Is it possible for someone to be fooled?

Q. Yes. I think that's how I phrased it the first time.

A. I think it's possible to be.

Q. Let me ask you this, in respect to your examination of Mr. Rompilla, do I take it that you have only done an examination on a person in his setting only one time before and that was the Clifford Smith case?

[73] A. I have done neuropsychological evaluations of other people that committed crimes. You said long prison records that committed capital offenses.

Q. Was it clear to you Mr. Rompilla understood why you were there giving him these tests?

A. I think he only understood partially. I don't know how much he understood.

Q. What part do you think he understood?

A. I think he was – I didn't inquire about this with him. I didn't discuss this with him. So I am going to make educated guesses. I think he understood that this neuropsychological testing could be helpful to save his life.

Q. How many times had you tested a person who had his life at stake?

A. Life at stake – I mean, I have tested prisoners on death row in San Quentin state prison giving them psychological tests as part of my Ph.D. dissertation.

Q. Did any of them have petitions outstanding?

A. I have no idea.

Q. That's how I want you to characterize my [74] question. Do you know of any other people other than I guess Clifford Smith and Mr. Rompilla who had petitions outstanding at the time of your examination to set aside their death penalty?

A. I only know of one other, one other, Clifford Smith.

Q. You will agree with me Mr. Rompilla, from the history you have seen, has been tested before?

A. Yes.

Q. These aren't the first psychological tests he's received?

A. Yes. I made sure I used different forms of the test so I wouldn't give the same tests again to him.

Q. With all that as background, are you saying that you don't believe you were fooled in this case but it's not impossible that you were?

MR. WISEMAN: Objection. That wasn't her answer. She said it's possible she could be fooled.

Q. The question stands.

A. My assessment is based on valid information. If I don't get valid information then my time has been wasted

and the patient's time has [75] been wasted. Therefore it's a very important part of my method to make sure I am getting valid information. This isn't a casual effort on my part. It's a constant effort on my part to make sure I am getting valid information.

I do this in various ways. I encourage the patient to take more time to solve the problem or to answer the question. I encourage them, give them positive feedback, which believe me, they always like. They don't get gratification by not doing well. They get gratification by being told they are doing well. That's a normal human reaction as opposed to a faking human reaction.

I look at the – whether there's anything abnormal that is unexpected, something that doesn't fit brain function coming out with the test. So there's consistency of the behavior to what's known about brain function. I watch the person's behavior just as a psychologist, which I am watching how they react and what they say and so and so forth.

Then I gave him a test directly of faking, that tends to pool for faking to get an objective measure of whether he was faking or not.

Based on all of that – based on [76] all of that my goal is to get the highest functioning that a person can perform, because I need to be making a differentiation between what's organic and what's something else. I don't want to know about something else. I want to know about what's organic. Then fit the rest of the picture in.

So I believe that, you know, the performances I got from him were the best he was capable of. That means he was not faking.

Q. The question was, is it fair to say that your conclusion is you don't believe that you were fooled but it's not impossible that you were?

A. Yes, I would just say I don't think I was fooled because it's not a matter of my belief. There's evidence and data I obtained.

Q. The subjective test, that's the one that was real simple but you tried to make it look hard, is that right, this is your objective test for faking?

A. Yes.

Q. I take it the fact there exists an objective test for faking is an indication that sometimes we expect people are going to try to fool us when we are doing these tests, right?

[77] A. I don't think you can say we expect people to. I think it's true these tests were designed for litigation purposes. So it doesn't mean people normally do this.

If you analyze the base rate, the likelihood of it occurring is very, very rare, 1 in 20,000. I may have seen a lot of patients but I haven't seen 20 patients. The likelihood of my having seen a faker is very low.

People make their careers – the way – people have done a lot of research in trying to find out what is a neuropsychological pattern of faking. No one has been able to find one. The only thing you can do is use, you know, these symptom validity tests and look at the MMPI which I couldn't give him because he can't read well enough.

Q. You couldn't give Mr. Rompilla an MMPI?

A. Not unless I sat and read him every question, it would take a couple hours to do that, five hours.

Q. Did you have some time limit that you had to have with him?

A. A plane, I had to catch a plane.

Q. Did you say five hours?

A. Five hours.

[78] Q. I take it all these other tests you gave were a lot shorter than the MMPI?

A. Yes.

Q. The objective tests for faking, was that one –

A. No, it's a sheet of information that they look at for about as long as they need, ten seconds or more. I gave him more time. I take it away. There are 15 items on this sheet. I ask him to write all the items down, 15, 16 items. Then I ask him to remember all the 15, 16 items after seeing them once.

If I normally showed you a sheet of paper with 16 words on it, you wouldn't be able to get all the 16 words. We expect them to get all 16 items.

Why is that, because the items are things like A, B, C, D, in small letters. Then Roman numerals, one two, three four. Maybe capital letter A, B, C, D, then maybe Arabic numbers one, two, three, four. It's so well clustered it's easy to remember that pattern. Someone who is trying to fake sees this as an opportunity to say, well, you know I can't get it all.

Q. How long did that test take?

[79] A. That test took whatever, 20 seconds.

Q. Do you remember how many he was able to remember of the 16?

A. All of them.

Q. He was able to remember all of them.

MR. McINTYRE: I have no further questions.

* * *

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. Is there any evidence in the school records from when Mr. Rompilla was in elementary school that he malingered in '59 through '61 when he scored in the retarded range on the WISC test?

A. I have never seen anyone study malingering in children, I have to tell you. Children generally –

Q. You would assume those are valid scores?

A. Yes. The other point, they were given repeated times and he scored in the same range.

Q. In fact contrary to malingering children would want to try to do if they could?

A. Yes, they are very eager to please.

Q. The IQ scores from that period in his life are consistent with the organic deficits you [80] identified in your present day testing?

A. Yes.

Q. Does Mr. Rompilla have the intellect wherewithal in your opinion to fool a neuropsychological test, would he know how to do that?

A. At the think if he wanted to do it, which he might want to do, that he would do it by – in some very awkward clumsy way. He would probably first say, sorry, I can't remember anything. He would probably say – or he would never be able to select out information. Some of which to recall and some of which to not.

Why, because it takes memory to do that. You have to remember what you are supposed to, and then decide what you are going to do and not do. He doesn't have the capacity to do that. That's complex reasoning. He would be completely unable to do that.

Q. Did he appear to you to be trying hard when he took the test?

A. Yes, he definitely appeared to be trying hard and was pleased when he did well.

Q. Did he in fact do well on quite a number of the tests you administered?

[81] A. Yes, he did. I wouldn't say quite a number. But he did well on a number of them.

Q. Mr. McIntyre asked you about an MMPI or I think you discussed with Mr. McIntyre an MMPI. Let me show you an MMPI that's a part of the 1975 DOC testing.

Are you familiar with how to read the scales?

A. Yes.

Q. Are the validity scales on that MMPI valid?

A. The validity scales are not here. I'm sorry. I am looking in the wrong part. Pardon me. The validity scales appear to indicate a valid test, yes.

Q. So when he scored – when he took the MMPI in '75 he, according to the MMPI results themselves, he was not malingering?

A. That's correct. The mailing – whether for primary second gain or call for help reasons, which is not a matter of gain but a call for help, basically are defined by an F score of 80 or above. His score of 64 is in a very normal range. So it's not there.

Q. Now, the testing that you administered, [82] do those tests have groups that sort of set the norm by which you then compare the patient's performance?

A. Yes.

Q. And do the groups that make up the norm consist of normal people, among others?

A. They are supposed to be screened to consist of healthy normal people.

Q. And intelligent people?

A. No, just healthy normal people.

Q. Are there psychiatric patients in that group?

A. No, there should not be any.

Q. Just normals is what I guess you guys call them?

A. Yes.

Q. Have you had occasion to – the implication of Mr. McIntyre's questions seem to be that Mr. Rompilla had a motive to malinger.

Have you tested other people in your career who have had a motive to do badly, not actually malingered but who have had a motivation?

A. Yes.

Q. Could you give us an example of such people?

A. People who are a plaintiff in a case [83] regarding negligence or product liability or car accident, personal injury.

Q. People would want to show they suffered severe damage?

A. Yes.

Q. You have experience then in determining whether the tests are valid, whether people have motives to conceivably linger?

A. Yes. I have to say a good part of my knowledge in the area comes from my six years at Bryn Mawr Rehabilitation Hospital where I also managed the mild head injury program which is a group constantly being pointed to as being filled with malingers.

The advantage is that I got to, one, treat people over years in time because they are mild head injury people. I got to talk to them and family members, five, ten, fifteen, twenty years after their injury. I got to have a very long-term view of people with these invisible brain injuries which gave me a lot of insight into how humans really do react to brain injury.

One basic problem is that it's actually not to their advantage – humans have a much stronger need to think of themselves as being [84] normal and good and okay. And malingering really goes against that. To present yourself as being incapable is something that very few humans will want to do.

Q. There was a number of questions both on direct and cross-examination regarding impulsivity. I think you were explaining in cross there's a spectrum of impulsivity in people. Normal people have some impulsivity, and then there's people at the other end of the spectrum.

Could you explain how Mr. Rompilla's degree of impulsivity is affected by his reasoning problems that you identified in your testing?

A. Yes, I mean – I don't know how well I said it before. What I was trying to say, you could have impulsivity because you are not – because higher levels of the brain are not controlling thoughts, or you could have impulsivity because there is a hormonal disturbance or lesion in the motivation part of the brain, which is an unusual place to have a lesion; except for a very severe head injury that could lead you to have – I mean at that point behavior doesn't get to the point of higher controlled areas. That's why I need to [85] define what impulsivity is.

I see him having a problem of the first type. Mental thought – thought problems that reduces the ability to control, to guide his behavior. It's a monitoring and guiding problem.

If he's going to act impulsively – I haven't done blood level tests to examine whether he has, you know, neural transmitter hormonal problems that would indicate a

psychiatric type of impulse control impairment, but he does have cognitive impairments that cause him to act without thinking.

From that – that's the definition of impulsivity that I see in the testing.

Q. Is there any way for a mental health professional to assess brain damage other than through neurological or neuropsychological testing?

A. Brain imaging scales.

Q. That would be a neurological test?

A. We break it down. That's a neuroradiological test, that's a medical test. You mean outside of medical and psychological tests?

Q. Exactly.

A. No.

Q. You indicated in response to questions [86] about the Beta IQ, you weren't familiar with it. Were you familiar with the WAIS and the WISC?

A. Yes.

Q. Is one used more frequently than the other? In other words is the WAIS and WISC used more frequently than the Beta?

A. Yes, the Beta has been used almost exclusively in army soldiers. WAIS and WISC has been used in basically all other testing, even in some employment settings, but school settings, medical settings, research settlings, almost all other settings.

Q. Is the Beta as sensitive an instrument as the WAIS?

A. No. That's why the WAIS was developed. Previous to the WAIS were tests like the Beta. Although Beta wasn't probably one of the strongest but probably easiest to administer. Tests based on the idea you can pick out a certain type of problem and that will be sensitive enough to IQ – to give you a valid measure of IQ, but the WAIS was developed because they finally concluded that there was no one kind of problem that was sensitive enough to intelligence, that people have many types of [87] intelligence. It was created to scan many types of intelligence and it takes about two hours to give, which is, I know, longer than the Beta takes.

Q. Are you aware of any differentials in the scoring scales between a Beta and a WAIS or WISC?

A. I can say the WISC and WAIS are known to have – there are many – several other IQ tests, have the best most accurate scaling. However, even those tests I might say tend to under – tend to underestimate – I'm sorry, tend to overestimate the low measures and underestimate the high measures.

People at the low end of the IQ tend to all be grouped into the same levels. The lower your IQ the more difficult for the test to measure, same at the high end. The higher IQ the – the scaling narrows at the high end and at the low end. It could potentially underestimate someone with a low – overestimate someone with a low IQ.

Q. Couple other questions, Mr. McIntyre asked you a difference between blacking out and passing out. He

doesn't ask you the follow-up, could you tell us what the difference is?

A. Blackouts can occur even when the person isn't intoxicated. They aren't necessarily becoming [88] unconscious as passing out is. Some degree of unconscious, black outs, can occur while a person is aroused and able to move, but they have complete memory lapse and awareness lapse. They completely lose that period of time, even though they are behaving and moving around.

Q. Is it fair to say passing out is intoxication of high levels, drink you to pass out?

A. Yes.

Q. Blacking out is more of a neurologic manifestation?

A. Of the drinking.

Q. Last question is you refer to some of the testing from 1988 regarding, I think, a WAIS score. Was that testing that was from the Department of Corrections, do you recall?

A. Yes, I think so.

Q. Have you seen any testing from a Dr. Cooke in this case?

A. I don't recall right now. Can you refresh my memory?

Q. I don't think I can. The question simply is have you seen it?

A. I don't recall seeing it.

Q. Any testing from any psychologists or [89] psychiatrist in '88 other than the DOC WAIS you just mentioned.

A. I, saw a statement by a psychologist, I didn't – I don't know what the full range of tests are he gave. He commented in some statement he gave on some of his findings.

Q. Would that be Dr. Gross?

A. Dr. Crown.

Q. Dr. Crown is – in the packet of materials you received from counsel, did you receive a declaration from Dr. Crown?

A. Yes.

Q. He's the gentleman from Florida?

A. Yes.

Q. He did testing in 1995?

A. I'm sorry. I am confusing it with '88. Sorry.

I need to rely on the records in front of me.

Q. That's okay.

A. Yes, I confused those. I did see partial information from 1988.

Q. Partial information you saw was that DOC testing?

A. Yes, that's correct.

[90] Q. Was there any other information from '88 that you ever saw?

A. No.

MR. WISEMAN: No further questions.

* * *

RECROSS EXAMINATION

BY MR. McINTYRE:

Q. Just a couple questions, you mentioned medical tests for organic brain –

A. Yes.

Q. There are medical tests?

A. There are other tests, yes.

Q. There are medical tests?

A. Yes.

Q. You call it a medical test?

A. Correct.

Q. As opposed to neuropsychological tests?

A. Yes.

Q. One of them is an EEG?

A. One of them is an EEG.

Q. One of them is a CAT scan?

A. Yes, or an MRI scan or SPECT scan or PET scan.

Q. Did you do or have any of those tests [91] done to corroborate your tests?

A. I don't have privileges to have them done. There's no funding. If I could have I would have those tests done.

Q. Did you suggest to Mr. Rompilla's counsel to have those tests done?

A. I didn't only because I didn't think it was possible.

Q. It's [sic] simply requires a yes or no. You don't have to get defensive.

MR. WISEMAN: I object to the characterization.

MR. McINTYRE: I think it was an accurate one.

MR. WISEMAN: You don't have to be offensive. She answered the question.

MR. McINTYRE: Unfortunately she didn't, Michael.

Q. Did you request Mr. Rompilla's counsel –

MR. WISEMAN: She answered the question. She said no, and she told you why.

A. I wanted to have the tests done. I didn't request them because they weren't possible.

Q. So you did not request –

[92] A. That's correct.

Q. – to have those done?

A. That's correct.

Q. But surely it would be possible for them to get those done, wouldn't it?

A. No, he's in prison.

Q. You can't get him out to have testing done?

A. I am not aware of that possibility.

Q. Okay.

A. I am not aware of being able to fly him to the University of Pennsylvania in shackles to be tested.

Q. He could be driven in a vehicle I suppose. Strike that. We don't have to get into this.

I think I have one more when I think about it. All of these medical tests don't require us – strike that.

They are objective tests, the patient doesn't have to say a thing for them, right?

A. That's correct. Let me say they are not what's considered the gold standard of brain impairment. Neuropsychological testing is considered the gold standard.

[93] Q. Is neuropsychological testing the most sensitive for brain damage testing?

A. It is. I have tested a patient who had serial magnetic resonance imaging scanning for years. In my testing I found visuospatial processing deficits.

Two or three years later the MRI scan finally found the tumor. There's a good case of neuropsychological deficit being found prior to MRI scan.

Q. Is that what you mean by the gold standard, most reliable testing?

A. Most sensitive testing, most likely to find the impairment.

MR. WISEMAN: Nothing further.

MR. NOLAS: So the record is clear on every previous occasion when an MRI, EEG, SPECT scan or other such testing has been requested, the Pennsylvania Department of Corrections has refused, refused to allow inmates to be taken out of the Pittsburgh facility or any other facility for such testing, refused to allow practitioners to bring their equipment in where possible to undertake such testing and has essentially limited us to neuropsychological testing. Given the fact that [94] that testing is more sensitive we have relied on that testing in Mr. Rompilla case and other cases.

MR. McINTYRE: Thank you. Would you state for the record whether or not you attempted to ask a Court or seek a Court Order for this type of testing?

MR. NOLAS: Yes, we have.

MR. McINTYRE: Have you done so in this case?

MR. NOLAS: We most recently requested it with Judge Toole in Wilkes-Barre in the Strong case.

The Department of Corrections opposed the request and it was refused. We did not make the request in Mr. Rompilla's case given that prior history with the Department of Corrections and given the testing by Dr. Armstrong and Dr. Crown.

MR. McINTYRE: Thank you.

MR. NOLAS: I would also – there's also the element of the fact the Post-Conviction Defender Organization has been defunded. There's an economic issue as to how many tests one can order given we ordered what our experts tell us are the most sensitive neurological testing that exists.

[95] (Deposition concluded.)

[96] 4-12, 1996

I hereby certify that the evidence and proceedings are contained fully and accurately in the notes taken by me of the testimony of the within witness who was duly sworn by me, and that this is a correct transcript of the same.

SAS
Sally A. Slifer, RMR
Registered Merit Reporter
Notary Public

The foregoing certification does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.

COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	NO. 682/1988
Respondent	:	
vs.	:	
RONALD ROMPILLA,	:	
Petitioner	:	

DEPOSITION OF PAUL K. GROSS, M.D.

Taken in the offices of Paul K. Gross, M.D., Suite 312, 401 North 17th Street, Allentown, Pennsylvania, on Monday, April 1, 1996, commencing at 6:15 p.m., before Mona Denise Ventresca, Registered Professional Reporter.

APPEARANCES:

OFFICE OF THE DISTRICT ATTORNEY
By: MICHAEL P. McINTYRE, ESQ.
Lehigh County Courthouse
P.O. Box 1548
Allentown, PA 18105
– For the Respondent

POST-CONVICTION DEFENDER
ORGANIZATION
By: MICHAEL WISEMAN, ESQ.
and
BILLY H. NOWLAS [sic], ESQ.
437 Chestnut Street – Suite 501
Philadelphia, PA 19106
– For the Petitioner

* * *

SLIFER, VOICE & SHADE

1228 Walnut Street
Allentown, PA 18102
(610) 434-8588

731 Lehigh Street
Easton, PA 18042
(610) 250-0383

INDEX TO WITNESSES

Witness	Page
PAUL K. GROSS, M.D.	
By Mr. Wiseman	3, 43
By Mr. McIntyre	36

INDEX TO EXHIBITS

Gross Exhibit	Description	Page
1	Report and notes	4

INDEX TO OBJECTIONS – P. GROSS, M.D.

	PG	LN
have agreed that all OBJECT ions will be made	3	3
the examination, no OBJECT ions will be reserved.	3	5
let me put an OBJECT ion on the record.	11	2
in which being the OBJECT of such violence	12	8
McINTYRE: Note my OBJECT ion on that basis, as	14	1
MR. WISEMAN: OBJECT ion, he doesn't know.	42	18

[3] MR. WISEMAN: This is an examination of Dr. Paul Gross taken at his office. The parties have agreed that all objections will be made during the time of the examination, no objections will be reserved.

MR. McINTYRE: That's agreeable to me.

* * *

PAUL K. GROSS, M.D., having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WISEMAN:

Q. Doctor, what is your employment?

A. Excuse me?

Q. What is your employment?

A. I'm a psychiatrist.

Q. For how long have you been a psychiatrist?

A. I'm a psychiatrist for 21 years.

Q. Directing your attention back to 1988, were you involved at all in criminal proceedings in regard to Ronald Rompilla?

A. I was asked to evaluate him by his attorney, related to the charges that were leveled against him.

[4] Q. Do you have any independent recollection of your involvement with the case at this point?

A. Not much, its very sketchy.

Q. Prior to today, have you spoken with anyone within the last month regarding the proceedings presently going on in Lehigh County Court?

A. No, I did not.

Q. Back in – by the way, I see you have in front of you a copy of your report from 1988. Have you had a chance to review it?

A. I have had a chance, yes, sir.

Q. What's your recollection or your understanding of the purpose of your interview or evaluation, I should say, of Mr. Rompilla back in 1988?

A. Well, as it states in the first paragraph, I was asked to evaluate what his mental state was at the time of the alleged crime, and that's as much as I can tell you at this time.

Q. By the way, at the time you had done that evaluation, had you done other evaluations in capital cases?

A. Yes, I had.

Q. Do you roughly recall how many?

[5] A. I don't recall. I would say perhaps a half a dozen or so, in that neighborhood.

Q. Now, in your report – by the way, your report has already been marked as an exhibit in the case, so I'll refer to it as a report that's been before the court.

In your report you indicate the purpose of the evaluation is to determine Mr. Rompilla's mental status, you just said, during the time of the alleged charges. What's your understanding of what that entailed when you use the term mental state, what were you looking at exactly?

A. Well, I was looking to see if he knew what he was doing, whether he was suffering from any kind of psychiatric disorder, whether he may have been intoxicated, exactly what his emotions and cognitive processes were. As much as you can tell later from a psychiatric point of view.

Q. Now, the things you just listed, are they things that you would normally do in such an evaluation or are they things that you have a specific recollection of having done in this case?

A. No. I don't recall specifically doing anything in this case, other than to refer to my record here and my notes and so forth.

[6] Q. So would it be fair to say then the things that you just indicated that comprised your evaluation are things that you routinely do –

A. That's correct.

Q. – in a criminal case?

A. Well, really in any case it's part of a psyche id evaluation, the mental status at the time of the crime you're looking for abnormal trends.

Q. Have you ever testified in the penalty phase of a capital case?

A. I don't think so.

Q. Have you ever prepared specifically a penalty phase presentation for the defense in a capital case?

A. I don't believe so.

Q. Have you ever prepared a penalty phase for the prosecution in a capital case?

A. I don't think so.

Q. Now, if I could direct your attention to the last page of your report, in particular, the last two paragraphs. Why don't you just take a minute to refresh yourself.

A. Okay.

Q. In the very last sentence of the report it says, my recommendation is that this area should [7] be further evaluated before any definite conclusions are drawn. When you refer to this area, what were you referring to?

A. I was referring to his reaction to alcohol.

Q. Now, in the report itself, it appears that Mr. Rompilla denies drinking alcohol outside of, for lack of a better term, socially. Would you agree with that characterization of what he apparently told you at that time?

A. The report apparently suggested that he was not an alcoholic and he was not drinking that heavily that it caused a problem, in his opinion.

Q. Given his statements to that effect, why did you recommend that that particular area be explored further?

A. Well, there is a condition in psychiatry where somebody behaves pathologically to alcohol. And certainly someone can be an alcoholic also and deny it, and do things under the influence of alcohol which would have influenced their behavior.

Q. I guess what I'm getting at is did you have any other information at the time that would have led you to want to explore that area more completely?

[8] A. Only as my report suggested, that he was drinking that day and he did say he was drinking. And that there certainly is that possibility that he was drinking more than he remembered or cared to remember.

Q. Now, long term effects of alcohol can in some cases cause organic brain damage?

A. It can.

Q. Is there any relationship between that possibility of brain damage and blackouts?

A. It can be. People with brain damage I think are more prone to have blackouts than those without them.

Q. So effectively then, when you represented that the alcoholic blackout possibility be explored further, that would include the exploration by definition of the possibility of organicity?

A. Again, there are lots of things to evaluate under the heading of possible alcoholism. That's one of them. You know, there might be others as well, but that's certainly one of them.

Q. Do you recall, after you wrote this report and submitted it to counsel, whether you had any further involvement in this case?

[9] A. I don't recall I had any further involvement.

Q. So counsel didn't come back to you and ask you to do additional things?

A. Again, I think my letter was submitted and I think that was the last I heard of it.

Q. Just so the record is clear, you've searched your files and you have no other material in this case?

A. I have no other material.

Q. By the way, the exhibit in court includes your handwritten notes that were part of your report?

A. Right.

Q. Now, in that next to the last paragraph of your report, you refer to a strong element of antisocial behavior of Mr. Rompilla. Is that right?

A. That's correct.

Q. I gather that he told you things or you saw things in his record that had an antisocial flavor?

A. Absolutely.

Q. You don't make a diagnosis here of antisocial personality disorder here, do you?

A. I didn't in this report.

[10] Q. I just want to get your views on a couple of thoughts regarding antisocial behavior. And for the record, I'll be referring to – well, let me ask you a credentia question. The Comprehensive Textbook of Psychiatry by Kaplan and Sadock, are you familiar with that work?

A. Yes, I am.

Q. Is that a standard reference in the field of psychiatry?

A. Yes, it is.

Q. And it's one that you use in your work?

A. Yes, it is.

Q. Now, I'm going to be referring in these questions to a passage in the section of Kaplan and Sadock, section 28, adult antisocial behavior and criminality, specifically on page 1402. I just want to read you a portion and see if you agree with this or not. Quote, a consistent finding in the histories of extremely violent recidivists is a history of

having been severely physically abused. Such is the case, whether one studies children, adolescents or adults, or whether one considers violent psychiatric patients or violent prison inmates, end quote. Do you agree with that same in Kaplan?

[11] MR. McINTYRE: Michael, let me put an objection on the record.

MR. WISEMAN: Just so the record is clear, what's the basis?

MR. McINTYRE: You can use learned treatises to cross-examine a witness, but you certainly cannot use learned treatises to get the part that you're reading in as substantive evidence, which is the only purpose I guess you're using it for.

MR. WISEMAN: No, there is another purpose. Just so the Judge is clear if he reviews this, the purpose is to see why or why not this particular expert took particular actions and predicates for the actions he took.

MR. NOWLAS [sic]: In addition, so that the record is clear, Dr. Gross was involved –

MR. McINTYRE: Hold it, guys, you're not going to tag team me here. That's not right, one lawyer is doing this deposition.

MR. NOWLAS [sic]: Fair enough.

Q. Do you agree with that statement in Kaplan?

A. Yes, I would agree with that.

Q. Just one more brief statement from that [12] section. Quote, whether violence toward children occurs

when parents are under the influence of alcohol or delusional and believe they are exorcising the devil, are in a manic frenzy, or are simply disciplining in the only way they know, the experience of such aggression seems to have lasting effects on the victims. There are several ways in which being the object of such violence contributes to the development of antisocial behavior.

First, it provides a model for behavior. Second, it frequently results in injury to the child's CNS, thereby impairing the child's ability to control impulses, think logically, function adequately at school, and behave in socially appropriate ways. Finally, it engenders rage in the victimized child, which frequently seems to be displaced onto teachers, peers, and even strangers, end quote. Do you agree with that statement?

A. Yes.

Q. Would it be fair then, Doctor, to say that when you see antisocial elements in someone that you're evaluating, one of the areas that you need to rule out as a cause for that behavior could be that the person had an abusive childhood?

[13] A. Yes.

Q. All right. On page 1403, I just want to read to you two sentences. One sentence, actually, and see if you agree with this. Quote, most have histories of school problems, learning disability, especially reading problems – I'm sorry, that didn't make sense, I read that out of context. Let me try that again. Many, referring to abused children in the context of the passage, have identifiable cognitive impairments, manifested by wide discrepancies on subtests of intelligence scales, poor short-term memory, and impaired

reasoning on mental status examination. Most have histories of school problems, learning disability, especially reading problems, and altercations with peers and teachers. Would you agree with that?

A. Yes.

MR. McINTYRE: Attorney Wiseman, what's the date of that article?

MR. WISEMAN: This is the 5th edition, which I believe is 1994.

MR. McINTYRE: And you're aware that examination in this case took place in 1988?

MR. WISEMAN: Actually I think it's 1989.

[14] MR. McINTYRE: Note my objection on that basis, as well, that we can't be using materials we've garnered or gathered since 1988.

Q. Has anything in regard to the – does the field of psychiatry have a different view now in 1995 than they did in 1988 on the issue that I just presented to you?

A. I think that sounds consistent with what was known in 1988 on that particular issue.

Q. How about the prior passage, would there have been any difference?

A. I don't think there would be any major differences in thinking on that issue either.

Q. All right. Doctor, so, again, if you're evaluating someone who has antisocial elements in their background, would it be an appropriate response for an evaluator to consider whether the patient has a history of cognitive

impairments as perhaps a cause of their antisocial behavior?

A. Well, yes. My understanding is that antisocial – there may be cognitive problems, but that it plays a small part in that, that actually we're talking about a larger issue. And that these are people who have absolutely no conscience and no guilt and no allegiance to a group. And, you know, [15] do things really for their own self-gratification and very angry people. But that, you know, it's my understanding that the cognitive slight brain damage, if you will, is not a major etiologic factor. That has to do with the way they were raised by their parents more than being damaged cognitively or physically in their brain. That's my understanding.

Q. Well, I guess my question is directed more towards before you reach a diagnosis of antisocial personality disorder. In a particular case when you're evaluating elements of antisocial personality disorder, do you look to see if there are any cognitive impairments as part of that evaluation?

A. I think you do that with any psychiatric evaluation to see if there's any organic or cognitive problems. But I don't think you do it more so for antisocial than you do for anything else, actually.

Q. Now, would you agree that – I think you did agree already – that one of the causes of antisocial type behavior is an abusive upbringing. Is that right?

A. I think that's commonly thought of and [16] agreed to, that's right.

Q. Upon page 1404 of Kaplan there's a short paragraph that says, family histories, especially regarding

aggressive behaviors, are essential. Delinquents and adult criminals are usually reluctant to admit that their parents have hurt them physically. Questions are answered more easily if phrased in such a way as to blame the patient, in part, for parental loss of control; e.g., quote, did you ever make your mom so mad she lost her cool and went further than she meant to, end quote, closed quote. Do you agree with that statement?

A. I would agree with that.

Q. Do you recall in your evaluation of Mr. Rompilla whether – well, withdrawn.

Did you discuss with Mr. Rompilla issues related to an abusive upbringing or family violence?

A. Yes, I did. Actually he denied any abuse as a child, by either parent. He said he had a good relationship with his father and he denied any abuse by his mother. Actually what he said was that he had a, quote, fairly normal childhood except for the fact that he didn't like school, which he left in the ninth grade. So what he described to me [17] was really unremarkable in terms of his childhood upbringing.

Q. Did you speak to other members of his family?

A. No, I did not.

Q. Did you – well, let me ask you this. Was your report on those issues based solely on what Mr. Rompilla told you?

A. Yes.

Q. Now, one more passage, I think we'll be done with this portion of the exam. Again, from 1404, no matter how thorough the psychiatric examination itself may be, there are aspects of functioning that should be conducted by experts in other disciplines. For example, the results of routine psychological tests are invaluable. Moreover, more specialized neuropsychological tests, such as the Halstead-Reitan and Luria-Nebraska Tests, often reveal organic deficits not elicited in either the psychiatric or the routine psychological examination, end quote. Do you agree with that?

A. I think that you can pick up, certainly, things in testing which you're not going to pick up in a clinical evaluation, that is true.

Q. Would it be fair to say that if there's no reference in your report to any psychological tests or neuropsychological tests, that you had none at the time of your evaluation?

A. That's correct.

Q. In other words, if you'd had them, you would have incorporated them?

A. That's right.

Q. Now, as this man is just referring to in the psychiatric examination, he needs to go to these other disciplines. You said other testing can pick up things. Why is that important when you're evaluating someone who is showing antisocial type –

A. It's not, I don't believe it's important when you have an antisocial behavior unless there's evidence of organic deficit. What I said was I don't think it's important

to do that. What's important is really the childhood issues and emotional issues and childhood, that may be the answer.

But I don't believe that organic brain dysfunction causes antisocial behavior. I think it may be a slight factor and I believe you're taking this out of context. So that – I had no suspicion at all in this evaluation that this man had any organic deficits at all. There was nothing [19] at all in this interview that suggested he had cognitive impairment at all. So as far as I was concerned, there was no reason to go into anything other than what was very straightforward about this case.

Q. All right. Now, you just said that – I think at the beginning of that answer you said there's some reason, although not a main reason, to go into organicity or did I mishear you?

A. No. My opinion about antisocial people is that there's no reason to delve into organic deficits to explain antisocial behavior. That in general, they are due to childhood experience in a very unhealthy family, and that causes the antisocial behavior.

Q. Let me back up then. You agreed with the statement in Kaplan that it's important to have organicity looked into. I guess my question is why?

A. I'm not going to disagree with an expert if that is his opinion. In my experience, I don't think it's fruitful to do that in cases of antisocial behavior because I think that's not where the defect is. It's not an organic brain disorder, it is a personality disorder that is caused by real, faulty dysfunctional family relationships.

[20] Q. Now, would you agree that bruised children often manifest central nervous system deficits?

A. I think they can and especially if there's head trauma. Mr. Rompilla gave no evidence of any head injury, I asked him that question, abuse of any kind that would suggest that there was any organic brain disorder.

Q. All right. I guess what I'm getting back to then, Doctor, is that given that there is some correlation between central nervous system deficits and abuse, and since abuse can explain certain antisocial behaviors, isn't there a connection between looking towards central nervous system deficits when you're dealing with someone who has an antisocial presentation?

A. I think if you suspect that the person has been physically abused, especially abuse of the head, then you should look into it. If there's no evidence of that, then I think you're on a wild goose chase.

Q. Just so the record is clear, because we're talking about antisocial personalities, again, your report does not diagnose him as antisocial. Is that right?

[21] A. Antisocial is a psychiatric term, it is a personality disorder. So when we talk about antisocial, psychiatrists generally mean it's a personality disorder.

Q. A personality disorder, an antisocial personality disorder is arrived at after a checklist of things are determined and checked off. And that diagnosis is not in your report, the formal diagnosis for DSM is not in your report?

A. I was not asked to diagnose him, just to look at his mental state. So I felt that I did what I was asked to do at that time and not go any further.

Q. Just a couple questions about organic brain damage. Doctor, does organicity relate to impulse control?

A. It can, it can explain it.

Q. Can it impair one's impulse controls?

A. Yes.

Q. Does it relate to problems with cognition?

A. Yes.

Q. And problems with judgment?

A. Yes.

Q. Problems with reasoning?

[22] A. Yes.

Q. And emotional lability?

A. Yes.

Q. Are these all things that I just mentioned that are relevant to mental functioning at the time of the offense? Hypothetically, not necessarily in this case.

A. A hypothetical question, it can be related to someone who commits a crime.

Q. In other words, all the factors I just ticked off that you agreed were part of an organic presentation relate to one's – potentially relate to one's mental function at the time of the commission of the offense?

A. It can, yes, it can.

Q. Now, is there a connection between child abuse and low IQ scores?

A. I believe there is a correlation between, you know, the more the abuse, the lower the IQ. I think that's just an intuitive kind of reasoning. I think it also stands up in testing.

Q. Now, let me ask you this, if you see a child with a low IQ score, is a possible explanation for that, that there's an organic problem?

A. That, absolutely.

[23] Q. And another possible explanation is that there's some environmental stresses, such as abuse or dysfunctional family?

A. Yes.

Q. Now, when you did your evaluation of Mr. Rompilla did you have at your disposal any IQ testing that he had had as a child or as an adult?

A. No, I did not

Q. Would you agree that abused children exhibit academic and behavioral problems in school?

A. Yes, I would.

Q. So if you saw poor functioning in school, that would be a potential red flag for an abusive background?

A. That's correct.

Q. And it would also be a red flag for possible cognitive impairments?

A. That's correct.

Q. Have you seen in your experience where abused children, often because of these difficulties in school, are placed in special education classes?

A. Yes, I have.

Q. Now, Doctor, I want to show you an exhibit that's been marked in this case. Actually, before we do that, let me just ask you a couple of [24] predicate questions. Did counsel, to your recollection, provide you with school records in Mr. Rompilla's case?

A. I don't recall having those records, no.

Q. Records from prior offenses?

A. No, I don't remember seeing those.

Q. Records from prior incarceration, including any psychological testing?

A. No, I didn't see those.

Q. Any hospital records?

A. No.

Q. Did they give you any records at all?

A. I don't recall nor do I note that I saw any other records.

Q. Would it be fair to say that any records you reviewed as part of your evaluation would be in your report?

A. That's correct. If I did review it, it would be noted.

MR. WISEMAN: All right. I'd like to show you an exhibit that's been marked.

Mr. McIntyre, I don't have my exhibit list in front of me, but it's the school records which I think were marked twice.

MR. McINTYRE: I've got them at [25] D-5 and D-8.

MR. WISEMAN: That sounds about right.

Q. In any event, just to give you some contact, Doctor, these are records that were retrieved from Mr. Rompilla's school. I'm going to ask you to – I'll just point to it since we're across the table. You'll see an entry at 4/57, Wechsler and you'll see a verbal score of 75?

A. Uh-huh.

Q. And then below it, 10/59, Wechsler, with a full IQ score of 64. Now, if you had had that material presented to you at the time of your evaluation by his attorneys, is that information that would have been useful to you in your evaluation?

A. Yeah. I think it is useful to note that when you're doing an evaluation, yes.

Q. And specifically, I think you said that there was no evidence of a cognitive impairment that you could see. But certainly those IQ tests are some evidence of a cognitive impairment?

A. That's correct.

Q. And those IQ tests are also evidence of potential dysfunctional family or abusive family?

[26] A. You don't know what it means. This person could just, you know, be kind of a borderline IQ without any abuse. But certainly there are a lot of possibilities.

Q. Let me just flip the page for you. There's another test here from 1961 with a full scale IQ of 69, again, on the Wechsler. Same question, that's information that you would have found useful in your evaluation?

A. Yes, it would have been useful.

Q. Now, if you would have seen those types of cognitive impairments back then, would you have thought it appropriate to have neuropsychological testing done? Keeping in mind that you don't do the testing.

A. I'm really not sure. I was not asked – because what I was asked to do was evaluate what his mental state was at the time of the charges. And I'm not sure if neuropsychiatric testing would help me answer that question any better in relation to whether, in fact, he knew what was going on and whether he was suffering from any psychiatric disorder at that time. I'm not sure how I would have dealt with that information.

I certainly would have wanted to [27] know more about it, perhaps with some medical records as a child to find out if there was anything more to it than that, you know, if that was ever looked at.

You know, this was a man who denied ever committing the crime to begin with, and really denied any problems at all on that day. I don't know if I would have done neuropsychiatric testing, given what he told me and what I knew about it. I might not have.

Q. Now, are you familiar with the phrase – well, I should say the word mitigating in the context of a capital case?

A. What phrase is that?

Q. Mitigating.

A. Yes.

Q. Are you aware of mental health mitigating factors in a capital case?

A. Some of them I am. Intoxication I believe is one of them.

Q. Are you aware of mental health mitigating factors in a capital case?

A. I think there are some psychiatric disorders that may mitigate, psychiatric symptoms that may mitigate.

[28] Q. Are you aware in your role as an expert in a forensic setting, that an abusive childhood can be a mitigating circumstance in a capital case?

A. No, I'm not aware of that.

Q. Do you have – are you aware of whether an organic deficit can be a mitigating factor in a capital case?

A. I'm aware of that.

Q. And how would that be a mitigating factor in your review?

A. Somebody with sufficient organic impairment would not be able to, for instance, have correct judgment about a situation. They'd be more impulsive than he should be, his emotions may be too intense and fluid.

Q. Lack of impulse control?

A. Lack of impulse control.

Q. Inability to foresee future consequences?

A. So that organicity certainly would be a factor.

Q. Now, in order to determine the existence of organicity, would it not be appropriate to endeavor to get to the neurological bottom of these IQ tests, if there is such a neurological bottom?

[29] A. I think if you're evaluating his cognitive state, I certainly think you'd want to get as much information as you could if that was what you wanted to do, sure.

Q. In the cases you've worked on, are you familiar – with the capital cases you've worked on, are you familiar with the circumstances of history mitigation?

A. Could you explain that?

Q. Do you see the role of the expert as gathering and compiling a history of the defendant as in an exploration for mitigating factors?

A. I think that's one of the roles of an expert psychiatrist, yes.

Q. Is there a relationship between neuropsychological testing and the assessment of brain damage?

A. Oh, absolutely.

Q. And so if you were setting out to determine whether there is, in fact, organicity, you would rely in part on neuropsychological testing?

A. Yes. If you wanted to find out about organicity, you would have to have neuropsychiatric testing among other testing, yes.

Q. Just to refine my question a little bit [30] more from a few moments ago regarding organicity as a mitigating factor. Would you agree that the presence of organicity has the potential to impair one's capacity to conform their conduct to the requirements of law?

A. I think sufficient organic deficits can certainly do that.

Q. Is organic brain damage a mental or emotional disturbance?

A. It is actually in the DSM IV, I would say it is an explanation for psychiatric disorders, it's a cause of them.

Q. Now, just to show you the school record again. You'll note the grade column, you'll see K, 1, 2, 3. And then beyond that you'll see notation for SP, SP, SP. Assuming that that SP means special education, following the third grade through the duration of Mr. Rompilla's stay in elementary school, is special ed placement something that you would have found useful in your evaluation?

A. It certainly would be useful. It's something that would have been interesting to note in my evaluation.

Q. And I'll direct your attention also on the exhibit to June of '61. There's a notation for [31] what appears to be the Stanford achievement test. And you'll note that he was born in 1948, so he would have been about 13 years old in 1961. And at that time he was reading at the third grade level, his arithmetic was also at about a third grade

level. Is that information that you would have found useful in your evaluation?

A. Yes, it would have been useful.

Q. And again, because that's evidence of either organicity or potentially of organicity or potentially of an abusive background or dysfunctional family?

A. Well, it's certainly evidence of a cognitive deficit. What that means is that you have to find out what that means.

Q. Some possible explanations are organicity, would you agree?

A. That's one of the causes of deficit, you have to look into that.

Q. And another potential explanation is an abusive childhood. Is that right?

A. Again, on a list – I mean, it's a possibility. It doesn't mean that there is one.

Q. I understand. Now, did childhood fever – withdrawn.

[32] I'd like to show you another exhibit that was marked in the hearing, Doctor, and direct your attention – this is the 1976 transfer petition, I think it's been identified from the department of corrections.

MR. McINTYRE: The one that showed up in the clerk's file?

MR. WISEMAN: That's right.

Q. You'll notice a scoring here for the wide range achievement test.

MR. NOWLAS [sic]: Let me just jump in for a minute. Do you have a number for it?

MR. McINTYRE: No.

MR. WISEMAN: I don't have it.

MR. NOWLAS [sic]: I'm sorry, I apologize.

Q. You'll see scoring for the wide range achievement. And just so you have some context for this, Doctor, this was testing that was done in 1976 upon Mr. Rompilla's entry to prison for a prior conviction. You'll see a reading score, spelling and arithmetic. And you'll see the percentiles at the end. There is a fourth percentile score on spelling, in the third percentile score in arithmetic. Is that information that you might have [33] found useful in your evaluation?

A. Yes, it would have been interesting to note that.

Q. And, again, that relates back to the school records we just discussed in terms of the reasons you'd find it of interest. Is that right?

A. Well, again I, would find it interesting because it gives you more of a picture of who you're dealing with. If the person is a slow learner, that is something that a psychiatrist should note. Again, I wouldn't infer that he was abused from that but, you know, that's your inference, not mine.

Q. Well, I wasn't making an inference, I'm just asking.

A. Again, for a complete evaluation that is something that is always important to know.

Q. Taking this wide range achievement test in conjunction with the school records we went through, would you explore it if you would have had the information and why?

A. Again, given my evaluation, rereading that and given what I was asked to do, I think I answered the question that the attorney asked me in terms of what was his mental state at the time of the alleged crime. And, again, if you read my [34] report, he said he didn't do anything wrong. He may have been drinking, and he denied having any disturbing pattern of thought or behavior on that day.

Having heard that and having been convinced that what he was telling me was reasonable, I didn't see any reason to go any further at that time. Except with the possibility that the alcohol may have caused him to be violent, may have an implication in a violent reaction. I mean, that's basically what my job was at the time as I understood it.

MR. WISEMAN: If we could take a three minute break, we might be approaching our conclusion. If that's all right with you.

(A brief recess was taken.)

Q. We're almost done here. Thinking back to the time of your evaluation, do you have any recollection as to whether or not Mr. Rompilla's attorneys asked you to determine if his ability – if his capacity to conform his conduct in the requirements of law was substantially impaired?

A. I don't recall that.

Q. If that was something you had been asked to look into, would that be contained in your [35] report?

A. Most likely I would have said that in my report.

Q. Do you recall if they asked you to look into the question of whether he had an extreme mental or emotional disturbance at the time of the offense?

A. Well, I was asked to determine his mental state. I would take that to determine whether he suffered from a psychiatric or organic or physical problem at the time.

Q. Do you recall if his attorneys asked you to look into social and developmental issues?

A. No. I don't recall that being asked at the time.

Q. Do you recall if they asked you to look into the existence or the absence of any mitigating factors at all in this case?

A. I don't think they asked me to do that.

Q. Again, if they had asked you that, it would have been in your report?

A. It would have been mentioned in the report, that's correct.

MR. WISEMAN: I have nothing further. Thank you, Doctor.

* * *

[36] CROSS-EXAMINATION

BY MR. McINTYRE:

Q. Doctor, just a few questions.

A. Okay.

Q. Did you have a file on Mr. Rompilla, an actual file?

A. I looked for one, I didn't have it. No, I don't have a file.

Q. Did you ever find a cover letter from his lawyers at that time?

A. We looked and couldn't find it.

Q. Back in 1988, this examination or evaluation took place in June, would it have been the norm to have gotten a cover letter from the lawyer representing the person prior to you doing an evaluation?

A. Well, it may not have been in '88. I must get one now, it changed. But it may have been that it was a phone call kind of thing at that time, a request or it may have been a letter. I think it varied back then.

Q. Is it fair to say that since about eight years have passed, it destroys your recollection?

A. That's correct.

[37] MR. McINTYRE: Let's have your report marked along with your notes in case you haven't done it before.

MR. WISEMAN: It has been marked.

MR. McINTYRE: Anyway, we'll call it Gross 1 for purposes of this deposition.

MR. WISEMAN: That's fine.

(Gross Exhibit Number 1 was marked for identification.)

Q. Did you look at your notes?

A. Yes.

Q. And did you compare it with the typed report?

A. Yes.

Q. Is the typed report accurate?

A. Yes, it is.

Q. You mentioned that you didn't think you had anything other than what Mr. Rompilla told you, and you probably didn't. But I'm looking at page 2, the first full paragraph where he relates a history of a prior charge. All those things came from Mr. Rompilla? I mean, it seems to be exact dates there and everything. Is it possible that that could have come to you from someone else?

A. It's certainly possible I could have [38] that. In fact, the exact date would lead one to think that I had some kind of documentation. The patient would most likely not remember an exact date.

Q. All right. And how about two, three, four paragraphs down, there is no history of any psychiatric illness or treatment for Mr. Rompilla. Does that indicate anything to you like you could have gotten that from him or does it seem like you got that from someone else?

A. That would seem like I would have gotten it from Mr. Rompilla himself.

Q. All right. Now these two exhibits that you were shown today, one was an initial transfer petition, and the other was the school records. If you had had them at the time that you did your evaluation, would they have affected the evaluation that you did, the result that you came up with?

A. Again, I was asked to do something that I thought I did. And I don't know that I would have done anything more. I don't think I would have done anything more than I already did at that time.

Q. As the defense attorney showed you those exhibits, did you see anything that would have affected the opinion that you rendered back in June [39] of 1988?

A. I don't see anything that would have changed my opinion.

Q. And basically, if I can paraphrase it, your opinion was although there was some evidence of antisocial behavior?

A. Yes.

Q. There was no other evidence for underlying psychiatric or mental disorder?

A. That's correct.

Q. And then you did say the possibility does remain, however, that Mr. Rompilla, while under the influence of alcohol, can become prone to violent behavior?

A. That's correct.

Q. Do you remember what the basis – can you tell from reading your report what the basis of that is? That because anybody who drinks, the drinking may cause some violent behavior?

A. Well, I think that in this case he obviously was in bars the day of the alleged crime, the murder, and drinking something. And I know as a psychiatrist that there is a condition that people can go kind of half crazy on alcohol and become very violent, things they would do under the influence [40] they wouldn't do not having been drinking. So I think I just kind of raised that as a possibility.

Q. As you would for anyone who had a history of drinking?

A. I did not have any evidence that it happened, but just as kind of a general hypothesis that that can happen, it's a possibility.

Q. Let me ask you this, I shouldn't let the curiosity get the better of me. How would you check that out, is there anything someone can do to check that out psychiatrically?

A. You get a history, because if there's a pattern, if it's happened once, it's going to happen again. So if someone drinks, you kind of get a corroboration in the history. And if you're really bold, you could challenge him with a couple of drinks and see how his behavior changes. I don't think under the circumstances with a guy in prison you would have done that. So I think what I would have done was try to get a previous history of any episodes that would have a bearing on this.

Q. Is there any diagnostic tests that you could do for that?

A. No. It's a clinical observation.

Q. You did a standard MSE, back in June of [41] 1988?

A. That's correct.

Q. And you were doing them at that time?

A. Yes, that is correct.

Q. And you were doing them for other people that would have been accused of murder?

A. That's correct.

Q. Back in 1988 had you ever been hired to do the kind of thing that the defense attorney asked you to do concerning mitigation, presenting a mitigation defense for a person accused of murder?

A. No, I did not. No, sir.

Q. Was that commonplace back in 1988?

A. I don't believe so, not in Lehigh County anyway.

Q. Now, you understand that it's more commonplace now eight years later?

A. Yes.

Q. In fact, I think a famous attorney wrote a book called The Abuse Defense?

A. That's correct.

Q. And we're more and more developing that today?

A. That's correct.

Q. But as you recall, you were not asked to [42] do that back then and that was not commonplace to do that?

A. That's right.

Q. Have you ever worked in tandem with a psychiatrist by the name of Gerald Cooke?

A. I am familiar with his work and I have used some of his reports in helping clients from time to time. We never really worked as a team, however.

Q. Do you know whether or not when you were retained for evaluation Dr. Cook was also retained for what he did? And a doctor, I believe it's Norm Sadoff, retained for what he does, do you know that?

A. In this case?

Q. Yes.

A. I don't know that at all.

Q. Is it possible that that happened?

MR. WISEMAN: Objection, he doesn't know.

MR. McINTYRE: You may answer.

A. It's certainly possible. I didn't know about it, but it's certainly possible.

MR. McINTYRE: I think I just have a few more questions. In fact, I don't have any, thank you.

[43] MR. WISEMAN: Just a couple follow up, Doctor.

* * *

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. Do I understand correctly then that your evaluation in 1988 was to cover competency to stand trial, is that something that you were concerned with?

A. Not in this report. I would have mentioned that actually if I was specifically asked to do that.

Q. So then you were looking at either sanity and/or diminished capacity?

A. Well, again, they were not specifically asked or otherwise I would have mentioned that in my first paragraph in terms of what was asked of me. Really, it was just determination of mental state at that time. There were many times I was asked to comment on what the mental state was at the time of the crime, those were often the kind of directions I got.

Q. And mental state at the time of the crime would include sanity, whether a person

A. It could include insanity.

[44] Q. It would include diminished capacity, whether they could form the intent to commit first degree murder?

A. Yes.

Q. That's where the alcohol blackout comes into play. Is that right?

A. That's possible, yes.

Q. But clearly you were not asked to do any kind of mitigation workup as we have discussed tonight?

A. That's correct.

Q. Now, had you been asked to discuss in your report and your evaluation mitigation, would the records I showed you – I think you said the records I showed you might have been useful to you in doing that type of an evaluation?

A. I think they would have been, if that were the question at the time.

Q. In determining the alcohol issue, either in regard to diminished capacity or as potentially a mitigating element in this case, would a family history of drinking have been something that you would have wanted to know about?

A. Yes. For those two questions, yes.

Q. That would include siblings, parents?

[45] A. I think alcohol in anybody in the immediate family would have been important to know.

Q. If I could just show you one more thing, I think we will be through. In the exhibit that I showed you that contained the WRAT scores, you'll see an MMPI scale?

A. Yes.

MR. McINTYRE: Which one is this? For the record, is that the transfer, the initial transfer petition?

MR. WISEMAN: Yes. I'm sorry, I didn't mention that.

Q. I don't mean to be disrespectful, but you're a psychiatrist not a psychologist, do you know how to read one of these?

A. I know the basics of this.

Q. Is that scale and that score in front of you, is that something that would have added to your evaluation at the time in 1988?

A. I think there's some elevated scales, that's always important to know when you're evaluating the mental status of a person. So, yes, it would have been interesting to note that.

Q. Which scales?

A. Here's 100, I think it's a personality [46] disorder scale. There's a paranoia scale, which is 80.

Q. There's a schizophrenia scale?

A. Yes, schizophrenia, which is 90. There's hysteria which is 82. So there's some elevated scores which are certainly abnormal. This is an abnormal MMPI.

MR. WISEMAN: Nothing further, thank you.

MR. McINTYRE: No further questions. I assume that his report and notes are in?

MR. WISEMAN: They're in.

(Deposition concluded 7:20 p.m.)

[47] April 11, 1996

I hereby certify that the evidence and proceedings are contained fully and accurately in the notes taken by me of

the testimony of the within witness who was duly sworn by me, and that this is a correct transcript of the same.

/s/ Mona Denise Ventresca
Mona Denise Ventresca
Registered Professional Reporter
Notary Public

The foregoing certification does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.

Gross #1

PAUL K GROSS. M.D.
ALLENTOWN MEDICAL CENTER
401 NORTH 17TH STREET, SUITE 312
ALLENTOWN, PA 18104-5014

TELEPHONE (215) 820-3900

Attorney Maria L. Dantos
Public Defenders Office
Lehigh County Courthouse
Allentown, Pa. 18101

RE: Ronald Rompilla

Dear Atty. Dantos,

I have had the opportunity to evaluate Ronald Rompilla, a divorced forty year old man, per your request. The purpose of this evaluation is to determine Mr. Rompilla's mental state during the time of the alleged charges. He is charged with criminal homicide and related charges including burglary and receiving stolen property. This report is based upon an evaluation conducted at the Lehigh County Prison, on June 4, 1988.

He is charged with murdering a man who was the owner and bartender of a local tavern, on January 15, 1988. Allegedly, the victim was stabbed to death and the knife in question had part of his thumb print on it. In addition, there was a footprint which matched Mr. Rompilla's foot, found at the murder scene. Mr. Rompilla denies the charges entirely.

On the day of the murder, Mr. Rompilla spent the beginning of the day with his brothers, working as a painting contractor. He left work at lunch time and went to visit several local bars near his home. He returned to his house at dinner time and then went out after supper again, to some local taverns. He was at the scene of the murder, in a bar called the Kozy Korner, staying there until closing time at 2:00 a.m. He said that Mr. Scalon, the owner, let him out at that time and he recalls that there were four people left in the bar. Following this, he ate at a local diner, tried to get into his brother-in-law's home which was locked and then proceeded to find a room in a local motel, having been driven around Allentown for half an hour in a cab.

He does not recall the exact amount of alcohol that he had, nor does he feel that he was intoxicated during that night.

He did not have any motive, according to Mr. Rompilla, to want to hurt the victim. He said he was always on good terms with him.

Mr. Rompilla's past history is significant in that he was incarcerated for fourteen years on charges of rape, burglary, simple assault and escape. He was released on September 29, 1987 and was on parole since then. He spent his time reuniting with his family, working for his brother and he felt he was getting his life back in order.

He does admit to drinking, although not a great amount which was a parole violation. When asked why he did so he replied, "I was in jail for fourteen years, I wanted to live a little".

He denied drinking heavily or regularly. He said he drank on weekends and does not consider himself an alcoholic. He did, however, attend AA while he was in prison. He denies any periods of blackouts, medical problems from his drinking or driving while he was intoxicated. He also denies that alcohol made him do any violent behavior.

As far as drug use is concerned, he uses marijuana occasionally and denies any other hard drugs. When asked if he takes medication of any kind, he replied, "No, I respect my body".

There is no history of any psychiatric illness or treatment for Mr. Rompilla. He has not spoken to a psychiatrist except for a brief interview prior to parole. He has no history of any medical or surgical problems. He has never been in the hospital. He denies any head injuries.

Mr. Rompilla's childhood was uneventful. He was born and raised in Allentown, by his natural parents. His father is alive and his mother is deceased from cancer, two years ago. He is one of nine children. He denies any abuse, physical or sexual, while growing up. He left school in ninth grade because he wanted to work. He says he can read and write.

He started getting into trouble with the police at age fourteen or fifteen. Since 1964, he has been in and out of jails, detention homes, etc. His earlier charges were theft, car theft and burglaries. His most serious charge prior to

this charge was that of rape, which he totally denies and feels that he was "set up by the police".

He is not a formally religious man. He says he believes in religion, "my own way", that he watches Billy Graham on television for inspiration. He has been close to his son since he was released from prison and has a good relationship according to Mr. Rompilla, with his ex-wife. He also says that he is getting support from his father and some of his siblings.

On mental status exam, Mr. Rompilla presents as a calm and approachable forty year old man, who is well muscled and in apparent good physical shape. He seemed open and relaxed during the interview. He did not seem to be purposely holding back on any information during our discussion. He denied the charges and said that he is hopeful that it will be cleared up at the time of trial. He feels that people are judging him on his past behavior and that he has straightened out many of his prior problems. There is no evidence during the interview of any thought disorder or affective illness. His affect is not depressed nor is there excessive anxiety. There is certainly no evidence for any psychotic feeling of hallucinations or paranoia. He is appropriately concerned and upset about his charges but says he can sleep at night, because he has peace of mind. He denies any serious alcohol problems, he says he enjoys it but is under control when he drinks.

In my opinion, although there is certainly a strong element of antisocial behavior in Mr. Rompilla, there is no other evidence at this point in my evaluation, for underlying psychiatric or mental disorder. The possibility does remain however, that Mr. Rompilla while under the

influence of alcohol, can become prone to violent behavior, although he himself strongly denies this.

My recommendation is that this area should be further evaluated before any definite conclusions are drawn.

Sincerely yours,

Paul K. Gross, M.D.

PKG/mwp

[Handwritten Notes Of Dr. Gross Omitted In Printing]

[1] IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Respondent, vs. RONALD ROMPILLA., Petitioner.	:	NO. 682-1988 HON. THOMAS A. WALLITSCH

Wednesday, April 3, 1996
Plymouth Meeting, Pennsylvania

Oral deposition of GERALD COOKE, Ph.D., held at the offices of Gerald R. Cooke, Ph.D., 4 East Germantown Pike, Plymouth Meeting, Pennsylvania, 19462, beginning at 5:55 P.M., before Lynne Bell Coale, Registered Professional Reporter, Registered Merit Reporter, and Notary Public.

Anthony Gravinese & Associates
Philadelphia, Pennsylvania
(215) 487-7750

[2] APPEARANCES:

LEHIGH COUNTY DISTRICT ATTORNEY'S OFFICE
BY: MICHAEL MCINTYRE
Lehigh County Courthouse
Allentown, Pennsylvania 18102
Representing the Commonwealth of Pennsylvania

PENNSYLVANIA POST-CONVICTION
DEFENDER ORGANIZATION
BY: MICHAEL WISEMAN, ESQUIRE,
AND BILLY H. NOLAS, ESQUIRE
Suite 501, the Lafayette Building
437 Chestnut Street
Philadelphia, Pennsylvania 19106-2414
Representing Mr. Rompilla

---

[3] INDEX

WITNESS

GERALD COOKE, Ph. D

EXAMINATION BY	PAGE
By Mr. Wiseman	4, 26
By Mr. McIntyre	14

EXHIBITS

NO.	DESCRIPTION	PAGE
19	Dr. Cooke' s CV	31
20	1988 WAIS, reference Mr. Rompilla	31

---

[4] MR. WISEMAN: The record should reflect we're here for a deposition of Gerald Cooke, Ph.D., in regard to post-conviction litigation in the Ronald Rompilla case.

The parties agree that objections to questions will be made on the record and objections will not be preserved, or reserved I should say.

. . . GERALD COOKE, Ph.D., having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WISEMAN:

Q. Doctor, what is your occupation?

A. I'm a clinical and forensic psychologist.

Q. Directing your attention to 1988, did you have any involvement in the case of Commonwealth versus Ronald Rompilla?

A. Yes.

MR. WISEMAN: Could we have [5] marked as an exhibit a letter – I guess we're up to 19.

MR. McINTYRE: Wasn't this already marked as D-2?

MR. WISEMAN: You're quite right.

MR. McINTYRE: Or D-3, one or the other.

MR. WISEMAN: You're right, absolutely right. We will not have this marked.

BY MR. WISEMAN:

Q. What I'd like to show you, Doctor, is what has been previously marked in this case as Defendant's Exhibit 3 and ask you if you recognize it.

A. Yes. That's my letter to the Public Defender, Maria Dántos.

Q. In the Ronald Rompilla case?

A. Yes.

Q. Now, have you conducted a search of your files in regard to Mr. Rompilla?

A. Yes.

Q. And other than the letter I just showed you, do you have any other material with regard to this case?

[6] A. No. It's pretty standard in our office that, after three years, if there's nothing happening in the case or no reason to preserve it, we keep the report but we get rid of all the things in the file, just the matter of preserving space.

Q. Now, you were retained by the defense in this case?

A. Yes.

Q. What were you retained to do?

A. I was asked to do a psychological evaluation of Mr. Rompilla. And I don't remember the specific referral questions, since I don't have the rest of the file.

Q. What testing did you do in this case?

A. Okay. I can only tell you what I probably would have done, again, without the file. But it's a pretty standard procedure. I'd say I'm 99 percent certain I did it.

I would have given him an MMPI, I would have given him an Incomplete Sentence Blank, the Rorschach inkblot

technique, and any of the two or three subtests of the verbal subscale of the Wexler Intelligence – Adult Intelligence WAIS Revised, the WASR, W-A-S-R.

[7] Q. Do you recall if you did any neuropsychological testing in this case?

A. I know I did not, other than the fact that the two or three subtests of the WASR would be part of a neuropsychological battery, but certainly by themselves would just constitute a rough estimate of intellectual function.

Q. I'd like to show you what's been marked previously in this case as Defendant's Exhibit 8 and direct your attention to the middle of the first page of the exhibit.

A. Yes, I see that.

Q. Now, in particular, directing your attention to the IQ testing conducted in 1957, the verbal score of 75; and, again in 1959, with a full scale of 64; and I turn the page and direct your attention to the 12/61 full-scale test score of 69.

A. I see it.

Q. What do those scores say to you as a clinical psychologist?

A. Well, they say to me that he was measured in the retarded to borderline range of intellectual functioning.

Q. Which tests show a retarded range?

[8] A. Well, anything below 70 would be considered to be the retarded range. So the verbal IQ of 75 in 1957 was borderline. The verbal IQ of 61 in 1959 would be considered retarded. Performance IQ of 75 would be

considered borderline. The full scale of 64 would be considered retarded.

Turning to 1961, verbal of 69 is retarded, performance of 75 is borderline, and the full scale of 69 is retarded.

Q. Now, the records I just put in front of you, did you have those records in 1988?

A. No.

Q. Generally speaking, when you see IQ testing in the range reflected in these records, what do you consider as a clinical psychologist? What's your next step?

A. My next step would be to conduct a full intellectual evaluation, what I call an organic screening. That is, I would use some quick measures that you can use in a prison setting that are part of the neuropsychological battery. Two of them are called Trails A and B. And, then, I might use the tapping subtest of the Raitan, R-A-I-T-A-N, battery.

Q. Now, when you say you do full intellectual [9] testing, what would that involve?

A. That would mean, instead of just doing two or three subtests of the verbal subscale of the WASR, I would give the entire test, which consists of five verbal scales and six performance scales.

Q. Is the –

A. I'm sorry, the other way around, six verbal and five performance.

Q. In the WASR the adult version of the WISC?

A. It is.

Q. Now, I take it from your answer that you would be looking into whether or not there's a genetic source for the low IQ testing.

A. That's taking it a step too far initially.

Q. Okay.

A. The first step would simply be to determine what the current intellectual functioning is. Then, based on that, I would use records and whatever additional testing I felt necessary to try and determine the reasons why an individual had a low IQ.

Q. What are some of the potential reasons why someone would have a low IQ?

A. There are a lot of possible reasons.

One is simply the normal bell curve, [10] they fall at the lower end. Another would be organic brain damage. Another would be emotional disturbance, because that can influence intellectual functioning.

So these are three general categories.

Q. When you say "emotional disturbance," are there causes that you would look for in terms of emotional disturbance?

A. Well, if you're talking about a child, I think you would look at the family situation, whether or not it was an abusive situation, a dysfunctional situation. You'd want to see more about the children's adjustment – the child's adjustment in school.

Q. Now, when you say, "If it's a child," would that be the case if you're looking at childhood records of an adult?

A. Yes. That's what I meant by, "if it's a child." If the scores were obtained when that person was a child, you'd want to find out what was going on when the person was a child in order to sort out the possible reasons.

You'd also get historical information: You know, what was the – including, Was the pregnancy difficult? Were there any abnormalities? things of that nature.

[11] Q. Why would you specifically do organic neuropsychological screening, given these particular test scores?

A. Well, because one of the alternatives would be an organic brain syndrome, which is now called a cognitive disorder. It's a change of terminology.

I would do the screening to see if there was anything that would suggest that it was organic rather than one of the other causes. And if I found on the screening that the person was impaired, then I would want to go on and do the full battery, the full neuropsychological battery.

Q. And, again, that screening would be Trails A and B, would include Trails A and B?

A. Yes, and the Raitan tapping test, usually, I use. But there are, then, six more Raitan tests that you would use if you went on to do the full neuropsyche battery.

Q. Now, if you were to administer the Trails A and B and the person came up on that as impaired, would that have caused you to do the full neuropsyche battery?

A. Again, I'd want to look at the overall pattern. I'd want to look at the pattern of scores [12] within the intelligence test; I'd want to look whether there was impairment on Trails and/or on the tapping.

One thing by itself wouldn't necessarily. But if those three things were pretty consistently pointing in the direction of organicity, I'd want to do the full battery.

MR. WISEMAN: I actually don't have much more. I just need one moment to talk with my colleague, if that's all right.

MR. McINTYRE: Sure.

(Discussion off the record.)

BY MR. WISEMAN:

Q. I want to show you another exhibit, Doctor, which has been previously marked in these proceedings as Defendant's 7. Just to give you the context, these are test results that were administered in 1975 to Mr. Rompilla. I'd like to direct your attention to the WRAT scores, W-R-A-T, at the left of the exhibit.

A. Right.

Q. What do those WRAT scores tell you about Mr. Rompilla?

A. Well, he was low average in reading, but he would be considered developmentally delayed in terms of [13] his spelling and arithmetic scores.

Q. And are those WRAT scores consistent with a learning disability?

A. Yes.

Q. And what is the interrelationship between learning disability and organicity?

A. There may or may not be one.

Learning disability can occur independently of organicity, or it may be due to and a function of organicity.

Q. If you were presented with someone who had these scores, would you consider organicity as a potential cause for those scores?

A. Definitely.

Q. Is there an interrelationship or relationship between learning disability and abuse as a child?

A. That's an interesting question.

Again, often children who do not come up to grade level, the reason is some sort of dysfunctional family situation and/or abuse. But there can be many other reasons, as well totally – there are children with learning disabilities who come from wonderful families. So it's one possible cause.

[14] Q. Is that something, given the WRAT scores, that you would want to explore in this case?

A. Again, once you're aware that there are some sort of intellectual or cognitive deficits, it's helpful to try and sort out the reasons for them as part of your understanding of the individual and how that bears on a legal case.

MR. WISEMAN: Doctor, I have nothing further. Thank you.

EXAMINATION

BY MR. McINTYRE:

Q. I have some questions for you, Doctor.

A. Sure.

Q. First of all, we skipped qualifications entirely. Let's get a little bit on the record about your qualifications.

A. Do you want me to give you a CV?

Q. Yes. Do you have that? We can get that later on.

Now, let me ask about your experience back in 1988.

Were you doing these MSEs a lot back [15] then?

A. Okay. First of all, MSE really is what a psychiatrist does, a Mental Status Exam. The psychological evaluation includes an interview which parallels the Mental Status Exam but goes far beyond that in terms of the psychological testing.

The answer to your question is, yes, I was doing those – at that point I had been doing them routinely for over 20 years.

Q. And had you been doing them in capital cases, as well as other type of criminal cases?

A. Yes, as well as noncriminal cases.

Q. Had the Public Defender's Office of Lehigh County been – I don't know if it's correct to call them a

client – but one of the avenues for you to receive clients, through the Public Defender's Office?

A. Well, I don't remember specifically. They probably had retained me in prior cases.

Q. Okay.

A. But I don't remember specifically.

Q. Now, normally, you get a referral letter from the person such as the Rompilla's attorneys in this case, I take it.

A. Not necessarily. Actually, more often than [16] not, the first contact is by phone. And we would – we have something we call a contact sheet, where we write down the basic information, the basic – you know, the name of the person, the attorney, the nature of the case, the kinds of questions and issues that are at hand.

Q. If there was such a thing in this case, it would have been thrown out after three years of inactivity?

A. Yes.

Q. I take it you have no actual recollection of this particular case? Or do you?

A. Vaguely. Not really any specificity.

Q. You went up to Lehigh County Prison and interviewed Mr. Rompilla?

A. Yes.

Q. And tested him there?

A. Yes.

Q. Do you know exactly what you were asked to do by the Public Defender's Office?

A. No.

The reason is, in addition to just the sort of referral for psyche evaluation, I will usually spell out with the attorney, Is there an initial [17] competency? Is there a question of insanity? Is the disposition – is it death penalty litigation? And I will go over that.

So I would have done that, but I don't recall what the answers were to those questions.

Q. All right. So there's no way for you to tell whether or not you did death penalty mitigation-type testing at that time?

A. Well, if I knew it was a death penalty case, which I believe I did, then, I would have – that would have been one of the questions in my mind: whether he showed any mental illness, emotional disturbance, or other sorts of problems that might be a psychological mitigating circumstance.

Q. What were the standard tests that you were doing back then in 1988 on that issue?

A. Well, the same battery of tests I mentioned before.

Q. All right. The MMPI?

A. Right.

Q. Rorschach?

A. Yes.

Q. Incomplete Sentence and the Wexler?

A. Well, just some subtests of the Wexler [18] initially, unless I found something that would make me pursue it.

Q. All right. I get confused on these things. The Wexler is an IQ test?

A. Yes.

Q. And if he had produced – if his results were in the mentally-retarded area from your test, would you have followed that up?

A. Yes.

Q. All right. And you would have followed it up in the way that you explained on direct examination today?

A. What I would have done, if I had gotten mentally-retarded scores on the subtests I gave him, I would have gone on to give the full IQ test, at the very least, and, then, probably a couple of organic screening [sic].

The problem there is, I would have already been there without the organic tests. I would have had the full Wexler with me. I would have gone on and done the full IQ test. And, then, if I found anything suspicious, I would have called the attorney and said, "I think we need to do a neuropsyche test."

Q. Is there any way we can tell, sitting here [19] now eight years later, that his test results were not in that mentally-retarded area, or they were and you did all these things?

A. Yes.

Q. We can?

A. Yes.

Q. Okay.

A. I know that I did not obtain scores in the mentally-retarded area at the time that I tested him, or I would have gone further. But I don't know exactly, you know, what those scores were.

Q. Okay. Now, do you have an opinion to a reasonable degree of psychological certainty as to which is more reliable: the test scores that you do or you did on this 40-year-old man in 1988, or on 30-year-old school scores – strike that – IQ scores that are in school records as produced by counsel today?

A. I don't think –

MR. WISEMAN: Objection to the form.

BY MR. McINTYRE:

Q. You may answer.

A. I don't think you can talk about reliability [20] per se.

Assuming they gave the full WISC, which is – and I only give part of the WAIS, actually, their scores would be more reliable than the ones I obtain, because I only gave part of the test.

But intellectual functioning at any given point in time is a function of many factors, and you would have to look at the variability among the different subtests to know what factors were leading to problems.

Q. Back in 1988, was it a standard for you to obtain school records of people such as Mr. Rompilla?

A. That depended.

What I would do when first talking with the attorney would be, among other questions, ask them if there was any reason for them to believe that their client was retarded or had organic brain damage or anything of that nature. That would have been a standard question.

Again, I can't swear to you that I said that, but I'm 99 percent sure I would have because that's part of the checkoff list always. When the evaluation comes in, I want to know whether I'm doing a psyche evaluation or a psyche – neuropsyche [21] evaluation. So I would almost always ask that question.

Q. Are you able to say right now, not having the scores that you got from your own IQ tests, whether or not, if you had the school results, whether you would have done anything differently?

A. Yes, I am able to say that.

With the school results, I would have definitely given the full IQ test.

Q. No matter what yours were?

A. No matter what those three were, because there could be marked differences. That would have been a red flag and that would have been something I would have pursued.

Q. On D-7, which were these prison record scores, you looked at the WRAT tests here.

Did you give any tests that would be similar to a WRAT?

A. No.

Q. All right. Also on that, do you see the Beta IQ score of 93 –

A. Yes.

Q. – average? I guess that puts him somewhere in the average?

[22] A. That does.

Q. If you had gotten that or if you had that, would that have made you do any more testing at all?

A. You mean –

Q. If you had had this record at the time of your testing.

A. Just this record?

Q. Yes.

A. Well, I would have been concerned about the spelling and arithmetic and would have gone back to the attorneys and said, you know, "Is this guy a special education?" "Did he have developmental problems?" and so on.

The Beta is a very iffy test. It's a very quick screening device. It takes about 15 minutes, and it involves only performance IQ, not verbal IQ. It is much less reliable than things like the WISC or the WAIS or other full IQ tests. So that wouldn't move me one way or another.

But the spelling and arithmetic scores would concern me.

Q. The tests that you did do, the four that we talked about, were those in conformity with the accepted standards at that time for psychological [23] evaluation?

A. Sure.

Q. Do you recall any results of – particularly, the MMPI, do you recall –

A. I can't –

Q. – anything about that?

A. I can't give you specifics. I don't remember what the profile was or – at all.

Q. All right. You wouldn't be able to recall whether or not, based on the MMPI scores, Mr. Rompilla was found by you to be a sociopath?

A. I can guess from my letter – and that's all that I'm doing – that I did not find any, you know, major mental illness that would have been a mitigating factor. I can't go much further than that.

Q. All right.

A. He might have been some sort of personality disorder, but I can't say specifically that it would have been what we called sociopath then, what we call now antisocial. It might have been any one of a number or a mixture.

Q. Sociopath now is called antisocial personality?

A. Disorder.

[24] Q. A disorder, right.

You mentioned that there were a lot of different reasons why a person could have a low IQ.

A. Yes.

Q. Are any of them rectifiable?

A. Sure.

Q. All right. I take it if there was some emotional problems at the time, that might result in a low IQ in a child, but, later on, if he got out of that environment, his IQ could rise?

A. That's fair, yes.

Q. There's no way for us to know whether or not your test results of Mr. Rompilla's IQ indicated a higher score because of the change in his life or a change in his life?

A. I don't know what I thought back then. But, of course, I didn't have the comparison, so there's no way to know.

Q. Do you remember whether or not the Public Defenders, Miss Dantos or Mr. Charles, showed you a report from Paul Gross that was done in June of 1988?

A. I don't remember.

Q. All right.

A. Again, I don't list what records I reviewed. [25] Had I done a full report, I would have.

Q. And you worked with Robert Sadoff, Dr. Robert Sadoff, occasionally, didn't you, back then in 1988?

A. Yes. Still do, occasionally.

Q. Do you know that he was brought into this case as well? Did you know that?

A. I don't recall.

Q. Nothing in your file indicates that?

A. Again, I only have the one letter.

I don't think he's CC'd on that. I don't know.

Q. That letter that you're looking at from you, is there a reason why you didn't issue a report, or was there a reason back then that you didn't issue a report every time you did a psychological evaluation?

A. Yes. I always convey the findings verbally first, and then I leave it to the attorney whether they want a report or not.

In this case – and I know because I know what it means when I generate that kind of letter – I didn't have anything that I felt could be helpful, and they just wanted simply a letter that could document that I saw him for the file, and that's [26] what they got.

MR. McINTYRE: All right. I have no further questions. Thank you, Doctor.

MR. WISEMAN: Just a couple follow-up, Doctor.

EXAMINATION

BY MR. WISEMAN:

Q. You mentioned on Mr. McIntyre's exam about special education.

Is special ed also the kind of red flag that would cause you to – a history of special education the kind of red flag that would have caused you to look towards organicity?

A. Well, again, it would have certainly caused me to investigate further, and that would have been one of the possible things I would be looking for.

Q. Now, on the Beta exam, in your experience, do the people tend to score higher or lower or about the same on a Beta as they do on a WAIS?

A. It depends on the type of person. But, by and large, they tend to score high.

Q. Do you have any estimate in your mind of how [27] much higher?

A. Frankly, I don't know anybody who's used the Beta except in an institutional setting, like in a state mental hospital or prison, where you want to do a lot of people quickly. You can do it with ten people in the room, that kind of thing.

I don't know anybody who would use it on a routine basis in an individual practice.

Q. Now, when you were asked on direct about what you would do to screen for organicity, you talked about a full IQ and you would do two screening tests, Trails A and B, and the finger tapping and Raitan.

A. Right.

Q. On cross-examination, I think you said you'd do a full IQ.

Did I mishear you or did you –

A. I think the question was somewhat different, as –

Q. Oh, was it?

A. – I recall. I mean, I think, basically, I don't remember the context of that question.

Q. Okay.

A. It may have been that if my scores had come out in the retarded range, what would I have done, and [28] I would have gone on to do a full IQ. Then, if the pattern on the full IQ, along with records that I didn't have, suggested organicity, I would start – I would do the organic screening.

But I think what I mentioned is I would not have gone prepared to do a neuropsyche. So I would have finished the IQ, called up the attorney, and said, "Look, I think there's organicity here, it's your call. Do you want me to go back and conduct the full neuropsyche battery?"

Q. Is an MMPI a neuropsychological test?

A. No.

Q. Is sentence completion neuropsychological?

A. No.

Q. Just so the record is clear, do you have any test results at all in your file at this point on Mr. Rompilla?

A. No.

Q. Do you recall counsel giving you any specific instructions at all or any theory of mitigation or any specific testing requests?

A. I don't recall.

As I say, if I knew it was a death penalty case – and I believe I did – I'm familiar with [29] the mitigating factors in a death penalty case, and I would have considered those in the process of my evaluation. But I don't know that they specifically gave me anything.

Q. In your experience as a forensic psychologist who's worked on capital cases, is organicity a mitigating factor that you've testified about in these cases?

A. Yes. It is a mental defect that certainly qualifies as a mitigating factor.

Q. How about child abuse; is that a mitigating factor?

A. That sort of comes in under the "other."

It often helps explain, certainly, to a jury how the person got to where they are, why they are the types of people they are, and it's then up to a jury to consider whether that's a mitigating factor or not. But that's certainly – where I find a history of abuse, that's certainly something that is a possible item to be presented.

Q. When you say "other," are you referring to the catchall mitigator?

A. Yes.

Q. Now, in your experience, is child abuse [30] sometimes a causative factor for emotional disturbance?

A. It certainly can be, yes.

Q. And, in that sense, could child abuse with a resulting emotional disturbance be one of the mental-health mitigators under the statute?

A. Well, that would depend if it met the specific mental health, you know, criteria as stated. So it might or might not.

Q. And, finally, I don't have the document with me, but there is evidence in this case that Mr. Rompilla scored a 79 on WAIS in 1988 after the trial proceedings when he was admitted to the Department of Corrections.

Assuming for the while that that score is in the ball park of what he would have scored on the WAIS, had you given him one in 1988, is that the type of score, with the other information we've discussed, that would have caused you to look at organicity?

A. With the other information in the records that I didn't have, yes. By itself, not necessarily.

MR. WISEMAN: Okay, nothing further.

MR. McINTYRE: I have no further questions. Thank you, Doctor.

[31] (Witness excused.)

(Discussion off the record.)

MR. WISEMAN: Counsel and I have had a discussion off the record and have agreed that defense counsel will provide to the Commonwealth a copy of the 1988 WAIS, W-A-I-S, score as reflected in the Department of Correction records, and we will forward it to the court reporter to be marked as Exhibit 20. I believe it's a one-page exhibit. It might have two pages.

Anything else?

MR. McINTYRE: No, that's fine.

(Exhibits 19 and 20 marked for identification.)

(Proceedings adjourned at 6:35 P.M.)

[32] CERTIFICATE

I HEREBY CERTIFY that the proceedings, evidence, and objections are contained fully and accurately in the stenographic notes taken by me upon the deposition of GERALD COOKE, Ph.D., on Wednesday, April 3, 1996, and that this is a true and correct transcript of same.

/s/ Lynne B. Coale
Lynne Bell Coale, RPR, RMR,
and Notary Public

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying reporter.)

NAME ROMPILLA, Ronald NUMBER S-2057 DATE 12/9/88

STABILITY 3 INTELLIGENCE RATING: Low Average

PSYCHIATRIC HISTORY:

None reported.

PSYCHOLOGICAL REPORT:

Test Administered:

1. Revised BETA II Examination
2. Jastak Wide Rage Achievement Test (WRAT) Reading Only

READING SCORE	40	S.S.	67	PERCENTILE	1	G.E.	58
SPELLING SCORE		S.S.		PERCENTILE		G.E.	
ARITHMETIC SCORE		S.S.		PERCENTILE		G.E.	

3. Bender-Gestalt
4. Projective Drawings
5. Minnesota Multiphasic Personality Inventory (MMPI)

SCALE:	?	L	F	K	Hs	D	Hy	Pd	Mf	Pa	Pt	Sc	Ma	Si
T-Score														

(K Corrected Where Applicable)

1082

OTHER: WAIS Digit Span, Similarities: 79

ANALYSIS OF INTELLIGENCE AND INTELLECTUAL FUNCTIONING:

Mr. Rompilla earned a WAIS Score of 79. This score falls within the borderline range of the mental ability according to the Beta II classification. The obtained rating is not viewed as a reasonably accurate estimate of his intellectual potential. Mr. Rompilla is housed in the RHU as a capital case. Therefore he did not take the usual diagnostic battery. Beta testing on file from 1975 and 1976 indicates low average intelligence.

ANALYSIS OF PERSONALITY MAKE-UP:

This is a 40 year old inmate who states that he was paroled from SCI-Huntington in 9/87 after serving about 14 years in jail for rape and escape. He begins today's session by announcing: "My lawyer advised me not to say anything; they're supposed to get me off death row." Told the purpose of this interview he responds: "I've been examined by psychiatrists (for reasons related to the present case) and I'm okay."

EXHIBIT 19

GERALD COOKE, Ph.D. &
MARGARET COOKE, Ph.D., P.C.
CLINICAL AND FORENSIC PSYCHOLOGY
LICENSED PSYCHOLOGISTS
4 EAST GERMANTOWN PIKE
PLYMOUTH MEETING, PA 19462

GERALD COOKE

CURRICULUM VITAE

PRESENT POSITIONS

Private practice in Clinical and Forensic Psychology. Forensic Psychodiagnostic Evaluation, Neuropsychological Evaluation. Consultation with attorneys, court testimony, Psychotherapy.

Consultant, Norristown State Hospital Psychology Department – Forensic and Neuropsychological Evaluation; 1978 to present.

Lecturer in Law and Psychiatry, Villanova University Law School, January 1987 to present.

Psychological Consultant, Joseph J. Peters Institute (Psychological evaluation of alleged sex abusers); April 1993 to present.

Consultant, Philadelphia City Solicitors Office/Police Department: Revision of Psychological Screening Process to eliminate adverse impact on minority group members.

CERTIFICATIONS

Licensed Psychologist, State of Pennsylvania Number PS-001778-L.

Certified as an Instructor by the Municipal Police Officers' Education and Training Commission, Number MPI 1759.

Diplomate, American Board of Forensic Psychology, part Chairperson of the Board's Continuing Education Committee; 1979-81; Examiner for the Board, 1979-present; Regional Examination Chairperson, Northeastern U.S., 1982-83.

Diplomate, American Board of Professional Psychology.

EDUCATION

9/59 - 6/63	University of Chicago, Chicago, Illinois, B.A. Psychology.
9/63 - 6/66	University of Iowa, Iowa City, Iowa, M.A., Ph.D., Clinical Psychology.
8/66 - 8/67	Post-Doctoral Internship, Norristown State Hospital, Norristown, PA.

PROFESSIONAL MEMBERSHIPS

Fellow, American Academy of Forensic Psychology.

Member, American Psychological Association.

Member, American Psychology-Law Society.

Charter Member, Division of Psychology and Law, American Psychological Association.

Resource Professional, American Psychological Association Committee on. Legal Issues.

Member, Southeastern Pennsylvania Mental Health Association. Member, Division of Children, Youth and Family Service, American Psychological Association.

Member, Subcommittee on the impact on the legal System on Women, Montgomery County Commission on Women.

Member, Division of Clinical Neuropsychology, American Psychological Association.

GRANTS AND AWARDS

Visiting Scientist, American Psychological Association, 1972.

NIMH Small Grant MH22267-01, Analysis of the Non-Professional Therapist Program, 6/16/72 - 5/31/73.

NIMH Small Grant MH12195-02, Principal Investigator on a $9,000, three-year (1972-1975) grant to evaluate the Paraprofessional Training Program at the Salvation Army Harbor Light Alcohol Treatment Program, Detroit, MI. Three-year continuing grant, 1975-1978.

Project Advisory Committee, $120,000 grant to the Forensic Sciences Foundation for a study of Utilization of Psychiatric and Psychological Assessments by Criminal Court Judges, 1980-1981.

Consultant, $57,000 NIMH Crime and. Delinquency grant for training CMHC personnel in Forensic Psychiatry/ Psychology, 1980-1982.

Meritorious Service Award, American Board of Professional Psychology, 1993.

PREVIOUS POSITIONS

1/68 - 6/71	Research Consultant, Hermann Kiefer Hospital and Sinai Hospital, Detroit, MI.

11/70 - 7/72	Group Leader of Black-White encounter groups of Police Officers, Detroit Police Department.
9/72 - 6/73	Group Leader of encounter groups on White supervisors and Black "new hires" for Detroit Edison and Michigan Bell Telephone.
1/68 - 8/73	Consultant and Acting Director of Psychology, Center for Forensic Psychiatry, State of Michigan.
9/67 - 9/73	Assistant Professor of Psychology, Wayne State University, Detroit, MI.
9/71 - 8/73	Consultant, V.A. Hospital, Allen Park, MI. Behavior Therapy, Forensic Psychology.
1/68 - 8/74	Private Practice, Detroit MI.
4/74 - 12/75	Psychological Consultant, State Correctional Institution at Graterford.
1976	Instructional Consultant, Bucks Count Department of Mental Health, Crisis Intervention Training Program for Police.
6/75 - 8/77	Clinical Evaluator of Juveniles for the Youth Services Bureau Project at the State Correctional Institution at Camp Hill.
6/71 - 7/78	Consultant, Detroit Salvation Army Alcohol Treatment Program.
8/73 - 12/78	Chief Forensic Psychologist, Norristown State Hospital, Norristown, PA.
1974 - 1979	Member of Norristown State Hospital Suicide Committee.

1/79 - 1/80	Consultant, Mental Health Advocates of PA.
12/78 - 4/81	Consultant, Norristown State Hospital Juvenile Forensic Unit.
1978 - 1994	Faculty, Continuing Education Program in Psychiatry. The Department of Psychiatry of the School of Medicine of the University of Pennsylvania; 1978 to 1994.
1/82 - 12/83	Consultant, Institute of Pennsylvania Hospital Neuropsychological and Forensic Evaluation.
1975 - 1985	Instructional Consultant, Temple University Center for the Administration of Justice. Selection and Training Programs for police departments; course in crisis intervention.
1981 - 1985	Affiliate Staff, Eugenia Hospital, Lafayette Hill, PA. Neuropsychological and Forensic Psychodiagnostic Evaluation.
1982 - 1989	Consultant, insight Centers – Professional Rehabilitation Services, Psychological-Vocational Evaluation.
1984 - 1988	Consultant, Placement Services, Inc. – Professional Rehabilitation Services, Psychological-Vocational Evaluation.
1989	Off Campus Clinical Practicum Supervisor, Department of Psychology, Temple University.

ARTICLES

1. Cooke, G. the Efficacy of Two Behavior Therapy Procedures: An Analogue Study. *Behavior Research and Therapy*, 1966, *4*, 17-24.

2. Boxer, A., Sadoff, R., & Cooke, G. the Court and the State Hospital: Model for a Therapeutic Relationship, Mimeo, 1967.
3. Cooke, G. Evaluation of the Efficacy of the Components of Reciprocal Inhibition Psychotherapy. *J. Abnorm. Psychology*, 1968, *73*, 464-467.
4. Cooke, G. The Court Study Unit: Patient Characteristics and a Comparison of Patients Judged Competent and Incompetent. *J. Clin. Psychology*, 1969, *25*, 140-143.
5. Chodorkoff, B. & Cooke, G. Development of an Inventory to Measure Psychosexual Development. *Psychol. Reports*, 1970, *27*, 186.
6. Cooke, G. & Chodorkoff, B. The Reliability of Classification of Behaviors within Psychosexual Stages. *Psychol. Reports*, 1970, *26*, 751-754.
7. Chodorkoff, B. & Cooke, G. The Attitudes of Medical Students Toward Mental Illness: An Abstract. *Proceedings of the 10th Annual Conference on Medical Education*, 1971, 183.
8. Cooke, G. & Jackson, N.L.P. Competency to Stand Trial: The Role of the Psychologist. *Professional Psychology*, 1971, *2*, 373-376.
9. Cooke, G. & Robey, A. The MMPI: A Case Study in Dissimulation. *J. Consult. Clin. Psychol.*, 1971, *36*, 355-359.
10. Cooke, G., Johnston, N. and Pogany, E. Factors Affecting Referral to Determine Competency to Stand Trial. *American Journal of Psychiatry*, 1973, *130*: 8, 870-875. Also in Messinger, et. al., (Eds) 1973 *Crime and Justice Annual*, Aldine, Chi.
11. Johnston, N. & Cooke, G. Relationship of MMPI Alcoholism, Prison Escape, Hostility Control and

Recidivism to Clinical Judgements. *Journal of Clinical Psychology*, 1973, *29*, 32-34.

12. Pierce, D., Cooke, G. & Frahm, P. Sort-Score Correlates of Schizophrenia *Journal of Personality Assessment*, 1973, *37*, 508-511.
13. Cooke, G., Pogany, E. & Johnston, N. A Comparison of Blacks and Whites Committed for Evaluation of Competency to Stand Trial on Criminal Charges. *Journal of Psychiatry and Law*, Fall, 1974, 319-337.
14. Wehmer, G., Cooke, G. & Gruber, J. Evaluation of the Effects of Training of Paraprofessionals in the Treatment of Alcoholism: A Pilot Study, *British Journal of Addiction*, 1974, *69*, 33-39.
15. Cooke, G. Manual for the Use of the MMPI in the Correctional System, Mimeo, 1975.
16. Cooke, G. Basic Helping Techniques, Mimeo, 1975.
17. Cooke, G., Wehmer, G. & Gruber, J. Training Paraprofessionals in the treatment of Alcoholism: Effects on Knowledge, Attitudes, and Therapeutic Techniques. *Journal of Studies on Alcohol*, July, 1975, *36*, (7), 938-948.
18. Cooke, G. & Sikorski, C. Factors Affecting Length of Hospitalization in Persons Adjudicated Not Guilty By Reason of Insanity. *Bulletin of the American Academy of Psychiatry and Law*. 1975, *2*, 251-261.
19. Cooke, G. & Pogany E. The Influences on Judges' Sentencing Practices of a Mental Evaluation. *Bulletin of the American Academy of Psychiatry and Law*. 1975, *3*, 245-251.
20. Gruber, J., Wehmer, G. & Cooke, G. Training Paraprofessionals in the Treatment of Alcoholism: Differences in Effects Due to Prior History of Alcohol and Drug Abuse. *British Journal of Addiction*, 1976, *71*.

21. Cooke, G. & Thorwarth, C. Prediction of Elopement of Mentally Ill Offenders Using the MMPI. *Criminal Justice and Behavior*, 1978, *5*, 151-157.
22. Cooke, G. Behavioral Treatment of Rapists. *The Prison Journal*, 1978, *58*, 47-52. Reprinted in *The Inventory of Marriage and Family Literature*, St. Paul; University of Minnesota, Vol. 5, 1979.
23. Cooke, G. Training Police Officers to Handle Suicidal Persons, *Journal of Forensic Sciences*, 1979, *24*, 227-233.
24. Cooke, G. The Role of the Psychologist in Evaluations of Criminal Competency and Responsibility, *Clinical Psychology*, Philadelphia Society of Clinical Psychologists, 1981.
25. Cooke, M. & Cooke, G. An Integrated Treatment Program for Mentally Ill Offenders: Description and Evaluation, *International Journal of Offender Therapy and Comparative Criminology*, 1982.
26. Male, T.C. & Cooke, G. The Psychologist and Joint Custody, in Pennsylvania Bar Institute, *Custody Update: The New Shared Custody Act and New Custody Rules*, Pennsylvania Bar Institute, 1982.
27. Dietz, P.E. Cooke, G., Rappeport, J.D. & Silvergleit, I.T. Psychojargon in the Psychological Report: Ratings by Judges, Psychiatrists and Psychologists, *Behavioral Science and the Law*, 1983.
28. Cooke, G. The Civil Competency Evaluation: Guidelines for Objective Assessment, *American Journal of Forensic Psychology*, 1985, *3*, 10-20.
29. Cooke, G. Psychological Evaluations in Child Custody Cases, in Pennsylvania Bar Institute, *Custody Update: Support, Witness and Discover*, 1987.

30. Cooke, G. Psychological Evaluation in Child Custody Cases in Pennsylvania Bar Institute, *Child Custody Litigation*, Harrisburg, PA 1990.

31. Cooke, G. & Cooke, M. Dealing with sexual abuse allegations in the context of custody evaluation, *American Journal of Forensic Psychology*, 1991, 9, 1-13.

32. Cooke, G. Legal Regulation of Child Sexual Abuse Evaluation and Testimony, *American Journal of Forensic Psychology*, Vol, 10, #4, 1992.

33. Cooke, G. Psychological Evaluation in Child Custody Cases, Pennsylvania Bar Institute, *Winning with Expert Witnesses and Discovery in Family Law Litigation*, Harrisburg, PA, 1994.

34. Cooke, G. The role of the mental health professional in harassment/discrimination cases: A moderate perspective, *American Journal of Forensic Psychology*, in press.

BOOK CHAPTERS

1. Cooke, G. Behavior Therapy with Stutterers, in E. Anderson, *Treatment of the Young Stutterer*. Wayne State University Press, Detroit, Michigan, 1969.

2. Cooke, G. Psychological and Neuropsychological Evaluation. Chapter in *Psychic Injuries* (M.E. Lewis, R.L. Sadoff, Eds.) Courtroom Medicine, Vol. 12, Matthew Bender, New York, Second Edition, 1978. (Five Chapters in the 1979 reprinting.)

3. Cooke, G. Legal Issues, Chapter in G. Tyron, (Ed) *The Professional Practice of Psychology*, Ablex, Norwood, NJ., 1986.

4. Cooke, G. Forensic Psychology; Chapter in *Wiley Encyclopedia of Psychology*, R.J. Corsini (Ed.), Wiley, NY 1984.

5. Cooke, G. Forensic Psychology, Chapter in Cyril H. Wecht (Ed.) *Forensic Sciences*, Matthew Bender, NY 1984.

6. Cooke, G. Parricide, Chapter in Owen, C.E. & Leibman, F.H. (Eds.) *Counseling Offenders: A New Perspective*, in press.

BOOKS

1. Cooke, G. (Ed.) *The Role of the Forensic Psychologist*. Charles C. Thomas, Springfield, IL, 1980.

BOOK REVIEWS

1. Cooke, G. Book Review of Therapeutic Communities in Corrections by Hans Toch, in *The Journal of Psychiatry and Law*, Fall, 1981, 345-347.

2. Cooke, G. Book Review of Clinical Handbook of Psychiatry and the Law by Thomas G. Gutheil and Paul S. Appelbaum in *The Journal of Psychiatry and Law*, Summer, 1984, 285-288.

3. Cooke, G. Book Review of Advances in Forensic Psychology and Psychiatry, Vol. I, in *The Journal of Psychiatry and Law*, 1986.

4. Cooke, G. Book Review of Custody Disputes: Evaluation and Intervention, Edited by Ruth S. Parry, et al., in *The Journal of Psychiatry and Law*, Summer, 1987, 307-310.

5. Cooke, G. Book Review of Handbook of Forensic Psychology, Edited by Irving B. Weiner and Allen K. Hess, in *Contemporary Psychiatry*, 1988, 7, 1, 64-66.

6. Cooke, G. Book Review of Evaluating Children for the Courts using Psychological Tests, Edited by Stanley

Kissel and Nelson W. Freeling, in *The Journal of Psychiatry and Law*, Winter 1990. 453-457.

7. Cooke, G. Book Review of Assessment and Prediction of Suicide by Ronald W. Maris, et al., in *The Journal of Psychiatry and Law*, Spring 1994.

8. Cooke, G. Book Review of The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men by C. D. Webster, et. al., *The Journal of Psychiatry and Law*, in press.

EDITORIAL CONSULTATION

Editorial Consultant, *Journal of Abnormal Psychology*, 1972-1973.

Consulting Reader, *Psychological Reports*, 1975.

Consulting Reader, *Journal of Studies on Alcohol*, 1975-1979.

Editorial Consultant, *Criminal Justice and Behavior*, 1976.

Subcommittee for Paper Selection, Eastern Psychological Association Convention, 1978.

Editorial Consultant, *American Psychologist*, 1979, 1980, 1982, 1987.

Consulting Reader, *Journal of Consulting and Clinical Psychology*, 1986.

CONVENTION PRESENTATIONS

1. Cooke, G. The Role of the Psychologist In Criminal Court Proceedings, Presented at the American Psychological Association Convention, Washington, D.C., 1976.

2. Cooke, G. The Role of the Forensic Psychologist in the Evaluation and Treatment of Offenders, Presented

at the Pennsylvania Psychological Association Convention, October, 1977.

3. Cooke, G. Behavioral Treatment of Rapists, Presented at the Conference, *The Faces of Rape*, January, 1978, Philadelphia.

4. Chairperson and Discussant: Panel on Forensic Criminal Psychology, Eastern Psychological Association Convention, Washington, D.C., March 1978.

5. Cooke, G. The Prediction of Dangerous Behavior, Presented at the Pennsylvania Psychological Association Convention, June, 1978, Lancaster, Pennsylvania. (Also participated as expert witness in a mock trial.)

6. Mugrauer, W. and Cooke, G. Crisis Intervention Training for Police Officers, Conference on Violence in the Family, Atlantic County Community College, NJ, August, 1978.

7. Mugrauer, W. and Cooke, G. Crisis Intervention Training for Police Officers, Police Training Conference, Pomona, NJ, September, 1978.

8. Cooke, G. The Role of the Expert Witness; Screening for Competency to Stand Trial, Presented at the Philadelphia Society of Clinical Psychologists Continuing Professional Education Program, December, 1978.

9. Cooke, G. Evaluation of Civil Competency under the Vecchione Decision, Presented at the Vecchione Workshop of the Philadelphia Bar Association, Philadelphia, May, 1979.

10. Cooke, M.K., and Cooke, G. An Integrated Treatment Program for Mentally Ill Offenders: Description and Evaluation, American Psychological Association Annual Convention, New York, 1979.

11. Cooke, G. Follow-up of Criminal Status of Persons Evaluated for Criminal Competence, American Psychological Association Annual Convention, New York, 1979.

12. Cooke, G. and Lewinn, L. Presentation of Psychological Evidence in Criminal Court Cases, Presented at the Fall Conference of the Pennsylvania Psychological Association, October 26-28, 1979.

13. Cooke, G. Presentation on Mental Illness, Philadelphia Bar Association Training Seminar on Mental Disabilities, Philadelphia, March, 1980.

14. Mugrauer, W. and Cooke, G. Crisis Intervention Training for Police Officers, at the Conference on Violence and use in the Family, Mt. Holly, NJ, April, 1981.

15. Cooke, G., Mullen, J., and Olsson, J. Utilization of Psychiatric and Psychological Assessments by Criminal Court Judges: Description of the Project, Methodology, and Preliminary Results, Presented at the American Psychology-Law Society Convention, 1981, Cambridge, MA.

16. Cooke, G. Psychological Evaluation in Custody Cases, Pennsylvania Bar Association Program on Shared Custody, 1982, Philadelphia, PA.

17. Cooke, G. Evaluation of Allegations of Child Sexual Abuse in Child Custody Cases, American Academy of Psychiatry and the Law Annual Convention, 1986, Philadelphia, PA.

18. Cooke, G. and Nicholas, W.T. Can Forensic Mental Health Professionals Be Friends of the Court? Lenape Valley Foundation Conference, 1987, Valley Forge, PA.

19. Cooke, G. Psychological Evaluations in Child Custody Cases, Pennsylvania Bar Institute Family Law Seminar, 1987, Philadelphia, PA.

20. Cooke, G. Psychological Evaluations in Child Custody Cases, Pennsylvania Bar Institute Family Law Seminar, 1987, Harrisburg, PA.

21. Cooke, G. Psychological Evaluations in Child Custody Cases, Pennsylvania Bar Institute Family Law Seminar, 1987, Pittsburgh, PA.

22. Cooke, G. Cross-Examination of Mental Health Experts in Child Custody Cases, Invited Presentation, Family Law Section, 1988, Annual Philadelphia Bench/Bar Conference, Washington, DC, 10/1/88.

23. Cooke, G. Psychological Evaluation in Child Custody Cases, Pennsylvania Bar Institute Family Law Seminar, 1990, Pittsburgh, PA.

24. Cooke, G. Psychological Evaluation in Child Custody Cases, Pennsylvania Bar Institute Family Law Seminar, 1990, Philadelphia, PA.

25. Cooke, G. Psychological Evaluation in Child Custody Cases, Pennsylvania Bar Institute Family Law Seminar, 1990, Harrisburg, PA.

26. Cooke, G. Family Law Section, Psychologists Forum, Panel Member, Chester County Bar Association, 1991, West Chester, PA.

27. Cooke, G. Psychological Issues for Clients in Custody Cases, Member of a panel presentation to the American Academy of Matrimonial Lawyers, Summer Program, 1992, Hershey, PA.

28. Cooke, G. Anatomy of a Child Custody Case, Panel member for Family Law Practicum, Montgomery County Bar Association, 1992, Norristown, PA.

29. Cooke, G. Family Law Section Psychologists Forum, Panel member, Chester County Bar Association, 1992, West Chester, PA.

30. Sadoff, R., Cooke, G., and Poplar, C. The use of Forensic Experts at Trial (including child sex abuse cases), Association of Trial Lawyers of America, NJ Boardwalk Seminar, 1994, Atlantic City, NJ.

31. Cooke, G. Winning With an Expert Witness, and Discovery in Family Law Litigation, Pennsylvania Bar Institute Family Law Seminar, 1994, Philadelphia and Harrisburg, PA.

32. Cooke, G. Custody Recommendations When There Has Been Domestic Violence Between The Parents, House Republican Policy Committee's Children and Family Task Force Sub-Committee on Protecting Children from Sex Offenders and Family Violence, 1994, Plymouth Meeting, PA.

GUEST LECTURES AND CONSULTS, ETC.

University of Pennsylvania Center for Studies in Social-Legal Psychiatry: 1973-1977, 1982 (Psychological testing in forensic cases), 1992 (Psychological & Neuropsychological Evaluation in forensic cases).

Beaver College: 1973-1975 (Forensic Psychology).

St. Elizabeth's Hospital Federal Forensic Unit, Washington, DC 1974 (Evaluation of competency to stand trial).

Villanova University Law School: 1975, 1984-1986 (Psychological testing in forensic cases).

Philadelphia State Hospital Forensic Unit: 1975, 1982, 1983 (Forensic Evaluations).

Swarthmore College: 1976 (Forensic Psychology).

Temple University Medical School: 1977 (Forensic Evaluations). University of Pennsylvania Law School: 1977-1980 (Psychological Evaluation in forensic cases).

Testimony before the Governor's Task Force on maximum Security Psychiatric Care: 1977.

Bucks County Bar Association: 1977 (Forensic Psychological Evaluation).

Wernersville State Hospital: 1978, 1983, 1991 (Forensic Evaluations) and 1989 (Assessment and prevention of suicides among mental hospital patients).

Allentown State Hospital: 1978, 1981, 1987 (Forensic criminal evaluations and testimony).

Rikers Island, NY Prison Complex: 1979 (as consultant to the National Center for Action on Institutions and Alternatives – Investigation of, frequency, causes and prevention of inmate suicides).

Philadelphia Bar Association: 1979 (Assessing civil competency). Philadelphia Association of Insurance Claims Processors and Adjustors: 1979 (Psychological evaluation in personal injury cases).

Monroe-Carbon-Pike Counties MH/MR: 1980 (Crisis intervention). Northampton County MH/MR: 1980 (Forensic Psychological Evaluations).

Community Services Institute: 1980 (The new insanity legislation), 1983 (Treatment of mentally ill offenders).

Veterans Administration Hospital Out-Patient Clinic, Philadelphia: 1981 (Forensic Evaluation).

Clarke Summit State Hospital: 1981 (Forensic Evaluation). Abington Hospital: 1981 (Forensic evaluation and treatment, privilege).

Harrisburg State Hospital: 1982, 1987, 1988 (Forensic criminal evaluation and testimony).

Philadelphia Psychiatric Center: 1982, 1983 (Forensic evaluation) and 1987 Neuropsychology as a contribution to critical diagnosis).

Pennsylvania Hospital: 1982 (Forensic and neuropsychological evaluation).

Pennsylvania Bar Institute: 1982 (Workshops on the new Shared Custody Act) and 1990 (Psychological evaluation in child custody cases).

Coatesville VA Hospital: 1983 (Forensic Psychology) and 1987 (Forensic Assessment and issues with aggressive patients).

Pennsylvania Association on Probation, Parole and Corrections Annual Meeting: 1983 (Forensic Evaluation).

Philadelphia Society for Clinical Psychologists: 1984 (Forensic Evaluation).

St. Joseph's University: 1984 (Forensic Evaluation).

Jefferson Medical College: 1985 (Forensic Neuropsychological Evaluation).

New Jersey Trial Lawyers Association: 1985 (Psychological evaluation of psychic injuries).

Montgomery County Police Chiefs' Association: 1985 (Psychological screening of applicants).

Norristown State Hospital: 1986 (Mental health professionals and the criminal justice system).

Haverford State Hospital: 1988 (Criminal evaluations for the Court).

Temple University Graduate Department of Psychology: 1989 (Forensic Psychology)

University of Pennsylvania Department of Psychiatry: 1992 (Psychological and Neuropsychological Evaluation in Forensic Cases).

Chester County Prosecutor's Office Training Seminar for County Police Departments: 1992 (Recognition and prevention of suicide in County jails).

Norristown State Hospital: 1993 (Invited Speaker-Forensic Psychiatry and Psychology with Robert L. Sadoff, M.D.).

St. Joseph's University, Graduate Department of Criminal Justice: 1993 (Psychological and Neuropsychological Evaluation in forensic cases).

University of Pennsylvania Law School, Law Clinic: 1993 (Forensic Psychology and Child Custody Evaluation).

The Association of Trial Lawyers of America – NJ, Boardwalk Seminar 1994 (The use of Forensic Experts at Trial), Atlantic City, NJ.

IN THE COURT OF COMMON PLEAS
OF LEHIGH COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Claimant	:	NO. 682-1988
VS.	:	
RONALD ROMPILLA, Defendant	:	

Oral Deposition of ROBERT SADOFF, M.D., taken pursuant to notice, at the office of Dr. Sadoff, Benjamin Fox Pavilion, Suite 326, Jenkintown, Pennsylvania, on Tuesday, April 23, 1996, beginning at approximately 5:30 p.m., before Geraldine M. Lipp, Registered Professional Reporter, Notary Public, there being present.

ESQUIRE COURT REPORTING

P.O. Box 71

Oreland, Pennsylvania 19075

Phone: (215) 576-8490

[2] APPEARANCES:

LEHIGH COUNTY DISTRICT ATTORNEY'S OFFICE
BY: Michael McIntyre, ESQUIRE
Lehigh County Courthouse
455 Linden Street
Allentown, Pennsylvania 15102
Representing the Commonwealth of Pennsylvania

PENNSYLVANIA POST-CONVICTION
DEFENDER ORGANIZATION
BY: MICHAEL WISEMAN, ESQUIRE
and BILLY H. NOLAS, ESQUIRE
Suite 501, The Lafayette Building
437 Chestnut Street
Philadelphia, Pennsylvania 19106-2414
Representing the Defendant

[3] INDEX

Testimony of: ROBERT SADOFF, M.D.

By Mr. Wiseman	4, 27, 38
By Mr. McIntyre	17, 35

EXHIBITS

Sadoff-1	Curriculum Vitae	39
Sadoff-2	Dr. Sadoff's declaration	39

[4] THE COURT REPORTER: Will this be the usual stipulations?

MR. WISEMAN: The stipulation is that objections must be made on the record or they are waived.

ROBERT SADOFF, M.D., after having been first duly sworn, was examined and testified as follows:

MR. WISEMAN: We are here for the deposition of Robert Sadoff in regard to post-conviction proceedings in the Ronald Rompilla matter.

DIRECT EXAMINATION

BY MR. WISEMAN:

Q. Will you please state your name.

A. Robert L. Sadoff, S-A-D-O-F-F.

Q. And what's your occupation, Doctor?

A. I am a physician specializing in psychiatry.

Q. And directing your attention to 1988, did you have any involvement in the matter of the Commonwealth against Ronald Rompilla?

A. I did.

Q. And I would like to show you what's been marked in [5] other proceedings in this case as Defendant's Exhibit 2 and ask you to look at that letter.

A. That is a letter that I sent on September 19, 1988 to Maria Dantos who was with the Public Defender's Office in Allentown at that time.

Q. And it indicates that you had some involvement in this case?

A. Yes. It noted that I examined Mr. Rompilla on September 15, four days earlier in 1988, at the Lehigh County Prison. And I had reported my findings to Miss Dantos by telephone and I was awaiting further advice from her.

Q. Did you have occasion to review your files to see if you had any other material in regard to Mr. Rompilla?

Let me clarify. Did you have anything in regard to the trial proceedings, anything emanating from the time of the trial proceedings?

A. I actually don't have my original file on him so what I have is this one sheet of paper that I authored that you sent me and I believe you also sent me (indicating.) So that's all I know about the case.

Q. Okay. Do you have a recollection of the reason that you were requested to evaluate Mr. Rompilla?

A. I do not.

Q. In 1988, would you have had a standard evaluation [6] that you would have done in a capital case?

A. I did, yes.

Q. What would that have consisted of?

A. I would have examined him for competency to stand trial. I would have examined him for criminal responsibilities. And I would have examined him for possibility of mitigating circumstances at the time of the commission of the crime.

Q. And what would that evaluation have consisted of?

A. Consisted of my going to the jail and sitting down with him and talking with him, examining him, doing a mental status examination, which means that I would observe him and I would observe his responses, the way he responded as well as the content of his responses. And if

need be, I would have gotten a psychologist to do psychological testing if I felt they were necessary.

Q. Now, you completed a declaration in this case dated April the 8th, 1996?

A. Yes, I did.

Q. In that declaration, you indicate that you have no recollection right now of having evaluated Mr. Rompilla.

A. That's correct.

Q. You also indicated that you reviewed certain records provided by my office regarding Mr. Rompilla's records.

[7] A. Yes, that's correct.

Q. And just so the record is clear, in paragraph 3 of your declaration, you indicate that those records show on October 1959 a WISC test score of verbal IQ of 61, performance of 75, and a full scale of 64.

Is that true that you reviewed those records?

A. Yes.

Q. And also in April of '57, there was a test score indicating a 75 IQ as well?

A. Yes.

Q. And the records also indicated that Mr. Rompilla was in special education classes at that time of his life?

A. Yes, that's correct.

Q. And in 1961, he scored on a WISC a verbal IQ of 69, a performance of 75 and full scale of 69.

A. Yes, that's correct.

Q. And then finally, the records you reviewed with that in 1974, his Wide Range Achievement Test, put him in a low percentile on that test?

A. Yes.

Q. Now, what do those test scores indicate – withdrawing.

As a psychiatrist, do you routinely administer or ever administer such testing?

[8] A. I do not.

Q. And do you ever interpret the raw data derived from such testing?

A. I do not.

Q. How do you in your practice make use of such testing?

A. If it's conducted by someone that I have requested it be done by, that person will have interpreted the testing and provide me with a report that I may incorporate into my final report.

If the testing is done by someone else who is not available to consult with, I might have my consultant, the psychologist, review the raw data and give me his input or her input on what that means.

Q. Okay. Now, in your declaration, you indicate that some of the testing is in the mentally retarded, or as I think you use the term, developmentally challenged range?

A. That's right.

Q. And is that knowledge you have from your practice?

A. Knowledge I have had from psychologists with whom I have worked over the years, yes.

Q. In looking at these test scores from Mr. Rompilla's childhood, you are able to know the significance clinically of a test score of a full scale [9] IQ of 64?

A. Yes.

Q. And it's in the retarded range?

A. Yes.

Q. Now, in your affidavit or in your declaration, you indicate that the attorneys – and by "attorneys," I assume you are referring to myself. I had spoken to you about these matters.

A. Yes, and I am referring to you (indicating).

Q. And I advised you that Dr. Cooke had testified in a deposition in regard to these proceedings and that he, in fact, worked with you – not worked with you but worked on this case back in 1988.

A. That's my understanding. I have no independent recollection of it. But having worked with Dr. Cooke on many, many cases in the past, I am not surprised.

Q. Okay. And in your declaration, you indicate it's your experience with Dr. Cooke that if he had had access to the scores that are set forth in your declaration, he would have conducted neuropsychological testing. Is that true?

A. Yes. That is true.

Q. Now, as a forensic psychiatrist, if you were presented with these scores and you had not had any type of neuropsychological testing done at that time, would [10] it be your desire to see neuropsychological and psychological testing done to help explain these scores?

A. First as a forensic psychiatrist having had that information and doing my psychiatric examination, I might have examined different questions. I might have probed in the area of reasons why he might have. Is it genetic? Did he ever have an accident or a fall that would have hit his head?

I always ask these questions but I might have probed deeper. Any toxic substances, high fevers that might have caused him to have some brain dysfunction? And I would have recommended a battery of psychological and neuropsychological testing to probe the cause, if we could find it, of these low IQ scores.

And I would also have the psychologist do the testing contemporaneously to compare these scores, to see if there is any increase, decrease or no change.

Q. In your declaration, you note there is an IQ score of 93 in October of '75?

A. Yes.

Q. And that would have been on the BETA testing?

A. Apparently that's correct, yes.

Q. And is that the type of discrepancy that would have caused you to look at possible organicity or other

factors that could explain the differential in the [11] scores?

A. Yes. Usually it goes the other way but when you see someone who has a low IQ as a youngster and it's higher later, you wonder if he was motivated when he was younger or what might have been going on at that time. I would have to explore that discrepancy.

Q. When you say "motivated," would a lack of motivation be caused by emotional interference going back – in a child's background?

A. Yes.

Q. Poverty would be one thing?

A. Again, you are getting into an area where a test may be controlled or regulated or poverty and socio-economic conditions. And I don't know the data on that. That you would have to ask Dr. Cooke.

Q. How about as an emotional interference issue, child abuse?

A. If that's there, if there is anything like that, we have seen it effect [sic] the IQ scores and motivation and school performance.

Q. I guess what I wanted to understand for the record is by "motivation," you are not thinking necessarily that the child was lazy or not a good student?

A. No. I am not thinking that at all. There would be many factors that would interfere with his ability to [12] be motivated or desire to be motivated.

Q. Just to back up a bit in terms of the neuropsychological testing, I would like the record to be clear if we could just briefly go through the types of tests out there to see how they fit into this picture.

If you would explain for the record, what is neuropsychological testing?

A. It's a subset, I guess, of regular psychological testing that probes to see whether there is any brain damage.

Q. Okay. And getting from that more general description to more specifics, what does intelligence testing probe for?

A. You are getting into areas that, again, it's not my expertise. Generally speaking, I would say it probes for intelligence.

Q. Okay. In particular, the Wexler Adult Intelligence Scales, are you familiar with the particular subscales in that test and what they each examine?

A. No.

Q. I think we talked earlier about the BETA. I think you said you don't have a lot of familiarity with the BETA?

[13] A. Not at all. I have heard the name.

Q. How about the Stamford Binet?

A. Again, I have heard of it.

Q. That's something you deal with in terms of –

A. No experience, no expertise.

Q. Now, other areas of neuropsychological function that tests for brain damage or organicity is the Halstead Ritan.

A. I am only familiar with the name and that it's a long detailed test that takes hours to administer and has to be done by a very specialized person that has experience in this field. I have seen parts of it given as part of my training of my students at Penn by neuropsychologists. But beyond that, I mean, I have no expertise with it.

Q. I am going to go through a brief list of names. If there are any that fit into the categories that you do have experience in terms of administering or interpreting, why don't you stop me.

The categories test?

A. No.

Q. Wisconsin card sorting?

A. No.

Q. Denman Neuropsychological Inventory?

A. No.

[14] Q. Iowa Neuropsychological Battery?

A. No.

Q. Finger oscillation or finger tapping?

A. No.

Q. Seashore rhythm?

A. No.

Q. Abstraction testing?

A. No.

Q. Figure design testing?

A. No.

Q. Blot design?

A. No.

Q. Sorting?

A. No.

Q. Short-term/long-term memory comparisons?

A. No.

Q. Internal impairment scales?

A. No.

Q. Placement testing?

A. No.

Q. Trials A and B?

A. No.

Q. Binder-Gestalt?

A. No. I have heard of all of these and I have seen some of these but I have no expertise.

[15] Q. Right. And just – I may have asked about this one. How about the Iowa Memory Testing?

A. You asked and no, I have not.

Q. Okay. And again, the proper person to do this testing is a psychologist with an expertise in neuropsychology?

A. Exactly, yes.

Q. Now, you mentioned earlier when we talked about possible derivations or possible explanations for mentally retarded range IQ testing something about fevers. Could you explain that?

A. Sometimes when children get high fevers when they are a year old or so, the fever as a youngster might effect his brain, might even have, you know, meningitis, or some other type of brain involvement that would leave him scarred or mentally challenged for the rest of his life.

Q. Now, can you give us, say, a sort of ballpark for how high a fever would have to be to be in the realm of one that would cause you concern?

A. Kids get higher fevers than that and probably up to 106 or higher.

Q. How about 105?

A. That's borderline but again, it could. I'm not an expert on it but I've heard that.

[16] MR. McINTYRE: Objection on the record since he is not an expert.

BY MR. WISEMAN:

Q. Let me ask you, Doctor: If you knew at the time you were evaluating Mr. Rompilla and you saw that he had a fever at the age of 2 of 105 accompanied with dehydration related to diarrhea, would that along with this

other information that you did not have, the testing, would that have been another red flag for you to explore possible organicity?

A. Yes, it might have been the organicity. It may have been the cause of some of his low IQ.

Q. Now, again, I realize this may be difficult because you don't have an independent recollection. But from working with Dr. Cooke in other cases, if I were to tell you that Dr. Cooke testified in his deposition that the school record information was a "red flag" to him that would have caused him to do neuropsychological testing, would that be consistent with your experience with Dr. Cooke?

A. Yes, it would.

MR. WISEMAN: I have nothing further. Thank you.

CROSS-EXAMINATION

[17] ---

BY MR. McINTYRE:

Q. Good afternoon, Doctor. We skipped your qualifications but it's true that you are a forensic psychiatrist?

A. Yes.

Q. Board certified?

A. Yes.

Q. In 1988 and now?

A. I was board certified in psychiatry, legal medicine and forensic psychiatry in 1988. The only one I got after

that was added qualifications in forensic psychiatry that came in 1994.

Q. Do you have a CV handy that we could actually append to your deposition?

A. I do.

MR. McINTYRE: Any objection, Mike?

MR. WISEMAN: No.

MR. McINTYRE: We will call it Sadoff-1.

BY MR. McINTYRE:

Q. If I understand correctly – and I know I probably shouldn't even ask you – you have absolutely no independent recollection of your exam of Mr. Rompilla at all?

A. That's correct, I have none.

[18] Q. And you have attempted to look for your file but I take it because of the eight years that have gone by, you don't have that file at all?

A. I don't have it.

Q. So basically, you don't know other than your examination of him at the prison which you see from your letter to the public defender, what you may have relied upon?

A. I don't know what I relied upon, no.

Q. You don't know if Dr. Cooke sent you anything, I take it?

A. I don't remember. He may have. I don't remember.

Q. Do you even know that you worked with Dr. Cooke on this case?

A. I have no independent recollection of that but it's likely that I did.

Q. Back in 1988, you were working in tandem with the psychologist Dr. Cooke?

A. I still do on occasion. Sometimes we are on the opposite sides of cases but very often we are on the same side. And if I have my choice, I actually choose to have Dr. Cooke as my associate in cases. But I trust his judgment and worked with him for years.

Q. Since we don't know whether you did work with him or not, I will ask you questions about what the standard [19] procedure would be.

Was there a standard procedure in cases that you and Dr. Cooke worked on together?

A. It wasn't standard but it was something we did frequently together. We would see the defendant independently and then before I prepared a report, he would send me a copy of his. And I would often incorporate the findings that he has in mine since he would be like a consultant to me in the sense that I would prepare a forensic psychiatric report. And part of my final opinion would include what was found in the testing.

Q. And are you familiar with the standard tests that Dr. Cooke did back in 1988?

A. I am familiar with some of those that he did then and he probably still does now but I don't know which ones he did in this case.

Q. I think I have those. I would just get your confirmation that these were the standard tests that Dr. Cooke did that you are familiar with.

A. MMPI.

A. Yes.

Q. Rorschach?

A. Yes.

Q. The Wexler IQ test?

[20] A. Yes.

Q. And I believe the Incomplete Sentence Test?

A. Yes.

Q. Is it fair to say that those were four standard tests that Dr. Gerald Cooke did back in 1988?

A. I believe he did them fairly regularly, yes.

Q. And you would get the results of those tests?

A. I would not get the results. I would get his interpretation of those or whatever else he may have done as a battery of tests. And he also did his own psychological interview and examination which he would include in his report.

Q. And then you would have those test results and then go see the defendant yourself?

A. Usually I would see the person first and I would say, "I think we need a battery of tests." And I would ask for those and then I would get his report before I prepared

my own. Or if I did my own report for whatever time requirements there may have been for discovery, I might then do an addendum after I get his.

Q. All right. Now, the tests we spoke of, that Wexler, that is an IQ test; correct?

A. Yes, it is.

Q. Was it standard for Dr. Cooke to administer that particular IQ test back in 1988 in the cases you worked [21] on with him?

A. I can't remember that in terms of 1988 or if that was the one he used more frequently than any but I would say it's a familiar test that I have heard him talk about and that I have seen in reports that he has used.

So generally speaking, I would say yes.

Q. All right. And I take it it was standard procedure for you to rely on his report of the results of that IQ test?

A. Yes. I would have no way of disputing that.

Q. Dr. Sadoff, can you think of any one case from any time that you have worked with Dr. Cooke in which grade school records were requested in addition to Dr. Cooke's conduction of his own IQ test?

A. I can think of a lot of cases that I know he wanted them and because he asked for them, we both got them. He would think of them more frequently than I would because that's the nature of his work. Usually, if there's a juvenile involved, he would want all the school records. I know that. And I would want them, too, especially if we are talking about his ability to be treated in the juvenile system.

Q. I think Mr. Rompilla was 40 years old in 1988.

A. Four years old?

Q. Forty. Do you know of any cases in which [22] 30-year-old grade school records would be requested by either you or Dr. Cooke?

A. I think Dr. Cooke would request them if he found that there were discrepancies in IQ that he would want to look at and see what the performance was in school, was it compatible and consistent with the IQ scores that are reported or is there a discrepancy. I think he would have asked for that.

Q. What would have triggered or made him request these grade school IQ test results?

A. I think if he found that he got a 93 on one and that he sees reports of 64, 61, 70, that's too much of a difference. He might ask how far back do those go, what was he like in school, are there school records that might know what his IQ might have been, his grades and the comments made by teachers about performance and his behavior and so on.

Q. So what you are saying is if he did his tests, his own IQ test, and then had some other test that was a discrepancy between the two, then he would order the grade school records?

A. I think so.

Q. Can you think of a case in which he had no test at all, he just did his tests and for some reason, he asked for grade school tests?

[23] A. He might – for example, he had no other data except what the defendant told him. Suppose the defendant told him that he had graduated from college. One would expect an IQ of 120 or so. Suppose he tests out at 73. No 73 IQ is going to graduate from college. He might ask for school records to see if he really graduated from college.

If he gets those records and it shows he did very well, he might want to go back and see if there were instances of his doing poorly in his earlier years, to see if it goes up and down, is it a straight line, does it go across like that. I think he might then, but only then if he has a real discrepancy in what the person told him and what he tests out to be.

Q. All right. So basically what you are saying is, unless there is some type of discrepancy in another test or between what the defendant told him and the test results, he wouldn't have asked for those?

A. He might not have in a 40-year-old person to go back to grade school records unless there was a reason to do so.

Q. You didn't ask for grade school tests as a standard part of your evaluation of a 40-year-old defendant, did you?

A. No, I did not.

[24] Q. Now, looking at your letter to attorney Dantos dated September 19, 1988 – which for the record, I guess, is Defendant Exhibit 2.

MR. WISEMAN: That's right.

BY MR. McINTYRE:

Q. Is it fair for us to infer from that that you found nothing favorable to Mr. Rompilla in your examination?

A. I think that's very fair.

Q. And I take it since one of the things you were looking for was mitigation since this was a capital case, it's fair for us to infer you found no mitigating evidence?

A. On my examination, that would be fair.

Q. You were requested to examine Mr. Rompilla?

A. Yes.

Q. And that you did?

A. Yes.

Q. Has the state of the art of forensic psychiatry changed from 1988 to the present?

A. That's a good question. I can only say that my examinations tend to be more thorough as I get older and have the wisdom of cross-examination about what I didn't I do earlier. And so having learned that, I usually try to incorporate that into my next examination.

[25] So the state of the art for me is – I think there have been a number of changes in forensic psychiatry that were caused by changes in law that we have to adhere to. But as far as if I can read between the lines of your question and what I think you are asking is do we do anything differently today than we did back in 1988 –

Q. That's correct.

A. If anything, I probably spend more time with people than I did before and probably ask a lot more questions. And again, those questions are ones that I was embarrassed that I didn't ask when I was asked on cross-examination if I did that. I don't do that in all cases but having learned that, I do try to teach it to my students as well. And I expect if it's changed in any way, it's changed we do spend more time.

Q. How about in your use of a psychologist and the testing that's done? Is there any change in that from what was done in 1988?

A. I don't think I would have changed in that because I have always used – I don't like the word "used" but I have always consulted with psychologists. And Dr. Cooke goes way back from 1970 even, maybe '75. So it's many, many years. And I have found that to be a very important part of my total forensic assessment, [26] especially in criminal cases. And I very often request the psychological battery.

Q. But are the tests that you are requesting the same now that they were in 1988?

A. That I can't tell you because I don't select them. I just say, "Do your usual standard battery." I think Dr. Cooke would be in a better position to answer that question.

Q. You can't tell from the results that you get from your psychologists today whether or not they are doing different tests?

A. If I am, I really can't recognize it.

Q. In your affidavit or your declaration, I guess is more correct, you indicate that you don't have any direct experience with the WRIT?

A. That's correct.

Q. You also note something about the IQ test that was conducted in October of 1975.

A. Yes.

Q. Did you know that was a BETA IQ test?

A. I have no independent knowledge of it now. If that's in the record that they sent me, it might have been. But again, I don't purport to have any expertise in that.

Q. Do you know whether or not there is any [27] discrepancy in a 93 IQ score in a BETA IQ test as compared with the other test results in different IQ tests?

A. I couldn't tell you that.

Q. All right. So there may not even be a discrepancy?

A. There may not. That's really up to the psychologists.

MR. McINTYRE: Okay. I have nothing further.

MR. WISEMAN: Just a little bit of follow-up just a couple of moments.

REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. Is brain damage relevant to mitigation in your view?

A. Yes.

Q. And is retardation?

A. Yes.

Q. And is poor performance in school?

A. If the poor performance in school is continued as poor performance later in life, it would be a factor. If he overcomes the poor performance in school and has [28] good performance in work and life and other things, it may not be as important a mitigating factor.

Q. Now, brain damage and retardation and poor performance, to the extent you have just described as mitigation, were they mitigators, in your view, in 1988?

A. Yes.

Q. And before?

A. Yes.

Q. Neuropsychological testing was around in 1988?

A. Yes.

Q. Intelligence testing?

A. Yes.

Q. Memory testing?

A. Yes.

Q. And brain damage?

A. Yes.

Q. That's something the field knew about back in 1988, and well before?

A. Yes.

Q. If the records that we have been discussing today and in your declaration been provided to you and Dr. Cooke, would you have considered them in your mitigation evaluation?

A. If they were sent to me, I would have, yes.

Q. By the way, when you indicated that you don't – [29] actually, Mr. McIntyre in his questioning said eight years later, your file appears not to be in existence.

Do you have a standard practice for when you destroy your files?

A. I am overflowing now and what I do is I have a storage bin downstairs that has old records but they are not well filed. I keep them for whatever reason but I have not had a chance to go down there and look for them. It may be down there. I haven't looked and I don't know.

Q. Okay. I just want to show you a letter that's been marked previously in this case as Defendant's 3. It would be a letter from Dr. Cooke dated June of '88 also to Maria Dantos. It appears from that letter that Dr. Cooke, as indicated in your letter as well, did not write a report about this case.

A. Right.

Q. And that's approximately four months before your evaluation.

A. Yes.

Q. And would it be fair to say that if Dr. Cooke did not write a report, that you would not have had a report to review, obviously?

A. I would not have had a report.

Q. So all the questions Mr. McIntyre was asking you [30] in regard to your relying on Dr. Cooke in this case, in fact, it is quite likely you didn't rely on him at all?

MR. McINTYRE: Object to the form.

THE WITNESS: I don't recall whether we talked on the telephone or not. Very often, he gives me input but I don't recall in this case whether he did.

BY MR. WISEMAN:

Q. By the way, your declaration, I take it, is a true reflection of the views that you expressed on April 8, 1996.

A. Yes.

Q. For purposes of the record, I would mark it as Sadoff-2. We can figure out later how it fits into the numbering scheme.

What's the significance, Dr. Sadoff, of collateral information in the forensic setting with a particular focus on a capital case?

A. Good question. I like to use collateral information in any case I have, whether it's capital or not. I think in

forensic work it isn't the same as a person coming to me because he's hurting, he's in emotional pain and he wants relief of that pain.

He comes to me because he's involved in some difficulty, civil or criminal. And the veracity, validity, credibility, whatever word you use, is not of [31] the same caliber as if he were coming for treatment. So it's very important for me to have collateral information that would either substantiate or negate what he tells me.

Q. In laymen's terms, is what you are saying is that defendants in a forensic setting are not always the most reliable sources for the information you need as a provider to make an informed judgment as to their forensic condition?

A. That's a fair way of putting it.

Q. People sometimes minimize mental illness?

A. Or maximize.

Q. Yes.

A. Either way.

Q. Sure. And sometimes people minimize poor backgrounds like child abuse, like – let's take child abuse. Have you had experience with people who minimize?

A. I have people who haven't told me about it when it was there. I have people who have told me that it happened to them that cannot be corroborated. So I think it can be exaggerated or minimized, either way.

Q. And particularly, if you are dealing with a forensic patient who has a low IQ, has cognitive problems and

possibly brain damage, their reliability as [32] a historian, their background, is more suspect than if you are dealing with a genius, for example.

A. I would think there are so many factors you would request. I would think because of low IQ, they would not give as much information. It may not be as reliable. When you get to the genius IQ – and I have seen a number of defendants in this category – they may give you information that they have concocted also that is not reliable, but in the other direction because they are so bright and so able. So again, it can work either way. And one needs to have some collateral or corroborating information to support what the patient says.

Q. Now, let me ask you: If you have – and this is hypothetical because we don't know exactly what Dr. Cooke administered in '88. Assuming he administered an IQ test that showed normal range IQ, not particularly smart, not particularly low intelligence, and had no other IQ testing to rely upon, I guess what I am not following in your answers to some of Mr. McIntyre's questions is what is the potential for discrepancy if you are only looking at one test without collateral information?

A. You don't know. You don't know. The only potential is – suppose the history is that he told [33] Dr. Cooke that he graduated from college and he has a fairly low IQ. That's a discrepancy of another test. Or he told Dr. Cooke that he was in special education classes and didn't get through the ninth grade and he has a normal IQ. That would also be a discrepancy.

Q. Right. Let's assume, then, for this hypothetical that the person reports to Dr. Cooke that he stopped going to high school in the ninth or tenth grade just because he

wanted to work and gave no – he neither graduated from college nor told Dr. Cooke he was in special ed but just basically said, I am a regular Joe and I dropped out of school to work.

Where would be the discrepancy – well, withdrawing. Wouldn't it have been proper or appropriate to try to obtain collateral sources to see if there is, in fact, a discrepancy in the present day testing?

A. Not necessarily. If he gives you an average background and he has an average IQ and everything looks pretty normal and you have no reason to suspect a discrepancy, you might not ask for anything more, especially if you have particular questions that you are asked to address. You have a limited budget, a limited time and you have to try to come to some kind of an opinion within a reasonable time frame and don't think [34] that spending a lot more money or time is going to give you any more information than you already have.

Q. Assume that obtaining the records that we have provided to you regarding Mr. Rompilla's schooling is not an economic issue for the lawyers at the time, wouldn't have cost him anything to get it. Is that the kind of information that you would find useful as collateral information in your forensic evaluation?

A. Yes.

Q. Are there in your experience capital cases where lawyers do provide you with collateral information?

A. Oh, sure.

Q. Things like school records?

A. Yes.

Q. Even without you asking?

A. Yes.

Q. As a matter of routine?

MR. McINTYRE: Note my objection.

MR. WISEMAN: What's the basis?

MR. McINTYRE: You are asking him for opinions which would go to attorney malpractice or incompetence. He is not qualified to do that.

MR. WISEMAN: I thought it was a fair response to some of the questions you were asking him.

BY MR. WISEMAN:

[35] Q. And just to follow up on that, that would have been true certainly as far back as 1988, if not earlier?

MR. McINTYRE: Same objection.

THE WITNESS: My recollection is – and again, I haven't but those that I have had in different states, some of them, of course, were like this one that's on appeal and I got all the records. When it is a fresh case that becomes a capital case and I have to evaluate as much as I can and we are pretty sure it's going to go to the second phase, let's say, the sentencing phase of the case, then we do try to get as much information as we can.

MR. WISEMAN: Okay. Nothing further.

MR. McINTYRE: I have a couple questions.

RECROSS-EXAMINATION

BY MR. McINTYRE:

Q. Dr. Sadoff, it wasn't standard for attorneys to provide you with grade school tests of 40-year-old defendants facing capital cases back in 1988, was it?

A. I don't know what's standard for lawyers and I didn't mean to get into the area of attorney malpractice. It really is not my intent.

What was standard was when I was involved in a [36] case and we were focusing on mitigating circumstances that could help in terms of death penalty at the sentencing phase, it was my practice to get as much information as I could if I thought it could be helpful.

Now, there are some cases where I didn't think I could be helpful even if we got other information because it was clear to me there was nothing I could hook onto that would help me in this particular case. And that's probably why I wrote such a letter. But I don't know what was standard for lawyers. What I know was standard for me is if I felt I could help, I would try to get as much information as I could. If that included the grade school records, fine. The psychologists often would get all of those and I would have them because he or she would. I didn't ask for them.

Q. Let me ask you one other question. It may take a couple to develop it.

You are aware that the mitigating circumstances in Pennsylvania back in 1988 and present were the following:

That the defendant was under the influence of extreme mental or emotional disturbance?

A. Yes.

Q. Or two, the capacity as a defendant to appreciate the criminality of his conduct or to conform his conduct [37] to the requirements of law was substantially impaired. You can't –

MR. WISEMAN: I would just object. Are those all of the mitigating factors or are you mentioning mental health factors?

MR. McINTYRE: Those are the mitigating factors –

MR. WISEMAN: You said those are the only mitigating factors.

BY MR. McINTYRE:

Q. We will stick with these.

A. I am familiar with those.

Q. You can't say to any degree of psychiatric certainty that those grade school IQ test scores that you now have seen from Mr. Rompilla evidence either of those, can you, standing alone?

A. Standing alone, they don't. What I look for is are they a building block in terms of reflecting that he may have had brain damage that we didn't find. And that's why they would have been important, but not by themselves.

Q. Can you think of any other mitigating circumstances that those grade school IQ tests standing alone

would be evidence of that you could testify to a reasonable degree of psychiatric certainty?

[38] A. No, only if they reflected that he had brain damage. I think just the grade school records alone are not going to help us by themselves standing alone.

MR. McINTYRE: All right. I have no further questions.

FURTHER REDIRECT EXAMINATION

BY MR. WISEMAN:

Q. Just a little follow-up on that last question. Are you familiar with the so-called catch-all mitigator in Pennsylvania, any other factor about the defendant's background?

A. Yes.

Q. In your experience, would scores indicating mental retardation during childhood, would that be something that would fall in the catch-all by itself?

A. See, in and of itself it doesn't. If it affected his state of mind at the time of the commission of the fact for which he was charged and they could develop that it was a factor in that from back in childhood, then it is important. But if, for example, you have those and they are not a factor in the criminal behavior, then I would say no.

Q. Would it be fair to say, then, Doctor, just so I [39] understand from the record, that your understanding of mitigation is that it is only mitigating if it relates to the

defendant's state of mind at the time of the commission of the offense?

A. It relates to that and the kind of person he is, is he treatable, is this something – because the mitigating factors, as I read them, reflect state of mind at a particular time. I have not in my experience used irrelevant material that had nothing to do with the crime itself as a mitigating factor. It had to be something that would have impacted on his state of mind at the time.

Q. And one final question: Do you have any recollection that the lawyers in the Rompilla case gave you any different view of what they were looking for in terms of mental health mitigation?

A. I have no recollection.

MR. WISEMAN: Nothing further.

(Whereupon, Exhibits Sadoff-1 and Sadoff-2 were marked for purposes of identification.)

(Whereupon, the deposition concluded at or about 6:30 p.m.)

---

[40] CERTIFICATE

I, GERALDINE M. LIPP, R.P.R., do hereby certify that ROBERT SADOFF, M.D., was by me first duly sworn to testify to the whole truth and that the above deposition was recorded stenographically by me and was transcribed

by means of computer-aided transcription under my personal direction and that the said deposition constitutes a true record of the testimony given by said witness.

I further certify that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney, or financially interested directly or indirectly in this action.

/s/ Geraldine M. Lipp
GERALDINE M. LIPP
REGISTERED PROFESSIONAL
REPORTER

EXHIBIT 1

ROBERT L. SADOFF, M.D.
SUITE 326
THE PAVILION
JENKINTOWN, PENNSYLVANIA 19046
PHONE: 215-887-6144 – FAX: 215-887-6477

CURRICULUM VITA

Birth Date:	Minneapolis, Minnesota February 8, 1936
Education:	Bachelor of Arts (BA), University of Minnesota, 1956
	Bachelor of Science (BS), University of Minnesota, 1957.
	Doctor of Medicine (MD), University of Minnesota School of Medicine, 1959.

	Master of Science (MS) in Psychiatry, University of California at Los Angeles, 1963.
	Thirty-three credits in Law, Temple University School of Law, 1963-66.
Internship:	Wadsworth Veterans Hospital, Los Angeles, CA, General Rotating Internship, 1959-60.
Residency in Psychiatry:	U.C.L.A. Neuropsychiatric Institute, Los Angeles, CA, 1960-63.
Military:	Captain, U.S. Medical Corps, Walson Army Hospital, Ft. Dix, NJ, 1963-65.
Fellowship in Forensic Psychiatry:	Temple University Schools of Law and Medicine, 1965-66.
Board Certification:	Certified in Psychiatry by the American Board of Psychiatry and Neurology, May 1966.
	Certified in Forensic Psychiatry by the American Board of Forensic Psychiatry, February 1979.
	Certified in Legal Medicine by the American Board of Law in Medicine, December 1981.
	Certified by the American Board of Psychiatry and Neurology – Added qualifications in Forensic Psychiatry, October 1994.
	Member, Board of Directors – American Board of Forensic Psychiatry, 1977-83, President, 1982-83.

Member, Board of Directors – American Board of Law in Medicine, 1980-1985

Licensure:

Minnesota	Pennsylvania
California	New Jersey
New York	

CURRENT ACADEMIC APPOINTMENTS

University of Pennsylvania
- Clinical Professor Psychiatry
- Director, Center for Studies in Social-Legal Psychiatry
- Director, Forensic Psychiatry Clinic

EDITORIAL APPOINTMENTS:

[a] Associate Editor, *Bulletin of the American Academy of Psychiatry and the Law.* 1973-1983.

[b] Editorial Board, *Journal of Psychiatric Education,* 1980-88.

[c] Editorial Consultant: *Journal of Law and Psychiatry.*

[d] Board of Editors, *International Journal of Medicine & Law.*

[e] Editorial Board, *American Journal of Forensic Medicine & Pathology.*

[f] Editorial Board, *Forensic Science International*, 1985-92

[g] Editorial Board, *Contemporary Psychiatry*, 1987-1991

[h] Board of Editors of the *Journal of Forensic Psychiatry*, 1989-

PROFESSIONAL AFFILIATIONS:

American Medical Association
Pennsylvania Medical Society
Montgomery County (PA) Medical Society
American Psychiatric Association (Fellow, 1971-)

[a] Member, Manfred Guttmacher Award Board, 1971-74; Chairperson, 1979-84.

[b] Member, American Psychiatric Association Task Force on the Right to Treatment, 1974-76.

[c] Member, Committee of Psychiatry and Law, 1976-79

[d] Member, Committee of Abuse/Misuse of Psychiatry in the United States, 1980-84.

[e] Member, Committee on Psychiatric Treatment in Correctional Facilities, 1983-86.

[f] Member, Task Force on the Use and Misuse of Psychiatric Diagnoses in the Courts, 1988-.

[g] Member, Isaac Ray Award Board, 1988-

Pennsylvania Psychiatric Society (Fellow, 1969)

[a] Member, Committee of Professions and Associations, 1972.

Philadelphia Psychiatric Society
American Academy of Psychiatry and the Law, President, 1971-73

[a] Chairman, Committee on International Relations, 1984-92.

American College of Legal Medicine, (Fellow, 1970-).

[a] Member, Committee on Legislation, 1972;

[b] Member, Education Committee, 1977-80;

[c] Member, Nomination Committee, 1979-81.

American Academy of Forensic Sciences (Fellow, 1972)

[a] Chairman, Section of Psychiatry, 1977-78.

American College of Psychiatrists, (Fellow, 1983-).
Member, Laughlin Committee, 1990-1994.
Fellow, Philadelphia College of Physicians, 1980-.

HOSPITAL APPOINTMENTS:

[a] Current:

[1] Hospital of the University of Pennsylvania, 1973-;

[2] The Institute of the Pennsylvania Hospital, 1983-;

[3] Philadelphia Psychiatric Center, 1980-;

[4] Albert Einstein Medical Center, 1971-;

[5] Consultant in Forensic Psychiatry, Harrisburg State Hospital, 1986-.

[b] Past Appointments

[1] Norristown State Hospital; Consultant in Forensic Psychiatry, 1965-74;

[2] Temple University Hospital, 1965-72;

[3] Philadelphia General Hospital, 1965-72;

[4] Abington Memorial Hospital, 1967-69;

[5] Trenton Psychiatric Hospital, Consultant in Forensic Psychiatry, 1979-83.

[6] Friends Hospital, 1975-1986.

PREVIOUS ACADEMIC APPOINTMENTS:

[A] Temple University School of Medicine, Department of Psychiatry:

Clinical Assistant Professor of Psychiatry, 1970-72; Instructor in Psychiatry, 1965-69.

Temple University School of Law:

Temple University Schools of Law & Medicine Lecturer in Law, 1966-72.

Unit in Law and Psychiatry:

Research Associate, 1965-68; Training Supervisor in Forensic Psychiatry, 1968-72;

Director, Forensic Psychiatry Clinic, 1965-66;

Clinical Director, State Maximum Security, Forensic Diagnostic Hospital, Holmesburg Prison, 1966-68.

[B] Villanova University School of Law:

Lecturer in Law, 1972-85.

OTHER APPOINTMENTS AND AWARDS

The Philippe Pinel Award, given by the International Academy of Law and Mental Health, June, 1995, Tromso, Norway.

The Earl Bond Award for Outstanding Teaching in Psychiatry, University of Pennsylvania, 1979.

Recipient, Nathaniel Winkelman Award, November 16, 1988.

Recipient (with Robert I. Simon, M.D.), Manfred Guttmacher Award for Best Publication in Forensic Psychiatry, 1992.

Joseph J. Peters Institute Polaris Award Recipient, 1995.

Distinguished Professor Award, Florida Hospital Center for Psychiatry, 1994.

The Best Doctors in America, 1992-1993-1994-1995.

Chairman, Guttmacher Award Board, American Psychiatric Association, 1979-84.

American Bar Association Commission on the Mentally Disabled, 1980-83.

Consultant, National Institute of Justice, 1980-83.

Who's Who in the World, 1991

Who's Who in America 1989

Consultant, National Institute of Mental Health, 1978-83.

Mentor, International Society of Philosophical Enquiry, 1987-.

Visiting Clinical Professor of Psychiatric Medicine, East Carolina University School of Medicine, Greenville, NC, 1984-.

Visiting Professor of Psychiatry, Penn State University Hershey Medical Center, 1974-.

Visiting Professor of Psychiatry, University of South Florida, Tampa, Florida, 1980-82.

Consultant, Veterans Administration Hospital, Philadelphia, PA, 1975-.

Faculty, Continuing Medical Education, Institute of the Pennsylvania Hospital, 1975-.

Pennsylvania Governor's Task Force for the Mentally Ill Offender, 1977-78.

Consultant, VROOM building, Trenton Psychiatric Hospital, Trenton, NJ, 1979-83.

Member, Board of Directors, Center for Rape Concern, Joseph J. Peters Institute, Philadelphia, PA, 1978-.

Director, National Commission on Confidentiality of Health Records, 1977-79. (for AAPL)

Associate Psychiatrist, State Correctional Institution at Philadelphia, 1965-68.

Member, Board of Directors, Montgomery County Mental Health/Mental Retardation Association, 1972-1974.

Participant, Crime Commission of Philadelphia, Research Project on Coordination of Psychotherapy for Criminals.

Faculty Member, Third Judicial Sentencing Institute for Pennsylvania Judges, Allentown, PA, December, 1966.

Group Psychotherapist, Sex Offender Research Project, Philadelphia General Hospital, Philadelphia, PA, 1967-72.

Member, Monitoring Committee, Greystone Park Psychiatric Hospital, (Doe v. Klein), Morristown, NJ, 1978.

Consultant in Forensic Psychiatry, Albert V. Cutter Psychiatric Boards Review Course, Buffalo, NY, 1967-77.

Consultant to Broadside, a community foster home for adolescent boys, Philadelphia, PA, 1970-73.

Member, Board of Directors and Chairman of Committee on Research and Development of TODAY, Inc. (Treatment of Drugs Among Youth) a residential drug rehabilitation center, Bucks County, PA, 1970-74.

Member, Committee to Prepare Standards for Mental Health Treatment in Jails and Prisons, 'American Medical Association, 1979.

Visiting Professor of Psychiatry, St. Vincent's Hospital, New York, NY, 1980-.

Consultant in Psychiatry, Philadelphia Psychiatric Center, 1980-.

American Bar Association Task Force IV Special Dispositional Statutes and Mentally Disabled Convicts of the Standing Committee on Association Standards for Criminal Justice, 1980-.

National Institute of Mental Health Project Utilization of Psychiatric and Psychological Assessments by Criminal Court Judges, Project Advisory Committee Member, 1980-82.

Jewish Academy of Arts and Sciences, Vice Chairman, 1985-.

Member, National Board of Directors, American Red Magen David for Israel, 1977-.

National President, American Red Magen David for Israel, 1987-.

Board of Directors, International Academy of Law and Mental Health, 1989-.

Special Lectures:

The First Annual Leon Yochelson Memorial Lecture, Washington, DC, 1983.

The Fourth Annual Lecturer, Kenneth Appel Memorial Lecture, College of Physicians of Philadelphia, September, 1986.

The Sixth Annual Winkelman Lecture, Philadelphia Psychiatric Center, November 16, 1988.

The Baldwin Keyes Honorary Lecture, Thomas Jefferson University, November 30, 1988.

The Fifth Annual Robert S. Garber Lecture on Medical Ethics, Carrier Clinic, Belle Mead, New Jersey, July 13, 1989.

William Schumacher Annual Lecturer (with John R. Petrila, Esquire) Portland, Maine, October 9, 1992.

National Lectures

Most states in the United States, including medical schools, universities, law schools, private and governmental hospitals and state psychiatric associations.

International Lectures

Lectures in Canada, England, Ireland, Scotland, West Germany, Greece, Israel, Japan, China, Australia, Italy, Sweden.

BIBLIOGRAPHY: Journal Articles:

1. Reducing Sugars in the Blood of Newborn Infants, Sadoff, R.L., & Ulstrom, R. A., *Minn. Med. Bulletin*, 30:387, April 1959.
2. The Physician as an Expert Witness, Sadoff, R.L., *Physician's Panorama*, 2:17-18, September 1964.
3. Group Psychotherapy for Stutterers, Sadoff, R.L., Collins, Keeler, W.J., *Amer. J. Psychiat.*, 122: 1344, 1966.
4. Experiences with a University-Affiliated Psychiatric Service in a Correctional Institution, Heller, M.S., Sadoff, R.L., *Corr. Psychiatr, & J. of Soc. Therapy*, 12:240, 1966.

5. Psychiatric View of the Sexual Psychopath Statutes, Sadoff, R. L., *Corr. Psychist. & J. of Soc. Therapy*, 10:242, 1965.

6. Psychiatry Pleads Guilty, Sadoff, R.L., *Amer. Bar Ass'n. J.*, 51:48, 1965.

7. "Military Law", Section X, Part A, and "The Dangerous Offender" Section VI, Part B., Sadoff, R.L. in *Insanity Procedures Under Federal Law*, edited by Heller, M.S. & Polsky, S., Temple Univ. Unit in Law & Psychiatry Research Series, pp. 121-136 and 324-350.

8. The Forensic Psychiatry Clinic: Model for a New Approach, Sadoff, R.L., Heller, M. .S., Polsky, S., *Amer. J. Psychiat.*, 123:11, May, 1967, pp. 1402-1407.

9. Crying and Weeping in Emotional and Psychosomatic Disorders, Sadoff, R.L., *Psychosomatics*, 6:229, 1966.

10. On the Nature of Crying and Weeping, Sadoff, R.L., *Psychiatric Qu.*, 40:490, 1966.

11. Psychiatric View of Insanity in Divorce & Annulment, Sadoff, R.L., Pennsylvania Bar Ass'n. Q., 37:1, 1966.

12. Psychiatric Involvement in the Search for Truth, Sadoff, R.L., *American Bar Ass'n. J.*, 52:251, 1966.

13. Combining Medical & Psychiatric Management of a Patient With Recurrent Myocardial Infarctions & Significant Family History, Sadoff, R.L., & London, A.M., Psychosomatics, 7:218, 1966.

14. Opportunities for Research in Pennsylvania's Newly Planned Correctional Institution, Heller, M.S., & Sadoff, R.L., *The Prison Journal*, 46:32, 1966.

15. Developing Clinical Facilities in Forensic Psychiatry, Heller, M.S., Sadoff, R.L., Polsky, S., *Amer. J. Psychiat.*, 124:1562, 1968.

16. Aphasia Due to a Right Hemisphere Tumor in a Right-Handed Man, Sadoff, R.L., Holmes, J.E., *Neurology*, 16:392, 1967.

17. Passive Dependency in Stutterers, Sadoff, R.L., Collins, D.J., *Amer. J. Psychiat.*, 124:1126, 1967.

18. Sexually Deviated Offenders, Sadoff, R.L., *Temple Law Q.*, 40:305, Spring, 1967.

19. Tortious Liability of the Insane: A Psychiatric Evaluation, Sadoff, R.L., Penna. *Bar Ass'n. Q.*, 39:73, 1967.

20. Mental Illness and the Criminal Process: Role of the Psychiatrist, Sadoff, R.L., *Amer. Bar Ass'n. J.*, 54:566, 1968.

21. Mental Illness and Civil Law: Expanding Role of Psychiatric Consultation, Sadoff, R.L., *New York Law J.*, Aug. 14-15, 1968.

22. Who Should Have a Gun: Some Preliminary Psychiatric Thoughts, Rotenberg, L.A., Sadoff, R.L., *Amer. J. Psychiat.*, 125:841, Dec. 1968.

23. On Changing Group Therapists, Sadoff, R.L., Resnik, H.L.P., Peters, *Psychiatric Q. Supplement*, 42:156, 1968.

24. On Guns: History, Dynamics and Control, Rotenberg, L.A., Sadoff, R.L., *Corrective Psychiat. & J. of Soc. Therapy*, 16:82, 1970.

25. A Unique Forensic Diagnostic Hospital, Jablon, N., Sadoff, R.L., Heller, M.S., *Amer. J. Psychiat.*, 126:1663, 1970.

26. Myths Regarding the Sex Criminal, Sadoff, R.L., *Medical Aspects of Human Sexuality*, 3:64, July, 1969.

27. A Psychotic Reaction to Magnicide, Sadoff, R.L., Boxer, A.D., *Corrective Psychiat. & J. of Soc. Therapy*, 15:86, Fall, 1969.

28. Court Martial in Vietnam, Danto, B., Sadoff, R.L., *Corrective Psychiat. & J. of Soc. Therapy*, 15:65, Fall, 1969.

29. Establishing Psychiatric Services for Sex Offenders in the Community, Peters, J.S., Sadoff, R.L., *Federal Probation Q.*, 35:33, Fall, 1971.

30. Clinical Observations of Pedophiles, Sadoff, R.L., Peters, J.J., *Med. Aspects of Human Sexuality*, 4:20, Nov. 1970.

31. Civil Law and Psychiatry: Newer Dimensions, Sadoff, R.L., Amer. *Bar Ass'n. J.*, 56:165, Feb., 1970.

32. The Expanding Role of Psychiatric Consultation in Civil-Legal Procedures, Sadoff, R.L., in *Legal Medicine Annual*, ed., Cyril H. Wecht, M.D., Ch. 19, p. 405, 1970. Appleton, Century, Crofts, N.Y.

33. Clinical Measure of Enforced Group Psychotherapy, Sadoff, R.L., Roether, H., Peters, J.J., *Amer. J. Psychiatr.*, 128:224, 1971.

34. The Role of the Psychiatrist as Consultant in Therapeutic Abortion, Sadoff, R.L., Owens, R., *Penna. Medicine*, 74:63, May, 1971.

35. Clinical Aspects of Parricide, Sadoff, R.L., *Psychiatric Q.*, 45:65, 1971.

36. Criminal Behavior Masking Mental Illness, Sadoff, R.L., *Corrective Psychiat. & J. of Soc. Therapy*, 17:41, 1971.

37. Confidentiality in Enforced Group Psychotherapy, Sadoff, R.L., Roether, H.A., Peters, J.J., Presented at American Psychiatric Ass'n. Meetings, Dallas, Texas, 1971.

38. The Psychiatrist as Consultant in Civil and Criminal Law, *Penna. Bar Ass'n. Q.*, Vol. 43, p. 176, June, 1972.

39. LSD and the Insanity Plea: A Note of Caution, Danto, B., Sadoff, R.L., *Newsletter* of the American Academy of Psychiatry & the Law, Vol. II, No. 2, January, 1971.

40. The Doctor as an Expert Witness, *Medical Insight*, Oct., 1972.

41. Frottage: A Multi-faceted Phenomena, *Med. Aspects of Human Sexuality*, Vol. 5, June 5, 1971.

42. The Group That Failed, *Psychiatric Q.*, Vol. 47, 1973, pp. 110-116.

43. The Importance of Informed Consent, *J. of Legal Med.*, May/June, 1977, pp. 25-27.

44. Traumatic Psychosis, in *Personal Injury Annual*, ed. by L. R. Frumer, M.K. Mintzer, Matthew Bender, Publ., NY, 1973, p. 207.

45. Comprehensive Training in Forensic Psychiatry, *Amer. J. Psychiat.*, 31:2, p. 223, Feb., 1974.

46. Commentary on "Group Rape" by J.M. MacDonald in *Medical Aspects of Human Sexuality*, Vol. 8, Feb., 1974, p. 80.

47. "Sex and the Law" and "Other Sexual Deviation," in *Comprehensive Textbook of Psychiatry II*, ed. Freedman A., Kaplan, H., and Sadock, Williams and Wilkins, Baltimore, 1975.

48. Evaluation of Amnesia in Criminal-Legal Situations, *J. of Forensic Science*, Vol. 19, No. 1, Jan. 1974, p. 98.

49. The Anonymous Sex Offender, *Medical Aspects of Human Sexuality*, Vol. VI, No. 3, March, 1972.

50. Informed Consent, Confidentiality & Privilege in Psychiatry: Practical Applications. *Bulletin of American Acad. Psychiat. and the Law*, 2:101-106, June, 1974.

51. Survey of Teaching Programs in Law & Psychiatry, Sadoff, R.L., Thrasher, J.W., & Gottlieb, D.W., *Bulletin of American Acad. of Psychiatry and the Law*, 2:67-72, 1975.

52. Treatment of the Violent Sex Offender, *Int. J. of Offender Therapy*, 1975.

53. Right to Treatment (with Cohen, I. & Cohen, H.L.) *Bulletin of American Acad. Psychiatry & the Law*, 3:59-65 #2, 1975.

54. "Changing Laws and Ethics in Psychiatry," *Bulletin of American Acad. Psychiatry & the Law*, Vol. V, No. 1, pp. 34-40, 1977.

55. "The Insanity Defense: Why it Should be Retained," *J. Legal Medicine*, June, 1977, pp. 31-34.

56. "New Malpractice Concerns for the Psychiatrist," *Legal Aspects of Medical Practice, March, 1978, pp. 31-35.*

57. "Hospitalization for Care or Incarceration?" *Legal Aspects of Medical Practice*, Vol. VI, No. 6, June 1978, pp. 50-52.

58. "Career Directions in Forensic Psychiatry"

59. Weekly Psychiatry Update Series, (Teaching pamphlets), Biiomedia, Inc., Princeton, N.J., 1977-78.

60. "Developing Community Mental Health Center-Criminal Justice System Interactions", *International Journal of Law & Psychiatry*, Vol. I, No. 4, 1978, pp. 427-436,.

61. "On Refusing Treatment: Rights and Remedies", *Advocacy Now*, Vol. II, 1979.

62. "Physician-Patient Sexual Indiscretion", *International Journal of Medicine and Law*, 1980.

63. "Coping with the Legal Onslaught", Changes in the Mental Health Law: Problems for Psychiatrists with Progress for Patients", in *New Directions for Mental Health Services*, 1980.

64. The Future of Mental Health Advocacy, *Advocacy Now*, June 1980.

65. A Psychiatric Study of Violent Behavior in Lifers (with Richard A. Pakola, M.D.), *Bulletin of the American Academy of Psychiatry & the Law*, II, 1974, pp. 58-66.

66. The Psychiatrist & Criminal Law, *Journal of Operational Psychiatry*, Vol. 5, #2, Spring, Summer 1974, pp. 95-100.

67. Risks of State & Private Hospital Psychicatrist [sic] in Involuntary Hospitalization in Re: Right to Treatment, *Bulletin of the American Academy of Psychiatry & the Law*, Vol. 3, #1, 1975, pp. 32-37.

68. Teaching Forensic Psychiatry (with T.P. Thornberry, Ph.D., D.W. Gottlieb & J. Young, M.A.), *Bulletin of the American Academy of Psychiatry & the Law*, Vol. 7, No. 3, 1980.

69. Changes in the Law have improved treatment of the Mentally Ill, *Hospitals*, May 1, 1981, pp. 61-64

70. The Role of the Psychiatrist in Insanity Cases, *Phila. Medicine*, Vol. 79, 1, January, 1983.

71. Ethical Issues in Representation of Mentally Ill Individuals for Commitment, with M. L. Perlin, *Law & Contemporary Problems*, 45: Summer, 1982, No. 3, pp. 161-192.

72. Practical, Ethical Problems of the Forensic Psychiatrist in Dealing with Attorneys, *Bulletin of the American Academy of Psychiatry and the Law*, 1984, Vol. 12, No. 3, pp. 243-252.

73. Comprehensive Survey of Forensic Psychiatrists: Their Training and Their Practices, with C. D. Hanson, P. Sager, J. Dent and D. Stagliano, *Bulletin of the American Academy of Psychiatry and the Law*, 1984, Vol. 12, No. 4, pp. 403-411.

74. Patient Rights v. Patient Needs: Who Decides? *Journal of Clinical Psychiatry*, 44:6, June, 1983, pp. 27-32.

75. Sexual Violence, *Bulletin New York Academy of Medicine*, 62:5, June, 1986, pp. 466-476.

76. Insanity: Evolution of a Medical-Legal Concept. *Transactions and Studies of the College of Physicians of Philadelphia*, Series 5, Vol. 9, No. 4, 1987, pp. 237-256.

77. Ethical Issues in Forensic Psychiatry. *Psychiatric Annals*, May, 1988, pp. 320-323.

78. On Accepting Retainer Fees in Forensic Psychiatric Cases. *The Newsletter of the American Academy of Psychiatry and the Law*, December, 1987.

79. Violence: Roots and Remedies: The Perspective of the Forensic Psychiatrist, *Bulletin of the American Academy of Psychiatry and the Law*, Vol. 16, No. 2, June, 1988, pp. 145-152.

80. Sadoff, R.L., "The Essence of Tarasoff," *Maryland Medical Journal*, 30:55, 1981.

81. Sadoff, R.L., "Family Violence Litigation: What the Examining Psychiatrist Should Know," *The Psychiatric Times*, Vol. 8, No. 2, February, 1991, pp. 39-41.

82. With Gutheil, T. G., "Expert Opinion: Death in Hindsight," in *Review of Clinical Psychiatry and the Law*, Ed. by Simon, R. I., Vol. 1, American Psychiatric Press, Washington, D.C., 1989, pp. 329-339.

83. With Gutheil, T. G., "Expert Opinion: A Case of Tardive Dyskinesia," in *Review of Clinical Psychiatry and the Law*, Vol. 2, Ed. by Simon, R. I., American Psychiatric Press, Washington, D.C., 1990.

84. With Gutheil, T. G., "Expert Opinion: Sexual Exploitation," in *Review of Clinical Psychiatry and the Law*, Vol. 3, Ed. by Simon, R. I., American Psychiatric Press, Washington, D.C., 1991.

85. With Petrila, J. P., "Confidentiality and the Family as Caregiver," *Hospital and Community Psychiatry*, 43:2, February, 1992, pp. 136-139.

86. Therapeutic Jurisprudence: A View from a Forensic Psychiatrist, in *New York Law School Journal of Human Rights*, Vol. 10, Part 3, Symposium, 1993, pp. 825-833.

87. With Halleck, S. L., Hoge, S. K., Miller, R. D., and Halleck, N. H., "The Use of Psychiatric Diagnoses in the Legal Process: Task Force Report of the American Psychiatric Association," *Bulletin of the American Academy of Psychiatry and the Law*, Vol. 20, No. 4, 1992, pp. 481-499.

88. Sadoff, Robert L., "Assessing Disability and Compensation," in *Current Opinion in Psychiatry*, Section on Forensic Psychiatry, November 1995, London.

89. Sadoff, R. L., "Mothers Who Kill Their Children," in *Psychiatric Annals*, 25:10, October 1995.

BOOKS PUBLISHED:

1. *Psychic Injuries*, with Marvin E. Lewis, Esq., Matthew Bender, N.Y., 1975.

2. *Forensic Psychiatry: A Practical Guide for Lawyers and Psychiatrists, 2nd Edition, 1988.* C. Thomas, Springfield, Ill, 1975. (1st Ed.)

3. *Violence and Responsibility*, Spectrum Publ., N.Y., 1978.

4. *Legal Issues in the Care of Psychiatric Patients: A Guide for Mental Health Professionals*, Springer, N.Y., 1982.

5. *Psychiatric Clinics of North America*, December 1983, Vol. 6, No. 3, Forensic Psychiatry, Saunders, Philadelphia, 1983.

6. With Simon, R. I., *Psychiatric Malpractice: Cases and Comments for Clinicians*, American Psychiatric Press, Washington, D.C., 1992.

TAPE RECORDINGS:

1. Behavioral Science Tape Library: "Psychiatry and the Law," Six Cassettes, 1972.

2. Trial Lawyers Tape of the Month: "The Psychiatrist in Civil-Legal Procedures," Autumn, 1971.

3. APA Tape Library: "The Right to Treatment: What It Is and What It Is Not," May 1975.

4. SKF: Psychiatric Recorder: Forensic Psychiatry, Moderator, Panel, 1978.

5. Medical Portfolio for Psychiatrists, Vol. 2, No. 1, Side 2, "The Right to Refuse Treatment," 1981.

6. Videotape recording: Patient Rights v. Patient Needs: Who Decides? Produced by Squibb, May 1983.

7. College of Psychiatrists audiotape on "The Insanity Defense," with James Cavanaugh, M.D., and Richard Ciccone, M.D., 1989.

CHAPTERS IN BOOKS

1. "Sex and the Law" and "Other Deviations," in *Comprehensive Textbook of Psychiatry, II*, ed. Freedman, A., Kaplan, H., and Sadock, B., Williams & Wilkins Press, Baltimore, 1976.

2. "The Psychiatrist and the Rapist: Legal Issues," in *Clinical Aspects of the Rapist*, ed. Rada, R. T., Grune & Stratton, N.Y., 1978

3. "Indications for Involuntary Hospitalization: Dangerousness or Mental Illness," in *Law and the Mental Health Professions*, ed. Barton, W., I.U. Press, N.Y., 1978.

4. "The Mental Health Profession's Role in Patient Advocacy," with Louis Kopolow, M.D., in *Mental Health Advocacy*, NIMH, Washington, DC, 1978.

5. "On the Nature of Crying and Weeping," in *The World of Emotions*, Soccarides, Charles C., Int. Univ. Press, NY, 1977.

6. "Violence in Juveniles," in *The Violent Child, Treatment and Legal Aspects*, ed. Kalogerakis, M.G., Jason Aronson, N.Y., 1978.

7. "Working with the Forensic Psychologist," in *The Role of the Forensic Psychologist*, ed. Cooke, Gerald J., Chas. C. Thomas Co., Springfield, Ill., 1980.

8. "Changes in the Mental Health Law: Progress for Patients – Problems for Psychiatrists in *New Directions for Mental Health Services*, ed. Halleck, Seymour E., Jossey-Bass, San Francisco, 1979.

9. "Adversary Approach to Violent Offenders" with Perlin, M. in *Violence: Perspective on Murder and Aggression*, ed. Kutash, I., Kutash, S. B., and Schlesinger, L. B., Jossey-Bass, San Francisco, 1978.

10. "The Legal Rights & Difficulties of Children in Separation & Divorce," with Stephen Billick, M.D., in *Children of Separation and Divorce: Management and Treatment*, ed. by Irving R. Stuart, and Lawrence Edwin Abt, Nostrand Rinehold Co., N.Y., 1981.

11. "Forensic Psychiatry," in *Forensic Sciences*, ed. by Cyril Wecht, M.D., J.D., Matthew Bender, N.Y., 1983.

12. Legal Issues in the Care & Treatment of Psychiatric Emergencies, in *Psychiatric Emergencies*, ed. by Dubin, W. R., Hanke, N., & Nickens, H. W., Churchill Livingstone, Inc., N.Y., 1983.

13. Psychiatric Malpractice in Forensic Psychiatry: The Plaintiff's Case, in *Critical Issues in American Psychiatry & the Law*, Vol. 2, ed. by Rosner, R., Plenum Press, N.Y., 1985.

14. Malpractice in Psychiatry: Standards of Care and the Expert Witness, in *Psychiatric Malpractice*, ed. by Reid, W. H., Spectrum, N.Y., 1984.

15. "Competence and Informed Consent," in *Legal Encroachment on Psychiatric Practice*, ed. by S. Rachlin, *New Directions for Mental Health Services*, No. 25, San Francisco: Jossey-Bass, March 1985.

16. "The Insanity Defense in Criminal Law," in *Premenstrual Syndrome*, ed. by Ginsburg, B. E. and Carter, B. F., Plenum Publishing Corporation, New York, 1987.

17. "What the Attorney should Know in Using Expert Witnesses in Child Custody Cases," with Schechter, M.D. and Grossman, J. C., and Dunning, B. J., in *Pennsylvania Child Custody* by Bertin, E., Bisel Company, Philadelphia, 1983.

18. "Children Who Kill," in *The Human Side of Homicide*, ed. by Danto, B., Bruhns, J. and Kutscher, A. H., Columbia University Press, New York, 1982, pp. 165-174.

19. Political and Legal Perspectives in *The Premenstrual Syndrome*, Ed. by William R. Keye, Jr., Saunders, Philadelphia, 1988, pp. 15-26.

20. In Defense of the Insanity Defense, in *Critical Issues in American Psychiatry and the Law*, Ed. by Rosner, R., Vol. 5, *Mental Health Services to Courts*, Plenum, New York, 1988.

21. United States Legislation in Forensic Psychiatry, in *Principles and Practice of Forensic Psychiatry*, Ed. by Bluglass and Bowden, Churchill Livingston, London, 1989.

22. "Basic Facts About Mental Illness", in *Legal Rights of Mentally Disabled Persons*, Ed. by P. Friedman, Practicing Law Institute, Washington, DC, 1979.

23. Psychiatric Malpractice, in *Preparing and Winning Medical Negligence Cases*, Ed. by Preiser,

S. E., Wecht, C. H., and Preiser, M. L., Michie, Charlottesville, VA, 1989.

24. Sadoff, R. L., "Medical-Legal Issues," in *Comprehensive Review of Geriatric Psychiatry*, Ed. by Sadavoy, J., Lazarus, L. W., and Jarvik, L. F., American Psychiatric Press, Washington, D.C., 1991, pp. 637-651.

25. "Ethical Issues in Forensic Psychiatry," in *Critical Issues in American Psychiatry and the Law*, Vol. 7, pp. 163-169, Ed. by Rosner, R., and Weinstock, R.: *Ethical Practice in Psychiatry and the Law*. New York: Plenum Press, 1990.

26. Psychiatry and Law (Forensic Psychiatry), ACLM *Medical Legal Primer*, Ed. by Wecht, C. H., ACLM Foundation Press, Pittsburgh, 1991.

27. With Dubin, L. L., The Use of Hypnosis as a Pretrial Discovery Tool in Civil and Criminal Lawsuits, in *Legal Medicine*, Ed. by Wecht, C. H., Butterworths, Salem, NH, 1990, pp. 105-124.

28. With Sadoff, Julie B., *The Impaired Health Professional: Legal and Ethical Issues* in *Psychiatric-Legal Decision Making by the Mental Health Practitioner*, Ed. by Bluestone, H., Travin, S., and Marlowe, D. B., John Wylie & Sons, Inc., New York, 1994.

29. Sadoff, Robert L., *Practical Issues in Forensic Psychiatric Practice* in *Principles and Practice of Forensic Psychiatry*, Ed. by Rosner, R., Chapman and Hall, New York, 1994, pp. 41-46.

FORENSIC PSYCHIATRIC EXPERIENCE

EXPERT WITNESS TESTIMONY

Testified in 20 states, several federal jurisdictions, occasional international consultations.

ACADEMIC PRESENTATIONS

Lectured in most states in the United States and in 12 countries of the world.

EXHIBIT 2

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTRY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA Respondent. v. RONALD ROMPILLA Petitioner.	:	No. 682/1988

DECLARATION OF DR. ROBERT SADOFF PURSUANT TO 28 U.S.C. SECTION 1746 AND 18 PA.C.S. SECTION 4904

1. I am a medical doctor licensed in the Commonwealth of Pennsylvania. I specialize in psychiatry.

2. I have no recollection of having evaluated Ronald Rompilla. I understand from review of my letter of September, 1988 addressed to Maria Dantos, Esq. – then employed in the Lehigh County Public Defender's Office – that I saw Mr. Rompilla on September 15, 1988. As a psychiatrist, I do not conduct psychological and neuropsychological testing and would not have done so in Mr. Rompilla's case.

3. I have recently reviewed school records regarding Mr. Rompilla. These records are attached to this Declaration. These records show that as a child Mr. Rompilla scored, in October, 1959, on the WISC, a standardized psychological IQ test, a verbal IQ of 61, performance of 75 and a full-scale of 64, which is in the developmentally challenged (formerly mentally retarded) range. In April of 1957, he had scored a 75 IQ, which is in the low normal range, at age nine. The records also note that Mr. Rompilla was placed in special education classes. In 1961, on the WISC, he showed a verbal IQ of 69, a performance of 75 and a full-scale of 69, which, again, is at the high end of the developmentally challenged. I am told that in October, 1974, his WRAT (Wide Range Achievement Testing) was 27, which, I am told, is in the low percentile. I have no direct experience with the WRAT.

4. I understand that trial counsel testified in post-conviction proceedings that they never obtained any of these materials and therefore they were not provided to me in 1988.

5. I understand from the attorneys that Dr. Gerald Cooke, clinical and forensic psychologist, had worked with me in evaluating Mr. Rompilla. It is my experience with Dr. Cooke that had he had access to these scores, he would have conducted a battery of neuropsychological testing to help assess the cause or etiology of these low scores when Mr. Rompilla was a youngster. It is to be noted that Mr. Rompilla achieved an IQ of 93 in October, 1975. There is clearly a discrepancy between his earlier IQ scores and his later one. It would have been my request to have neuropsychological testing conducted had I been faced with this information that I apparently did not have in 1988, when conducting my examination. The concern would have been

the presence or absence of organic brain dysfunction that may have affected his IQ score.

6. I am presently not available to testify in this latter until late May, 1996. This declaration sets forth my views.

7. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa.C.S. § 4904.

/s/ Robert Sadoff, M.D.
ROBERT SADOFF, M.D.

Dated: Jenkintown, PA
April 8, 1996

IN THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PA CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, : No. 682-1988
:
-vs- :
:
RONALD ROMPILLA, :
Defendant. :

DEPOSITION OF FRANK M. DATTILIO, M.D.

Deposition taken in reference to the above matter at the medical offices of Frank M. Dattilio, M.D., 1251 South Cedar Crest Boulevard, Suite 211-D, Allentown, Pennsylvania, 18103, on Tuesday, May 7, 1996, commencing at 10:15 a.m. and stenographically reported by Robyn L. Berner, Registered Professional Reporter.

APPEARANCES:

MICHAEL McINTYRE, ESQUIRE
Assistant District Attorney
c/o Lehigh County Courthouse
5th & Hamilton Streets
Allentown, Pennsylvania 18101
– For the Commonwealth

MICHAEL WISEMAN, ESQUIRE
c/o Post-Conviction Defender Organization
437 Chestnut Street – Suite 501
Philadelphia, Pennsylvania 19106
– For the Defendant

* * *

JAMES P. GALLAGHER III & ASSOCIATES,
LTD. 3420 Talbert Avenue – Suite 201
Allentown, Pennsylvania 18102
(610) 366-9088

[2] INDEX

WITNESS	Direct	Redirect	Cross	Recross
FRANK M. DATTILIO, M.D.				
By Mr. McIntyre	4, 13	122		
By Mr. Wiseman			10, 47	125

EXHIBITS

PLAINTIFF'S	Description	I.D.
Exhibits 4, 5 & 6	Grade School WISC Results	126
DEFENDANT'S		
Dattilio Exhibit 1	Ambulatory Reports	90

[3] DR. DATTILIO: Just for the record, I provided the stenographer with a copy of Dr. Armstrong's report to provide her with a copy of the words that will probably be flying around here, just so you know that. If you have an objection to that, she can return that as soon as she's finished.

MR. McINTYRE: Let's go on the record. This is Mike McIntyre with the Lehigh County District Attorney's Office. We're here in Dr. Dattilio's office in the case of Ronald Rompilla, case no. 682 of 1988. What I'd like to do, first, Mike, is the doctor told me he is unavailable as of 3:00 this afternoon. Now, it's 10:00 right now, or it's 10:15 now, depositions were scheduled at 10:00. Do you think you're going to need more time than that?

MR. WISEMAN: I'm not sure myself. If we run out of time, we'll just pick a convenient time.

MR. McINTYRE: Just so we don't get into a fight about that time being the bewitching hour.

MR. WISEMAN: Let me just say, I'd like to state a general objection on the record to Dr. Dattilio's testimony in this case. In a recent Pennsylvania Supreme Court case, Commonwealth versus Buehl, B-U-E-H-L, which can be found at 658 A.2d 771, in particular, page 781, the Court held inadmissible the testimony of a mental health professional who was giving testimony as to issues in the case, mental [4] health issues, without having examined the subject of his opinions, and the Court specifically held that such testimony was inadmissible.

MR. McINTYRE: Okay.

MR. WISEMAN: So I'd just like to place that on the record. We do object to any opinions this doctor would offer about the issues before the Court.

MR. McINTYRE: All right. We'll take a chance with it.

DR. DATTILIO: Off the record.

(Thereupon, a discussion was held off the record.)

FRANK M. DATTILIO, M.D., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McINTYRE:

Q. Would you state your name, please.

A. Dr. Frank M. Dattilio, D-A-T-T-I-L-I-O, one word, no accent.

MR. McINTYRE: Mike, I guess we should put on, we're under the same rules we've been under for the other depositions, you have to state your objection.

MR. WISEMAN: Yes.

BY MR. McINTYRE:

Q. What is your occupation?

A. I'm a clinical psychologist.

[5] Q. What is your address?

A. Suite 211-D, as in David, 1251 South Cedar Crest Boulevard, Allentown, Pennsylvania, 18103.

Q. Do you have any specialties?

A. Yes, I do. My specialties are clinical psychology, cognitive therapy and behavior therapy.

Q. Are you board certified?

A. I am.

Q. With who?

A. With the American Board of Professional Psychology and in Behavioral Psychology.

Q. I'm going to show you what's been marked as P-3, Commonwealth 3, excuse me.

MR. WISEMAN: I see you're marking it.

MR. McINTYRE: Right, I called it P-3. There's 1 and 2 that were entered at some other time in this case.

BY MR. McINTYRE:

Q. I ask if you can identify this.

A. Okay. This is a complete and updated version of my curriculum vitae.

Q. Is that accurate?

A. Yes, to the best of my knowledge.

Q. Okay. Dr. Dattilio, have you had an opportunity to review various documents in regard to the case of the Commonwealth versus Ronald Rompilla?

[6] A. Yes, I have.

Q. Now, have you seen a statement from Dr. Barry M. Crown dated November 29, 1995?

A. Yes, sir.

Q. And have you seen a report from Dr. Carol Armstrong dated March 5th, 1996?

A. Yes.

Q. Have you seen a report from Dr. Paul Gross dated June 4th, 1988?

A. I have.

MR. McINTYRE: And for the record, that Dr. Gross report would be exhibit D-1 in this case, the Dr. Gross report.

BY MR. McINTYRE:

Q. All right. Have you also seen grade school records from Mr. Rompilla?

A. Yes, I have.

MR. McINTYRE: Now, maybe you could help me out with this, Mike. I'm not exactly sure what exhibit they were in the case. I have them as D-5.

MR. WISEMAN: Sure. I'll tell you in a second. The school records were initially marked as Defendant's 4 and 5, and I believe that the authenticated version where a custodian was brought into court was actually D-8. I think that's how we've been referring to them.

[7] BY MR. McINTYRE:

Q. Have you seen a hospital record for Mr. Rompilla back in 1988 from the Sacred Heart Hospital?

A. Yes, I have.

MR. McINTYRE: And can you help me out with that, Mike. I'm at a loss as to what exhibit that is in this case. I have it as D-4.

MR. WISEMAN: Sure. I have it as D-6.

MR. McINTYRE: Okay. What I have as D-6 is the next exhibit that I'll ask the doctor about.

BY MR. McINTYRE:

Q. The initial transfer petition from the Commonwealth of Pennsylvania, have you seen that?

A. Yes.

MR. WISEMAN: I have that as D-7. I think we all know what we're talking about.

MR. McINTYRE: Just so we have all these numbers right.

BY MR. McINTYRE:

Q. Doctor, did you have the opportunity to examine Mr. Rompilla?

A. No, I did not.

Q. Did you have the opportunity to review depositions of Dr. Crown or Dr. Armstrong?

A. No, I did not.

[8] MR. McINTYRE: For the record, Mike, I don't believe those depositions have been transcribed, at least I don't have them.

MR. WISEMAN: You don't?

MR. McINTYRE: Do you have them?

MR. WISEMAN: Yes.

MR. McINTYRE: When did you get them?

MR. WISEMAN: I don't know the exact date. I've had them for probably – which ones, of Crown and Armstrong?

MR. McINTYRE: Yes, those two.

MR. WISEMAN: I'd say I have them for about ten days or so. I thought you were getting copies of them.

MR. McINTYRE: I haven't received them.

MR. WISEMAN: Okay.

THE WITNESS: Also, I want to state for the record I've not had the liberty of reviewing any of the raw data, test data, from either Dr. Crown or Dr. Armstrong's evaluation.

BY MR. McINTYRE:

Q. You've just seen the reports?

A. Only the reports.

MR. McINTYRE: I guess we ought to have for the record, let's see if we can find out what exhibits those are. We marked those both as exhibits, Armstrong's report and Crown's report. I think you did. Let's just double [9] check that.

MR. WISEMAN: Armstrong's report is Defendant's 18. Dr. Crown's report was attached to the – Dr. Crown's statement was attached to the initial P.C.R.A. petition. I think it was marked as D-16.

MR. McINTYRE: All right. I agree with those.

BY MR. McINTYRE:

Q. Pursuant – did you read over all those documents that you had then?

A. I did.

Q. And did you then receive from me a request for certain questions?

A. I did. It was a three page request dated April 8th, 1996.

Q. And did you answer those questions in a report form?

A. To the best of my ability, I did.

MR. McINTYRE: And I believe counsel has received that report.

MR. WISEMAN: Yes, Friday afternoon of this past week we received that.

MR. McINTYRE: All right. I'm going to offer Dr. Dattilio as an expert on the question of whether or not any expert, including Crown and Armstrong, can render an opinion based on an examination and test results from 1995 [10] and 1996, along with the other items of evidence which we've just gone over, as to whether or not Mr. Rompilla evidenced any problems under the sentencing code in regard to mitigation in a capital offense at the time of the commission of the offense back in January of 1988. You may question him on those qualifications.

MR. WISEMAN: Are you offering Dr. Dattilio, then, as an expert in capital mitigation from a forensic setting, forensic perspective?

MR. McINTYRE: I don't know if its necessarily you have to say that. I'm offering him as I indicated to you. I can't make it more clear. He's going to be asked whether or not he has an opinion as to whether any expert can retroactively relate back from testing done eight to nine years later, whether a person's mental condition – what it was eight to nine years earlier.

MR. WISEMAN: I would object as to the form of the offer. I don't think you can offer an expert as to one of the ultimate issues in the case. You can offer him as an expert, obviously, in a learned field.

Let me ask a few questions in addition to that.

MR. McINTYRE: Sure.

CROSS EXAMINATION ON QUALIFICATIONS

BY MR. McINTYRE [sic]:

Q. Do you have any neuropsychological expertise?

[11] A. I have some experience in neuropsychological testing and supervision.

Q. Are you board certified in any form for neuropsychology?

A. No, I am not.

Q. Just bear with me a moment.

A. Sure.

Q. Are you a member of the American Board of Professional Neuropsychology?

A. I am a member of the American Board of Professional Psychology.

Q. How about professional neuropsychology?

A. No.

Q. Are you a member of the National Academy of Neuropsychology?

A. No.

Q. American Academy of Neurology?

A. No.

Q. International Neuropsychology Society?

A. No.

Q. American Society of Neurorehabilitation?

A. No.

Q. You're a clinical psychologist?

A. Yes.

Q. And your practice is primarily in the area of [12] marriage and family therapy?

A. No, not only.

Q. Well, I said primarily.

A. No.

Q. It's not primarily?

A. No.

Q. Your letterhead lists the American Association for Marriage and Family Therapy.

A. Yes, that's correct.

Q. What other areas do you practice in?

A. Clinical psychology, psychodiagnostic evaluations, forensic evaluations.

Q. In your report you mention that you're on the staff of the Department of Psychiatry at the University of Pennsylvania School of Medicine?

A. That's correct.

Q. And would that be as a clinical associate at the Center for Cognitive Therapy?

A. That's correct.

Q. That's not a paid position, is it?

A. No.

Q. That's a volunteer position?

A. That's correct.

Q. How long have you held that position?

A. Since 1986.

[13] Q. Does that position involve issues of neuropsychology?

A. No.

MR. WISEMAN: I would object to Dr. Dattilio being offered as an expert in this case. The issues that are before the court are neuropsychological issues, and I think Dr. Dattilio clearly is not an expert in neuropsychology. He's an expert in clinical psychology; and I think he is not, therefore, credentialed to make the comments you have offered him to make as an expert, and I would note my objection on that basis.

MR. McINTYRE: Okay. No more questions on his qualifications?

MR. WISEMAN: No.

CONTINUATION OF DIRECT EXAMINATION

BY MR. McINTYRE:

Q. Doctor, I want to ask you some questions similar to the ones I posed which you answered in the report that you filed in this case.

I guess we should begin – we'll call them reports, although Dr. Crown's wasn't technically a report; but the

narratives you read from Dr. Crown and Dr. Armstrong, have you familiarized yourself with those?

A. Yes.

Q. First of all, what did Dr. Crown indicate in his [14] statements?

A. Well, he indicates that – first of all, it wasn't clear to me as to exactly what this was. It appeared as though it was almost in a deposition form, but I wasn't sure whether or not he had submitted this as a formal report.

He indicated that he had administered a number of tests and reviewed background information. He also indicated that he had performed a clinical interview with Mr. Rompilla. He states in here that he administered – just bear with me for a second, please – the Wide Range Achievement Test and, also, I believe he said he administered the Wechsler Adult Intelligence Scale.

Q. Let me ask you this. Does he report anywhere in that the score that Mr. Rompilla achieved?

A. No. Surprisely, no. In fact, there are no scores indicated here at all.

Q. All right. Is that unusual?

A. Yes.

Q. Why do you say that?

A. Our ethics of psychology say if we administer any tests psychological in nature, educational tests, that we must, if those tests are valid and reliable, we report the scores, the interpretation and the findings of that.

Q. Are there different ethics for a neuropsychologist than there are for a psychologist?

[15] A. No.

Q. I take it neuropsychology is a subspecialty of psychology?

A. That's correct.

Q. How about Dr. Armstrong's report, does she give test results?

A. Yes, she does. Dr. Armstrong again, while this is a thorough report of the findings, it's a little bit unusual in that typically the background information and history is stated first leading up to the reason why the evaluation was requested. Then there's usually a listing of tests that were administered, which she has on page two and page three respectively. Then usually they will go into the findings of the test results, which she's listed just for quick citation here, and then they usually draw conclusions, which she has done at the end.

Q. Can you tell from Dr. Armstrong's report whether or not she administered any tests that we know as an IQ test?

A. Yes. Actually, what Dr. Armstrong administered was several cognitive tests, the Logical Deductive Reasoning Test, a test on Cognitive Flexibility and a Written Calculation. She also administered selective subtests of the Wechsler Memory Scale, Digit Span, Visual Memory Span and Logical Memory Test I.

[16] Q. Okay. Did she give any numerical scores for the results of those tests?

A. No, she failed to state a verbal performance IQ as well as a full scale IQ, which, again, is a little surprising to me as to why she would have gone through the efforts of the tests.

Q. And do you know from your reading of the reports from Drs. Crown and Armstrong that there is a lot to do in this case with prior IQ tests of Mr. Rompilla, his grade school IQ tests?

A. It appears so.

Q. Would you know of any reason why neither of these doctors would list the scores that they administered?

A. I'm at a loss as to why they haven't.

Q. Okay. Now, let me ask you this. Can you conclude anything to a reasonable degree of psychological certainty from Dr. Crown's statement about Mr. Rompilla's condition?

A. Can I conclude anything?

Q. To a reasonable degree of psychological certainty.

A. Well, no, it's hard for me to do that because he seems very vague in his report with respect to where he derived certain information; and he uses information that was administered from tests previously, and I would be leery to derive anything directly from that.

Q. Let me ask you the same question about Dr. [17] Armstrong's report. Can we conclude – and listen closely to this question – first, initially from Dr. Armstrong's report, and tell us from the results whether or not Mr. Rompilla had some type of a mental problem or had some

type of a mental problem at the time of his testing in early 1996?

A. I think it's very difficult for us to infer from the results and conclusions of her test that at any time specificity can be placed on any brain damage that occurred with this gentleman.

Q. Well, do we know, can we conclude there was one at the time she examined him and tested him?

A. I think that clearly her findings are accurate, that he did indeed have brain damage at the time she evaluated him.

Q. Now, the next question is, can we conclude when that brain damage occurred?

A. Not with any degree of accuracy, no.

Q. Can we conclude to a reasonable degree of psychological certainty when the brain damage evidenced by the testing done by Dr. Armstrong in 1996 occurred in Mr. Rompilla?

A. No.

Q. Can we conclude with any reasonable degree – strike that – to a reasonable degree of psychological [18] certainty what caused the problems evidenced by Dr. Armstrong's testing in 1996?

A. From what I've gathered from the reports and the background information, not clearly, no.

Q. Is there more than one possible cause of the type of damage that shows up in this testing by Dr. Armstrong in '96?

A. Based on what I've read and all the information, yes.

Q. What types, what can cause this problem?

A. First of all, we're talking about a number of factors that occurred over a long span of time. There's a history of alcoholism, not only Mr. Rompilla himself but with his biological mother. There's a conflictual history about blows in the head that he sustained between what's reported by Dr. Crown and Dr. Armstrong and what was reported years ago by Dr. Gross. Again, depending on when those incidents occurred, we might be able to try to pinpoint some things, but it's very difficult to do.

Q. A history of alcoholism is a possible cause of this type of brain damage?

A. Could be.

Q. How about head injury?

A. Could be.

Q. How about – and I have no idea about this one – [19] how about prolonged periods of incarceration in a state penitentiary?

A. Depends on what happened during those prolonged periods. If there were documented fights or nondocumented fights in which he sustained any kind of damage to his head, if there was any indication of any substance use, homemade or whatever, that occurred during the time in which he was incarcerated and plus, you know, the normal course of deterioration of one's mental and physiological state over time in certain circumstances.

Q. All right. Before I ask you about that, the aging process, what about – and what I was throwing out here, and I have no idea about it, is the fact that a person has been incarcerated alone, not that he then got into a fight. Mr. Rompilla, you know from the records, was incarcerated from '76 through '87, and then he got out for a short time, committed this offense in January of '88, and went back in from '88 to '95, when he was first tested by Crown. Any studies on that?

A. If anything, what Mr. Rompilla would have probably been affected by is his emotional status as a result of his incarceration; and depending on the circumstances, that may have some impact on his functioning. What's interesting is neither Dr. Crown or Dr. Armstrong seemed to administer any type of projective psychological testing or any MMPI test, [20] which would give us more of a clue into his psychodynamics and the emotional state of his condition.

Q. Now, let's talk about the aging process. Mr. Rompilla, if I'm not mistaken, is going to be 48 this year, I think in November?

A. According to the literature, that's correct.

Q. Now, does the aging process affect out mental status?

A. Yes, over time.

Q. How does that – can you expound on that?

A. Well, with any aging process, there's deterioration of functions. It's different for everyone, but usually at age late 40's or 50's, there's not necessarily too much deterioration. It usually occurs in the last third of a person's life.

Q. All right. You say usually. Is it possible that a change can occur in a person's mental status from age 40 to age 48?

A. It's possible.

Q. Is it possible that that can occur to a person who's facing a death sentence and is incarcerated during that period of time?

A. It's possible that there would be deterioration in his mental status.

MR. WISEMAN: I'm going to object to these last [21] two questions in regards to possibilities as opposed to certainties.

MR. McINTYRE: I think you missed the first one, but okay. It's noted.

BY MR. McINTYRE:

Q. Let me ask you this concerning alcoholism. Does the use of alcoholism [sic] instantaneously cause brain damage? The fact that the heavy use of alcohol, does that instantaneously cause brain damage, or does that happen over time?

A. Normally, it happens over time.

Q. All right. Now, let me give you an example. What if I was a heavy drinker to age 30, and age 30 I had no brain damage, and then I stopped drinking. Would that heavy drinking of alcohol affect me later in life?

A. It depends.

Q. On what?

A. Well, a number of factors. It depends on the predisposition of your condition prior to drinking and during the time that you're drinking. We don't know what's always going on inside of the brain just by virtue of the way an individual functions. It may have accelerated a pre-existing deteriorative state that may have later manifested. That's a possibility.

Q. So the manifestation of the problem doesn't have [22] to occur at the time of the drinking; it could occur later?

A. It's possible.

Q. Okay. Now, would it be important for any expert, including Crown and Armstrong, to know what was going on with Mr. Rompilla from the time of his incarceration in 1988 until the time of their testing in 1995 and 1996?

A. I would think it's not likely.

Q. All right. Let me try that question again. Would it be important for them to know what happened to him when he was in prison during that period of time?

A. I would think so, yes.

Q. You understand what they've done is they've used their test results of 1995 and '96 to render an opinion as to what his mental status was at the time of the crime?

A. That's the impression I received.

Q. In order to do that, is it important for a person to know what has happened to him in the intervening years between the crime and their testing?

A. If I were doing the evaluation, that's what I would want to know.

Q. Did you note from either of these doctors any suggestion that they got any type of a history from Mr. Rompilla or anyone else as to what happened to him in those eight years, from 1988 to 1995, 1996?

A. While incarcerated?

[23] Q. Yes.

A. Not that I recall.

Q. Let me ask you this, Doctor, and then I'll ask you some small questions, but I'm going to ask you basically the crux of my questions today, and actually I wrote it out for you, and then we'll ask you some small questions as to your opinion.

First of all, I want to know if you have an opinion to a reasonable degree of psychological certainty, and I'll ask you what that opinion is, okay?

A. Yes.

Q. Do you have an opinion, to a reasonable degree of psychological certainty, as to whether or not any expert has the ability to render an opinion to a reasonable degree of psychological certainty as to Mr. Rompilla's mental state on the date of the murder in January 1988 based solely on exams and testing done in 1995 and 1996?

A. Yes, I have an opinion.

Q. What is that opinion?

A. Based on your statement, it is my contention that it is very difficult for anyone to retroactively determine whether or not that existed at the time.

Q. All right. Now, when I talk about mental state, I want to ask you specifically this, and I'm going to read for the record from the sentencing code, and I want to know [24] whether or not in that same question these experts can opine to a reasonable degree of psychological certainty as to whether or not at the time of the crime the defendant manifested either of these conditions: Number one, the defendant was under the influence of extreme mental or emotional disturbance; and, number two, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. Do you have an opinion?

A. Yes.

Q. And what is that opinion?

A. The opinion is that they would have had to have first-hand information about the environment, the circumstances, individuals who witnessed his behavior, emotional displays that were credible, or having had witnessed it themselves first-hand in order to render that kind of an opinion.

Q. All right. Let me ask you this, whether or not the availability of any of the other information that Dr. Crown and Dr. Armstrong had would change your opinion about their ability to render that opinion in the first place.

Let's take these one at a time. Let me show you something that I haven't shown you before, and it's not one of the things you've seen. This is Defense Exhibit No. 20. [25] I believe I can state these are some testing [sic] done

on Mr. Rompilla in 1988, December 9th, 1988, almost a year after the offense for which he was convicted, and just take a look and study that.

For the record, I haven't shown the doctor that.

A. Okay.

Q. Assuming that that test was done on Mr. Rompilla, those tests – first of all, let me ask you some questions. Wasn't an IQ test done on him in December of '88 based on that exhibit?

A. They said he earned a 79 on the WAIS, Wechsler Adult Intelligence Scale. I assume they mean an IQ scale of 79, which borders on low average.

Q. That is not in the retarded range, is it?

A. It's in the high end of the borderline range, and that score and that test scale borderline went from 70 to 79 with 80 starting the category of low average, so he was at the crest of the borderline, the high end crest of the borderline range just one point shy of low average.

Q. What does that tell us about his ability to function?

A. That he can function in some circumstances reasonably well, that he's not, you know, a very bright individual, but he's certainly able to get about, hold a job, work in certain positions, recall things to a [26] reasonable degree.

Q. All right. Is that consistent or inconsistent with a finding – strike that. Let me rephrase that question.

That score of 79 on the WISC test, is that any –

MR. WISEMAN: You mean WAIS.

BY MR. McINTYRE:

Q. I'm sorry, WAIS. Is that any evidence of the mitigating circumstances that I indicated to you before, number one, the defendant was under the influence of extreme mental or emotional disturbance? Take that one, is there any evidence of that from that score?

A. It's hard to draw any conclusion just from that score. I would want to see the whole subscale scatter. There may be dips, low dips in the subscales; but basically, I mean, that doesn't suggest that anyone is under any extreme mental stress.

Q. How about the second one, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired?

A. Clearly with an IQ of that level, the individual is capable of understanding.

Q. Is capable?

A. I'm giving you a rough response to that score [27] alone. Again, I haven't seen the subscale scatter of that test; but, you know, individuals of that score category have been able to do that.

Q. Were there any other scores reported on that documents [sic]? The Jastak Wide Range Achievement Test otherwise known as the WRAT, reading score of 40, spelling of 67 – I'm sorry, strike that. A reading score of 40, which puts him in a one percentile.

A. That's all I see.

Q. Is that indicative of either of those two mitigating circumstances that I've indicated to you? Is that any hard evidence?

A. No. Not by itself, no.

Q. Is there anything on that report, D-20, indicative of the testing done on him, a little bit less than a year after the murder in this case, which would indicate to you that either of those mitigating circumstances were present at the time of the commission of the offense?

A. Not based on this limited information, no, but I'm going to underscore the term limited because it is a limited amount of information, okay. It's very, very superficial.

Q. All right. Now, you've seen the report from Dr. Paul Gross dated June of 1988, correct?

A. I have.

Q. Is there anything in that report which indicates [28] to you that there may have been mitigating circumstances presented on behalf of Mr. Rompilla at the time of the commission of this offense?

A. No. In fact, this is what sparked some of my concern about what was being said in the most recent reports by Drs. Crown and Armstrong. There's conflict in terms of what Mr. Rompilla reports with respect to his history as opposed to what was described in the reports of Dr. Armstrong and Dr. Crown.

Q. Can you be specific?

A. Yes. I'll refer you to page three of Dr. Gross' report.

Q. And what does that indicate?

A. You know, just give me one second, please.

Okay. I'm sorry. I'm going to refer you to page two of Dr. Gross' report. About midway down, the fifth paragraph, there is no history of psychiatric illness or treatment from Mr. Rompilla. He has not spoken to a psychiatrist except for a brief interview prior to parole. He has no history of any medical or surgical problems. He has never been in a hospital. He denies any head injuries.

The second paragraph down, last three lines, he denies any abuse, physical or sexual, while growing up. He left school in the ninth grade because he wanted to work. He says he can read and write.

[29] Q. All right. Now, Doctor, are you aware that Mr. Rompilla was examined by a psychologist by the name of Dr. Gerald Cook in 1988?

A. Yes.

Q. Are you aware Dr. Cook performed four psychological tests on him?

A. Yes.

Q. Are you aware that they were, I believe, the MMPI?

A. That's my understanding.

Q. The Rorschach?

A. Yes.

Q. The Incomplete Sentence?

A. Yes. Well, Sentence Incomplete.

Q. Wechsler IQ?

A. Yes.

Q. And are you aware that Dr. Cook at that time found no evidence of any mitigating circumstances?

A. That's my understanding.

Q. And are you aware that he was also seen by a psychiatrist, Dr. Robert Sadoff, for the same issue, as to whether or not he evidenced any of the mitigating circumstances?

A. Yes.

Q. Are you aware Dr. Sadoff also found nothing?

A. Yes.

[30] MR. WISEMAN: I would object to the characterization, your characterization, Mr. McIntyre, that Dr. Cook and Dr. Sadoff found nothing.

MR. McINTYRE: I think that's the testimony.

MR. WISEMAN: I don't think that was the testimony. It may be your spin on the testimony.

MR. McINTYRE: Would you like to correct it on the record here? Maybe we can agree as to what they found.

MR. WISEMAN: I guess what I'm thinking is perhaps you can ask the witness what the witness is basing his conclusion on that they found no mitigation. That's all. I'm just objecting to your leading question, I guess is the proper objection.

MR. McINTYRE: All right.

BY MR. McINTYRE:

Q. That's your understanding, I take it, though, what these experts found at the time of the trial?

A. That's correct.

Q. Or shortly before the trial, for the record.

Is D-20, this testing that was done on 12/9/88, a little after a year after this incident and I guess a little bit after the trial, is that consistent with those opinions given by Dr. Gross, Dr. Sadoff and Dr. Cook?

A. Yes.

Q. All right.

[31] MR. WISEMAN: Again, I would object to the question, which assumes that they had an opinion, that you're asking the witness if the exhibit's consistent with an opinion. It's now been expressed on the record, and I think it's your view of what the doctor may or may not have found.

BY MR. McINTYRE:

Q. Okay. Let me show you what's been marked, I have D-6, but I think Mr. Wiseman said D-7. This is the initial transfer petition. You've seen that, correct?

A. Yes.

Q. And I believe that's from 1975 or '76?

A. '75/'76, correct.

Q. And does that – at that time was Mr. Rompilla tested, according to that document?

A. According to this, yes.

Q. And as far as you know, prior to the incident, which occurred in 1988, this would be the first earliest date before the incident that he was tested?

A. Correct.

Q. What kind of test was he given there in that exam?

A. Okay. According to this, he was administered intelligence testing on the Beta on 10/15/75, which he had a score of average range.

Q. And what number was that?

[32] A. I don't see a number here.

Q. All right. Turn, I think it's on the next page.

A. Okay. Beta IQ is 93, which places him in the average range.

Q. Do you know anything about this particular IQ test known as the Beta?

A. It's an alternative to the WAIS scales, the Wechsler scales. It has fairly good validity and reliability.

Q. Is there any way you can equate that to the scores in the Wechsler? We talked about the 1988 test. I'm sorry, that was the WAIS. Can you relate it to the WAIS?

A. I don't know what the correlational values of those two tests are, so I'm going to have to say, no, I can't.

Q. So you don't know whether a 93 is equivalent to a 79 in the WAIS?

A. Yes.

Q. You do know the 93 from the Beta indicates average intelligence in 1976?

A. That's correct.

Q. How about other tests?

A. Wide Range Achievement Test was administered, and he obtained raw scores of 47 on reading, spelling was 10, and arithematic [sic] was 13, which yielded scale scores of 93, 73 [33] and 71 respectively; and so this equals a reading level of seventh grade seven months, a spelling score of third grade seven months, and an arithematic [sic] score of third grade four months.

Q. Were there any other tests besides the Beta and the Wide Range Achievement Test?

A. Yes, the MMPI was also administered.

Q. Let's talk about the MMPI tests. Are there results there that indicate things to you from those tests, the MMPI?

A. Yes.

Q. First of all, is there anything in the MMPI test that goes to whether or not in 1976 Mr. Rompilla was suffering from any type of mental problem that would have been evidence of those two mitigating factors that we've mentioned before?

A. Which were, again?

Q. Let me read them to you so we're right on this. Number one, the defendant was under the influence of extreme mental or emotional disturbance; and number

two, the – capacity of the defendant to appreciate the criminality of his conduct or to confrom [sic] his conduct to the requirements of law was substantially impaired.

A. Okay. According to what I'm reading, I'm looking at scaled scores of the MMPI, and I'm going to go through [34] them quickly, okay, the L, F and K scales, which are validity scales – when we talk about within normal limits, we're talking about any scale that's below a T of 70. So for example, on the L scale, he has 60, F is 64, and K, which measures defensive, is 62. These fell within the normal limits, which we'll say he was being reasonably honest and not biased in portraying himself in either a negative or positive light, that he was relatively honest when he was doing this.

The scale measuring hysterionic [sic] personality characteristic is 82, which is elevated. That suggests he has the tendency to engage in overdramatized behaviors, seeks excitement and attention from others. Depression was 65, a slight elevation but wasn't too depressed till you're under 70. His hypochondriacal scale was 76.

Q. What does that mean?

A. His tendency to be anxious, agitated, a hypochondriac, body symptons [sic] elevated. His psychopathic deviate scale was 100. It was off the chart.

Q. What does that tell us?

A. He's a full blown sociopath.

Q. What's that?

A. Has absolute disregard for rules, regulations, the rights of others, just acts on impulse, acts on his own need.

[35] Q. Can you be higher than 100?

A. No. He scraped the top of the scale, and that's with a validity scale being within tact. He's a wavering sociopath.

Q. Do you have an opinion as to whether or not that would have been helpful or harmful to Mr. Rompilla if any expert produced those records and used those records during his portion of his trial when he was attempting to show mitigation?

A. In 1988?

Q. Yes.

A. Yes, this would have been extremely disruptive to his case.

Q. All right.

A. The next scale is the Mf, which measures masculine/feminine profile. That's basically within normal limits, a 53. The scale measure paranoia, which is 82, was elevated, so there's paranoid characteristics that accompanied his sociopathic scale. Pt is the psychoasthenia scale, which measures anxiety, slightly above 70. 73 was the score. Schizophrenia scale was a 90. Okay, that measures his ability to – his tendency to deviate from normal thinking patterns and styles, and that was significantly elevated, and also the mania scale, which is 66, not too terribly elevated.

[36] Q. Do any of those test results, Doctor, affect your, what I'll call your bottom line opinion in this case as to the inability of an expert with testing and examination in 1995 and '96 opining that Mr. Rompilla had evidence of

mitigating circumstances at the time of the offense in 1988?

A. This information would have certainly been useful to someone making a firm decision. I don't know specifically how they would have utilized this information. I'd have to think about that a little bit.

Q. Let's see if I can put it in a simpler way. Does that in any way help or hinder that call based on 1995, 1996 testing to opine what his condition was back in 1988?

MR. WISEMAN: Objection to the form.

BY MR. McINTYRE:

Q. I'll let it stand.

A. Okay. Well, it certainly gives a profile on the man's personality, and it would be important to factor in the scales that were elevated with the results that they're finding and take a look at the correlations with individuals who supposedly have brain damage and what the profiles of the MMPI would show. There are textbooks and research data which talk specifically about correlational factors between different tests; so that studies have been done to say that if individuals evidence brain damage or brain injury of certain areas or functions, that correlation with other [37] tests will be high, and I don't know exactly what it would be in this particular case, but it certainly would have been meaningful information for them to look at.

Q. Okay. But does it help one rendering an opinion concerning the two mitigation factors we talked about?

A. Oh, yes. It suggests that he was capable of understanding what he did.

Q. So that it doesn't help buttress an opinion that he had this evidence of mitigation in 1988?

A. That's correct.

Q. In fact, doesn't it do just the opposite with that elevated area in the sociopath?

A. Yes, sociopathic deviate scale.

Q. What does that indicate in regards to mitigation or aggravation? Strike that. What does that high level indicate as far as these two mitigation factors we talked about, if anything?

A. Well, it underscores the notion that escapable of acting out and – acting on impulse, that he would possibly disregard rules and regulations and lie.

Q. In a sociopathic personality type, is that like voluntary, though, like you deliberately know what you're doing?

A. Yes. Most of the time, yes.

Q. All right. Let me show you the grade school IQ [38] tests which, again, I think I've called it P-5, but we have it on the record exactly what number it is. And you have taken a look at that, have you not?

A. Yes.

Q. All right. Now, I said P, it was D. By the way, there is a report of the three different IQ tests, '57, '59 and '61, 1957, 1959, and 1961?

A. Yes.

Q. I take it at the oldest he is thirteen, 1961?

A. That's correct.

Q. Generally, how reliable are these grade school IQ tests?

A. Well, they're as reliable as they are today. I mean, he was given the standard WISC. Since then, there's the WISC-R, which is WISC Revised, and WISC III, which we currently use. In '57 his full scale IQ was 75.

MR. WISEMAN: You mean his verbal, don't you?

THE WITNESS: Right, verbal score of 75, and then his verbal and performance were given in '59. Verbal was slightly lower. No, actually, I'm sorry, that's about 14 points lower, so that's a significant drop, and performance score was 75, yielding a full scale IQ of 64.

BY MR. McINTYRE:

Q. All right. Let me show you items I've had marked as P-4, P-5 and P-6. It seems to me that they're separate [39] sheets, and you haven't seen these before. It looks like they're the results of what's on the Exhibit D-5 on the grade school IQ's. Can you confirm by looking at each one and making certain that one was accurately transposed on to the other. First of all, I guess you're looking at P-4 right now. Does that look like the 1957 WISC test that was administered to Mr. Rompilla?

A. Yes, April 1957.

Q. Would you just take a moment to see if it's been accurately transposed from P-4 on to D-5?

A. That's correct, verbal scale score's 30, and then the full IQ or the verbal IQ scale score is 75.

Q. Is there any more information on P-4 than is on D-5? In other words, is there any more information in the documents in your left hand that has been transposed on to the documents on your lap?

A. No, only one note, many replies, very irrelevant.

Q. Do you know what that means?

A He may have rambled, and sometimes things didn't necessarily make sense.

Q. Now, look at P-5 underneath it, that would be the '59 test, Can you do the same thing for that, make sure it's been accurately transcribed on to D-5 that's on your lap?

A. Yes, that's correct.

[40] Q. And is everything that's on P-5 been transposed on to D-5?

A. Yes; it appears that way.

Q. Would you do the same thing for the IQ test done in 1961, which is P-6, the last paper you have in your left hand.

A. Yes. Okay, this gives us a little bit more than the previous one. Verbal IQ of 69 and performance scale of 75 with a full scale of 64, and it tells me that there's a 13 or 14 point spread between the verbal and performance score, which suggests there's more to do with academic impoverishment than anything else, particularly in the performance scale in looking at the scaled scores here, 9, 8, 5, 5, 5.

Q. What do you mean it has more to do with academic impoverishment than anything else?

A. When there's any kind of brain damage, we usually will notice that there is a lower performance scale score with specific dips and subtest scores on the performance test than on the verbal test.

Q. What do we know here?

A. Well, its the opposite, so there's no suggestion that he wasn't paying attention in class or applying himself or really learning the information, and that if he were up to par academically, he might have a higher IQ score, which [41] puts him more in the borderline range than this verbal score would put him in the mentally retarded range at that time.

Q. All right. Is there anything about either of those exhibits, P-4, 5 and 6 or the reports of those IQ tests as indicated on D-5 which change your opinion in this case?

A. No. I'm looking at the scaled scores. It gives me additional information there, but other than that, no.

Q. Is there anything on these grade school IQ tests done in 1957, '59 and '61 that would show that Mr. Rompilla evidenced either of the two mitigating factors that we've talked about throughout this deposition at the time of the commission of this offense in 1988?

A. No.

Q. All right. I'll take those back from you, Doctor. Let me show you the hospital records from Sacred Heart Hospital dated, I believe – if I can find them exactly –

March of 1950. I believe Mr. Rompilla would be about a year and a half old. Have you seen these?

A. Yes.

Q. What do they indicate, if you know?

A. They indicate some blood work was done with him; and from what I could gather – it was very difficult to read – that he had been admitted with some fever, I believe.

[42] Q. Did you see a temperature of 105 at some point?

A. Yes.

Q. And did you see complaints of diarrhea?

A. Yes.

Q. What, if any, value does that have in aiding us to reach a conclusion in this case as to what Mr. Rompilla's mental capacity was at the time of the commission of this offense?

A. There's nothing profound about what I've read in here that would suggest that he sustained any particular trauma, other than the fact he had a fever and some diarrhea.

Q. Does every child of about a year and half old that has a 105 fever and diarrhea have brain damage?

A. Not that I'm aware.

Q. Do you know of any significant percent of those children who have high fevers and diarrhea that develop brain damage?

A. Not offhand, no.

Q. Does that change your opinion in this case?

A. No.

Q. The fact that he was hospitalized in March of 1950 –

A. No. In fact, they discharged him without any follow-up, from what I can see. There was follow-up on [43] 3/9/50, and it said one BM in 24 hours, temperature normal, he presents no abnormalities.

Q. All right. I'll take that back, Dr. Dattilio.

Dr. Dattilio, are there objective tests that can be done to determine whether or not a person has brain damage?

A. When you say objective –

Q. Yes.

A. What are you referring to?

Q. Something that doesn't require questions and answers from a defendant, let's ask that, from a person?

A. There are, yes.

Q. Things like a CAT scan?

A. CAT scan, MRI.

Q. Anything else?

A. EEG.

Q. How do those work, each one at a time.

A. EEG is an electroencephalogram, which measures brain waves and brain activity. A neurologist administers it, would look for abnormal spiking and brain waves or any abnormal activities. Two versions can be given, either an awake or an asleep EEG.

CAT scan stands for computerized axial tomography, and that's designed to look at anatomical structures in the brain. The individual is placed in a donut-shaped [44] mechanism, and it takes axial tomographic pictures of the different sides of the brain.

MRI stands for magnetic resonance imaging, and this is kind of an expansion of what the CAT scan does, but it gives us more of a clear picture of soft tissue in the brain. With the advent of MRI's, they've picked up little tiny insignificant pimples in the brain that were never seen before and also gives you a more clear picture on different dimensions, and its a fascinating piece of equipment. That's also used in helping us localize and determine any kind of brain injury.

Q. All right. If we were to do any of these tests on Mr. Rompilla now, would that aid us in discovering or trying to find out what his mental capacity was back in January of 1988?

A. Again, that would be a very tough call to determine. First of all, I don't know anything would necessarily show up anatomically, all right; and because, you know, brain damage can be very diffuse and not necessarily visible to the naked eye, so it may or may not show up. Whether or not it's able to tell us anything has been there congenitally or instilled at any particular time in a lifespan, it's very difficult. It's only conjecture that a doctor would be able to determine that.

Q. Doctor, do you have an opinion to a reasonable [45] degree of psychological certainty as to who would have been best able to determine whether or not Mr. Rompilla had evidence of any of these mitigating factors at the time of the commission of this offense?

MR. WISEMAN: Objection.

MR. McINTYRE: You may answer.

THE WITNESS: Do I know who would have?

BY MR. McINTYRE:

Q. Yes.

A. Probably a trained professional who would be following his history and administered a battery of psychological tests every so many years and comparing them over time, along with any other evidence and history, would have a better opportunity to do that than someone trying to do it retroactive.

Q. That was a poorly worded question. Let me reduce your answer or give you a parameter of all the people you know who did examine Mr. Rompilla who would have been best able to make that call as to whether or not he evidenced any mitigating circumstances at the time of the commission of this offense?

MR. WISEMAN: Objection.

BY MR. McINTYRE:

Q. You may answer.

A. I think the two psychiatrists and [46] neuropsychiatrist.

Q. Dr. Gross, Dr. Cook, Dr. Sadoff?

A. That's correct.

Q. And you already talked about the tests, the psychological tests that Dr. Cook did.

A. Yes.

Q. Do you have an opinion as to whether or not they were adequate to determine whether or not Mr. Rompilla evidenced any of these mitigating circumstances at the time of the event?

A. Dr. Gerald Cook, let me say, is a very fine neuropsychologist. He's very thorough. He administered a select battery of tests at an initial screening. When he did not find any significant evidence on that testing, he discontinued any further testing out of the unnecessity.

Q. And is that appropriate?

A. Absolutely. There's no reason to subject someone to additional psychological tests when we have enough evidence to suggest there's nothing significant existing. Knowing Dr. Cook and his thoroughness, if there had been, he would have proceeded.

MR. McINTYRE: All right. I have no further questions. You can cross examine.

MR. WISEMAN: Let's take five minutes.

(Thereupon, a brief recess was taken.)

* * *

[47] CROSS EXAMINATION

BY MR. WISEMAN:

Q. Ready, Doctor?

A. Yes.

Q. Doctor, did you make any notes or memoranda or write any other or make any other writings other than the ones you provided to Mr. McIntyre?

A. No. The one you're referring to, May 1st, 1996?

Q. Right.

A. Yes, correct.

Q. No notes to yourself?

A. I made some notes.

Q. Can I see them, please?

A. Yes, sure. These are notes on Dr. Armstrong's report.

MR. McINTYRE: Let the record reflect the doctor handed him three pages.

THE WITNESS: And the underside of those three pages are scrap.

MR. McINTYRE: So it was all scrap paper; you only used one side?

THE WITNESS: Yes, recycling program.

BY MR. WISEMAN:

Q. Now, on these notes, these notes appear to be [48] summaries of the different testing that Dr. Armstrong administered?

A. Correct.

Q. And the summaries here appear to be things that contain material not in her report?

A. Correct.

Q. So they are your understanding of what the testing – what the testing involves?

A. Correct. Some of the tests that she administered I wasn't as fully familiar with as some of the other ones, so I made some notes on what I believed it was, what they measured, and then cross-checked them.

Q. So you essentially researched the tests she used?

A. I researched to check to make sure they were commensurate with my understanding and recollection of what those tests are used for.

Q. Okay. Now, may I see the letter that Mr. McIntyre sent you, please?

A. Sure.

Q. This is the April 8th, 1996 letter?

A. Correct.

MR. WISEMAN: It might make things easier, Mr. McIntyre, if we could just run off a copy of that, I just want to make a note or two.

BY MR. WISEMAN:

[49] Q. Doctor, I notice on your bookshelf a copy of Kaplan & Sadock, Comprehensive Textbook of Psychiatry?

A. Yes.

Q. Is that a book that you use in your work?

A. I've discussed it as a reference in some of the things I've written.

Q. It's a standard reference with the mental health profession?

A. Yeah, it's one of them.

Q. I also notice at least a smaller version of the DSM-IV?

A. That's a quick reference, yes.

Q. You also use the DSM in your work as a mental health professional?

A. Yes.

Q. And that's a standard reference as well?

A. Yes.

Q. Can you tell us what brain damage is exactly?

A. Good question. My understanding of brain damage is any unusual or abnormal condition of the brain that may have occurred during the course of development either indigenously or exdigenously.

Q. What do you mean?

A. What may have occurred from within due to natural physiological causes, or it may have occurred as a result of [50] some type of external blow or injury or exposure.

Q. Would it be fair, then, to say that the causes of brain damage could be trauma, one of the causes could be trauma?

A. Yes.

Q. A blow to the head?

A. True.

Q. And another cause could be disease?

A. That's correct.

Q. And earlier on, I think in discussing the MMPI with Mr. McIntyre, you indicated that brain damage – withdraw.

The MMPI is a personality test?

A. That's correct.

Q. And I think you said that a brain-damaged person might show up on MMPI, although it's not a neuropsychological test?

A. Yes.

Q. Just so the recrod [sic] is correct, MMPI is not a neuropsychological test; it's a personality test?

A. Yes, primarily used for that.

Q. Is it fair to say brain damage could have an impact on personality?

A Yes.

Q. And it can have an impact on function?

[51] A. That's true.

Q. And isn't it true that brain damage can affect one's cognition?

A. Yes.

Q. And one's reasoning?

A. Yes.

Q. And one's judgment?

A. Yes.

Q. And one's ability to predict future consequences?

A. Yes, that's correct.

Q. Future consequences of their actions?

A. Yes, correct.

Q. Isn't it true that brain damage can also impact on impulsivity?

A. Yes.

Q. And emotional ability?

A. Yes.

Q. And one's ability to control behavior?

A. That's also correct.

Q. Now, in your report, you indicate that you are attempting to give an objective opinion, quote, unquote?

A. Are you referring to a specific line?

Q. Oh, I think it's at the beginning of your report. If you want, I can find you the exact spot.

A. Right. Initial line, where he says, where I say, [52] This is in response to your letter dated April 8th, 1996, soliciting an objective opinion from me on the psychological and psychiatric evaluations of Mr. Ronald Rompilla.

Q. So the term objective opinion is one Mr. McIntyre used in his letter to you?

A. I believe so.

Q. You would agree that's something of an incongruity, objective opinion. An opinion, by its nature, is a subjective call?

A. Yes. Semantically, yes.

Q. While you may not agree with the opinions of the experts you've critiqued, you have no basis for saying that their opinion is any more objective than your opinion?

A. That's correct.

Q. Now, also, in the beginning of your report you mention, and I think you mentioned it in your testimony as well, that you did not see Mr. Rompilla?

A. That's correct.

Q. Did you think that was important to note in your report?

A. Yes.

Q. And why is that?

A. Well, because often times individuals may draw certain conclusions based on unclear information that would – that would suggest I did indeed evaluation him. I wanted [53] to make it very clear for the reader that I did not evaluate him, I did not meet him, nor did I have any access to the raw data on the reports.

Q. Now, in a neuropsychological setting, you would agree that face-to-face evaluation and interview of the patient is an essential component of it?

A. It's imperative, that's correct.

Q. So, for example, if someone has a large scar on their head and a concave area surrounding that scar, that might be something that a neuropsychologist or psychologist would want to inquire about?

A. Yes.

Q. And, obviously, if you don't see him, you can't inquire about it?

A. That's correct.

Q. And seeing a patient is also important in terms of interpreting testing as well, isn't that true?

A. That's correct.

Q. Now, correct me if. I'm wrong, but as I understand your view of Dr. Armstrong's report is that you do not disagree with her conclusion, that at the time she tested Mr. Rompilla he suffered from organic brain damage?

A. That's correct.

Q. Your quarrel with her, to the extent you have one – and correct me again if I'm wrong – relates to the [54] etiology of the impairments?

A. It relates to, in part, the etiology and also her ability to designate the time and chronology of the occurrence of the disorder, the damage.

Q. So you would agree that those two factors can be related?

A. Yes.

Q. Etiology as it relates to the timing of it?

A. Correct.

Q. Now, just so we're clear on the record, you state on page two of your report, the beginning of the third full paragraph, Dr. Armstrong appears to be accurate in her interpretations of the test results, which suggest that this gentleman does display evidence of a learning disability and brain damage as a potential result of alcohol abuse.

A. Correct.

Q. I believe on the top of page four you say, Dr. Armstrong's tests were, quote, unquote, valid and reliable?

A. Correct.

Q. And on page four in the last full paragraph, you say the neuropsychological tests used by Dr. Armstrong are quite accurate and are often used to help neuropsychiatrists and neurologists and sometimes neurosurgeons to determine localization of functioning with brain damaged patients.

A. Correct.

[55] Q. So, again, you had no quarrel with her conclusion about brain damage?

A. No, I do not.

Q. In Mr. McIntyre's letter to you, he asked you a question related to whether the doctors' opinions could have been infected in some way by some outside agenda. My question to you is, do you have any reason at all, based on your review of Dr. Armstrong's report, to think that her opinion is anything but a valid, reliable opinion as to the existence of brain damage?

A. That's correct.

Q. Now, let me ask you about a number of other neuropsychological tests. Are you familiar with the Shipley Institute of Living Scale?

A. Vaguely, yes.

Q. If I were to tell you that if a person were to score in a significantly impaired range on that test, would that be consistent with brain damage?

A. Yes.

Q. Are you aware of the Category Test?

A. Which one are you referring to?

Q. It's called the Category Test.

A. Is it part of the Halstead-Reitan?

Q. Yes.

A. I'm familiar with the Halstead-Reitan. I'm trying [56] to remember the Category Test. Why don't you go ahead.

Q. Well, my question is, if someone had significant impairments on that test, would that be consistent with brain damage?

A. Based on my knowledge of the validity of the Halstead-Reitan, the answer is correct, yes.

Q. If someone were to score, had significant impairments on the Wisconsin Card Sorting Test, would that be consistent with brain damage?

A. It could be. Again, let me state that usually we don't take any one subtest per se and draw a conclusion based off that. It's all sides considered equal so, you know, within that frame work, yes.

Q. Trails A and B, how about that test?

A. Yes.

Q. If I were to tell you that someone was impaired on a Trail A, would that be consistent with brain damage?

A. Yes.

Q. And how about significantly impaired with Trail B?

A. Yes.

Q. How about if someone were impaired under Laurie Christenson?

A. Spell it.

Q. That would be L-A-U-R-I-E – C-H-R-I-S-T-E-N-S-O-N.

[57] A. I'm not familiar with that test at all.

Q. How about the Rui-Ostreth, if someone were to be significantly impaired on that test, would that be consistent with brain damage?

A. Absolutely.

Q. Right-hand Indiana facia test (phonetic), if someone were significantly impaired on that, would that be consistent with brain damage?

A. Yes.

Q. A similar subtest of the WAIS-R, if someone were of the second percentile, would that be consistent with brain damage?

A. It would be, in and of itself.

Q. The WAIS-R is not a neuropsychological test, is it?

A. The WAIS-R is full range –

Q. By itself?

A. No, certain selective subtests are used. Similar tests measure categorical reasoning that could also be indicative of simply a mental disorder, like schizophrenia, that may not have an organic basis to it.

Q. Now, the testing I just went through with you comprised testing Dr. Crown testified to in these proceedings. Now, leaving aside the quarrel you may have with the format of his declaration, would you agree that [58] taking all of those tests I just ran through with the level of impairment that I just indicated, that that shows a profile of someone who has organic components?

A. If indeed those tests were administered, and they were, the scores are accurate, yes.

Q. You testified in the Martin Appel matter, is that correct?

A. Is that a matter of public record?

Q. Sure it is. You were in court, you were sworn.

A. Yes, I did.

Q. And prior to that, I think, if my recollection serves me, you filled out an affidavit, which was attached to the petition?

A. Yes.

Q. Verifying the facts in the petition were correct and accurate, correct?

A. Yes.

Q. And then you came to court and testified about it, isn't that correct?

A. That's right.

Q. Now, Dr. Crown's declaration was similarly attached to a pleading that was filed in court?

A. Uh-huh.

Q. You are you aware of that?

A. No.

[59] Q. Would you agree that there is a difference between a mental health report, a formal report, and an affidavit of a witness that's attached to a pleading for purposes of being told in court?

A. Particularly if they're labeled as such, yes.

Q. Is there anything in Dr. Crown's declaration that says that it's a report? Would you like a copy?

A. I think I have it here.

There's nothing here that states it as titled anything other than Section 1746 and 18 PA.C.S. at the top.

Q. I can assist. It says Declaration of Dr. Barry M. Crown pursuant to 28 U.S.C. Section 1746 –

A. You can see the copy I received doesn't have that at the top. I had no idea.

Q. Let me finish reading the caption for you, Declaration of Dr. Barry M. Crown pursuant to 28 U.S.C. Section 1746 and 18 PA.C.S. Section 4904. And it starts off with I, Dr. Barry M. Crown, do hereby declare and verify as follows.

A. Okay.

Q. That doesn't say it's a report?

A. I didn't have that information before, or it would have been more clear to me.

Q. Okay. Now, have you ever seen Dr. Crown's C.V.?

A. No.

[60] Q. Let me show a copy to you that's been previously marked. Why don't you take a look at it since you've never seen it.

A. Okay.

Q. Assuming that what's on Dr. Crown's C.V. is accurate, and I would state for the record that Mr. McIntyre stipulated that Dr. Crown is an expert in psychology and neuropsychology at his deposition, do you have any reason to think that Dr. Crown is anything but a bona fide neuropsychologist?

A. Not after looking at that, no.

Q. Now, the testing that I reviewed with you that Dr. Crown performed and testified to in his deposition, is that generally consistent with the profile you get from Dr. Armstrong's report?

A. Yes.

Q. All right. So they're both internally consistent in the sense they both show organicity?

A. Correct.

Q. So would it be fair to say, then, as we sit here today you don't have a quarrel with, assuming I've protrayed [sic] accurately what Dr. Crown testified to, that he, too, concluded accurately that Mr. Rompilla suffers from an organic impairment?

A. Yes.

[61] Q. And I take it, again, your quarrel would be in the case of the etiology and the timing of the onset of the –

A. That's correct, exactly.

Q. Now, you did have a couple of – I don't know whether to call them quarrels or quibbles, I guess you can testify – with Dr. Armstrong's report, the order in which

things were presented. For example, does that in any way diminish your opinion of the validity of her conclusions?

A. No, it was just my statement it was unusual. I guess this was the short form of her report. Typically neuropsychologist reports are very lengthy because they go in very great detail first and foremost with the individual's background, injuries and what led up to the event, why they're being evaluated. It was just unusually written.

Q. And you also have a comment in your report that you assume she is qualified, although she fails to state any of her credentials. You didn't state your credentials in your report, did you?

A. They're all over the letterhead, yes, I did.

Q. Oh, that's what you consider credentials, just the listing of –

A. Yes, whether they're a clinical psychologist or whether they're board certified, whether they're licensed. In the Commonwealth of Pennsylvania, you can work under the [62] auspices of an institution and call yourself a neuropsychologist even if you're not licensed and you're not board certified as long as you're under the institution. So typically, even when one is in part of an institution, they indicate that they are licensed as a psychologist in the Commonwealth, and they'll indicate if they're board certified, whether it be S.B.P.P. behind your name, whatever.

Q. Have you had a chance to review Dr. Armstrong's C.V.?

A. No.

Q. Why don't I show you that. It's been previously marked in these proceedings.

A. Okay.

Q. Do you have any view of Dr. Armstrong as anything other than a qualified, bona fide neuropsychologist?

A. No, she has good experience and training. I didn't see where she was board certified, though, which is unusual for a neuropsychologist. She's licensed in Ohio and Pennsylvania, and the licensing in all of the states of the United States are generic. In order for a person to be qualified in a subspecialty, the American Board of Professional Psychology was established in 1947 to indicate and certify by regular credentials check, evaluation and passing of a test.

[63] Q. So that would be board certified by the American Board of Professional Psychology?

A. As is the case with Dr. Crown.

Q. And Dr. Crown is a diplomate [sic] of the American Board of Professional Neuropsychology?

A. Yes.

Q. And I think his C.V. indicates he is the chair of the examination committee from '94 to 1997?

A. Uh-huh.

Q. So then the bottom line, just so I understand in regard to Dr. Armstrong, does your review of her curriculum vitae in any way cause you to question her conclusion?

A. No. I just think she should get board certified. It makes it easier when you testify in court; but, no, her education and credentials are excellent.

Q. Okay. Now, you have some experience, I take it, with abused children?

A. Yes.

Q. That's part of your practice?

A. Yes.

Q. And do you see adults who were abused as children?

A. Yes. I also see adults who are abusers for the Commonwealth of Pennsylvania.

Q. So that's something you're familiar with?

A. Yes.

[64] Q. And deal with routinely?

A. Yes.

Q. Would you agree that – and tell me if you would agree – people who are abused as children can show impulsivity?

A. Oh, yes, absolutely.

Q. And why is that?

A. Abuse usually has a multi-faceted effect on children. One of the effects it has on children, it tends to stimulate them, neurochemically often times as a result of – I'm speaking specifically of physical abuse, there may

be reaction that involves rage, recent, and that can be rechanneled into excess energy and express, acting out behaviors such as impulsivity.

Q. The impact that abuse has on a developing child is such that children have difficulty controlling their behavior, some do?

A. Correct.

Q. And that goes to impulsivity?

A. Yes.

Q. Would that also go to such children as being unpredictable?

A. It may.

Q. And, again, in the abuse dynamic, children don't – the people they look up to for security are often the [65] ones who are the abusers?

A. That's correct.

Q. And that can confuse a child?

A. Extremely.

Q. And that causes unpredictability?

A. That's right.

Q. Does it cause children to underachieve?

A. It may.

Q. Right. Of course, we're dealing abstractly, I assume?

A. Hypothetically.

Q. I'm asking, it may cause a child to underachieve?

A. That's correct.

Q. And that will be underachievement in terms of schooling?

A. It may affect academics, yes.

Q. It could affect a child's social relationships with others?

A. Yes, that's correct.

Q. They could be loners?

A. That's correct.

Q. They could be isolated from others?

A. That's correct.

Q. Which, I guess, is the same as saying they're loners, socially isolated?

[66] A. Yes.

Q. Off by themselves?

A. Yes.

Q. Does it cause them to perform erratically as well as to underachieve; in other words, sometimes they might achieve better than at other times with no apparent rhyme or reason to the differences?

A. That's possible, yes.

Q. Is delinquency from school something that abused children sometimes evidence?

A. Yes.

Q. What's a schizoid personality?

A. A schizoid personality is a disorder that falls under the category of what we call Access I Diagnosis of the DSM-IV, and it's a personality by which an individual is not psychotic but they're withdrawn. They become loners. They, for the most part, live in a nonpsychotic world. There's no break with reality, but they have difficulty with interpersonal relationships. They may not speak much, they have difficulty relating, you know, to withdrawal.

Q. Is that – some of what you just mentioned seems to be somewhat consistent with some of the other indicia of an abused child, the isolation, the inability to relate.

A. That, typically, is, the extreme version of an abused child, yes.

[67] Q. So an extremely abused child could have a schizoid personality?

A. Yes.

Q. Now, you went through the 1975 or '76 MMPI results with Mr. McIntyre on direct examination?

A. That's correct.

Q. Isn't it true, Doctor, that an accepted way of reading an MMPI is to look for the two high spikes, the two highest scores?

A. Only are you saying?

Q. I'm asking if it's an accepted way of reviewing the MMPI?

A. To look just at the two – well, no. I mean, many do it.

Q. How do you look at an MMPI?

A. Many do it. You have to remember, again, its all sides considered equal. You want to look at the two highest spikes. You want to look at the configuration of the validity scales and the other scales that are elevated and ones that are not elevated.

Q. Obviously, you want to look at validity scales; and in regard to Mr. Rompilla's 1975 test, you said they were valid scales?

A. That's correct.

Q. So its a valid test?

[68] A. That's correct.

Q. Once we've decided it's valid, would you agree that looking at the high spikes is something that would be an appropriate clinical approach to interpreting the MMPI?

A. Yes.

Q. And do you recall what the spikes are in Mr. Rompilla's?

A. Yes, the sociopathic deviance and schizophrenic scale was elevated.

Q. So that's a 4-8 spike?

A. Yes.

Q. Now, if someone comes to you with a 4-8 spike or you are called upon to interpret in a clinical setting a 4-8

spike, wouldn't you agree there are elements of a 4-8 personality that are consistent with that of an abused child?

A. Yes.

Q. In particular, are you familiar with the MMPI Handbook by Dahlstrom and Welsh, Volume Publication Copyright 1960, Sixth Printing 1986?

A. Yes.

Q. Now, I you want to read along or follow along, I should say, you can open to page 273.

MR. McINTYRE: Note for the record my objection.

MR. WISEMAN: Based on what?

[69] MR. McINTYRE: My understanding of the use of a learned treatise was to impeach, and I haven't heard anything insignificant. It seems like you want to reinforce something. If you want to get the doctor to say something and impeach him, that's proper.

MR. WISEMAN: I see it more as making clear for the record what we're talking about since we are dealing with matters of professional expertise.

THE WITNESS: All right.

BY MR. WISEMAN:

Q. The portion I asked you to review is the clinical configuration section of Dahlstrom, which deals with the two high spikes, and I've asked you to look in particular at the 4-8 section, and it says that persons with this profile, the 4-8, are described frequently as odd, peculiar or queer.

They are unpredictable, impulsive, nonconforming and the term schizoid personality frequently applies to them. Their education and occupational histories are characterized by underachievement, marginal adjustment and uneven performance. Nomadism, social isolation or underworld membership is often present. Delinquency is closely associated with the 4-8 profile.

I think you would agree, as I said earlier, those are also consistent with the profile of an abused child?

A. That's correct.

[70] Q. Now, if someone, let's say a child came to you and took an MMPI, if a child came to your office today and you scored their MMPI and they had a 4-8 spike, that would cause you to look further?

A. Yes.

Q. You would want to know why they're speaking in a peculiar way?

A. Yes.

Q. And you would look into if there's abuse?

A. Family dynamics, abuse, yes.

Q. I think we also talked about brain damage. One of the things you said that happens with abused children is that they are stimulated neurochemically?

A. Yes.

Q. That's an organic manifestation or organic consequence of abuse?

A. Yes.

Q. And you agree abused children often demonstrate central nervous system deficits?

A. Yes.

Q. So would it be fair to say, then, if you saw a child who met this abusive profile, you would also want to be on the lookout for organic problems?

A. I would want to rule them out, yes.

Q. Or rule them in, right?

[71] A. Correct.

Q. Just so I understand where we're at, then, if child comes in, takes a MMPI, scores a 4-8, as a clinician you need to look at abuse and you need to look at organicity?

A. This is assuming, by the way, that in your hypothetical scheme that the child is old enough to take the MMPI. Children usually don't take it. We have adolescence tests.

MR. McINTYRE: Note my objection. I don't know how the child taking an MMPI has any relevance to this test. Mr. Rompilla would have been 28.

MR. WISEMAN: We'll connect it up.

MR. McINTYRE: All right.

BY MR. WISEMAN:

Q. All right. Just so I have the answer clearly then, as a clinician you would look to abuse, you look to organicity?

A. Yes.

Q. You would look to organicity. Would you look to organicity as evidence of abuse, or would you look to organicity as a potential cause of abuse? In other words, sometimes organic children act out sometimes in certain ways that causes them to be the targets of abuse?

A. My inclination would be to look at it either way, [72] but I would probably be more biased to looking at whether or not abuse caused any of this.

Q. That abuse caused the organicity?

A. Yes.

Q. Trauma to the head, for example?

A. That's correct, assuming we're talking about physical abuse.

Q. That's what we're talking about. Actually, would any of these things we just discussed apply to someone who's not only physically abused but also psychologically abused in the sense they live in a dysfunctional family?

A. Yes.

Q. So if your parents are always calling you a dummy and showing you no affection, that would add to the profile as we've discussed?

A. That's correct.

Q. Now, in addition to the 4-8 spike that Mr. Rompilla showed on that test, the MMPI Test in 1975, he also spiked high on paranoia and hypochondriacal. He scored 82 on each of those.

A. Correct.

Q. And he was also spiked abnormally high on neurotic at 76, and he scored a 73 on the neurotic obsessive compulsive scale, is that correct?

A. Yes.

[73] Q. So these are all abnormally high scores?

A. Yes.

Q. That does not – withdraw it. That certainly doesn't diminish the profile of MMPI as of a healthy person?

A. No, that's reflective of the fact that the two, 4 and 8's, were so high, it inflated all the other scales as well.

Q. So that's a profile of a disturbed person?

A. Yes, you bet.

Q. Now, you were discussing Dr. Cook's work on this case; and in Mr. McIntyre's letter to you, he states on page two, that's Mr. McIntyre, that the tests which he, Dr. Cook, performed were the MMPI, the Rorschach, the Sentence Incomplete and the Wechsler IQ.

A. He spelled Wechsler incorrectly.

Q. Mr. McIntyre, yes. And Rorschach?

A. Right.

Q. And Mr. McIntyre also says to you in the second or the first full paragraph on page two, Dr. Cook did testify at his deposition that if he had the school records, he would have done additional neuropsychological testing?

A. Yes, that's correct.

Q. Now, did you interpret that statement from Mr. McIntyre in his letter to mean that Dr. Cook had performed neuropsychological testing?

[74] A. No. I interpreted it that he was not – he did not decide upon the test that he would administer without reviewing all of the information, that he was assuming that he had all the information, that's why he chose those tests. If he had the additional information, the school records, he may have gone on and given some other tests. That's how I interpreted it.

Q. So your understanding is Dr. Cook did not perform any neuropsychological testing in 1988 on Mr. Rompilla?

A. That's correct.

Q. And as we discussed earlier, the WAIS-R is not a neuropsychological test by itself?

A. That's correct, but let me say this, too, to expand that response, that the full scale Wechsler Adult Intelligence Scale and the Rorschach, which is also very helpful in suggesting any signs of organic brain damage, are sufficient at times to indicate whether or not there was an existence of any type of a neurologic dysfunctioning that would then induce one to give additional measurement.

Q. So what you're saying then is that although not perfect, a full WAIS-R can serve as sufficient testing, neuropsychological testing?

A. As well as the Rorschach, yes.

Q. Now, based on that you, your view of Dr. Cook's testing in '88 is that if he had seen anything unusual in

[75] the full WAIS-R, that would have caused him to do additional neuropsychological testing?

A. Without a doubt.

Q. Now, would your opinion change if I told you Dr. Cook did not do anything approaching the full WAIS-R, in fact, did three subscales?

A. Yes.

Q. And if he did just three subscales, you'd agree that is not adequate or not even begins to be an adequate neuropsychological screen mechanism?

A. It depends on what subscales he used. Could you tell me what specifically they were?

A. Well, I can read to you the paragraph from his deposition, page six, in which he says what tests he gave.

A. That would help.

Q. He said I would have given an MMPI, I would have given him an Incomplete Sentence, Rorschach Ink Block Technique and any of the two or three subtests of the Verbal Subscale of the Wechsler Intelligence, Adult Intelligence, WAIS Revised, WAIS-R. Now, you'd agree – well, withdraw it.

Dr. Cook testified also he did not consider that to be a neuropsychological screening?

A. And I agree.

Q. So we are in agreement, then, that Dr. Cook did no [76] neuropsychological screening in 1988?

A. That's correct.

Q. Now, we've gone over, you've gone over with Mr. McIntyre the various school records of Mr. Rompilla?

A. That's correct.

Q. And just give me a moment to find my file. Let's take them one at a time. Let's first talk about a test of 9/54, September 1954. It says S.R.A., and it has an IQ of 60. Are you familiar with the S.R.A.? I'm wondering if it could be the S.A.R.

A. I think it was transposed. I think it was the Stanford Achievement Record.

Q. So he scored in a – well, did he score in a retarded range on that achievement test?

A. Well, it says IQ 6.

Q. That's a typo. I think the original said 60. Assume it says 60.

A. Assuming it said 60, he would be in the mildly mentally retarded range.

Q. Now, in 1954 Mr. Rompilla, who was born in 1948, would have been roughly six years old?

A. Correct.

Q. So at six years old, he's scoring in the – somewhere in the retarded range. Let's look at the next test, which is April of '57. He takes the verbal portion of [77] the WISC, and he scores a 75?

A. Yes.

Q. And that's what, in the borderline or retarded?

A. That's in the borderline range.

Q. But that's only half a test; that's not the performance?

A. Yes.

Q. And verbal without a performance is really not a completely accurate picture?

A. Right. Although, I have to say, within the verbal subtests, the one test that is probably the most indicative of IQ is the vocabulary subscale, so it's not far off; but you're right, it's not complete.

Q. All right. So that would have been at approximately – I'm really pushing my arithemetic [sic] – approximately age nine?

A. Yes.

Q. Now, two years later at age eleven he scored a 64 full scale on the WISC, and that is clearly within the retarded range, is that right?

A. That's right. Mildly mentally retarded.

Q. And if you turn the page, in December of '61 when he would have been approximately thirteen years old, he scored in the range of retardation again with a full scale of 69, is that correct?

[78] A. That's correct.

Q. So that you have, in effect, someone who between the ages of six and thirteen is scoring consistently in the retarded range, and the best he did was the 75, which puts him in the borderline on an incomplete test?

A. Right.

Q. Now, let's make believe, again – since we're dealing with children we can make believe – that a child comes into your office, is fifteen years old, and you see these scores. As a clinician, are you going to look for organicity?

A. I would be concerned about it, yes.

Q. As a clinician, would you look for abuse?

A. Yes.

Q. And the reason you would look for abuse, I think as we discussed earlier, abused children often underachieve in school?

A. Yes. I would also look for depression because scores – abused kids can be depressed as well.

Q. Now, a mentally retarded kid or kids in the borderline of mental retardation are often placed in special education classes?

A. Today, yes.

Q. And would you agree, then, that placement in special ed is an additional indicator or red flag, if you [79] will, that someone might have a cognitive impairment?

A. Yes, correct.

Q. Also, placement in special ed could also be evidence or an indicator of an abusive home life?

A. Correct.

Q. Now, if you look at the first page of the school records, you'll see starting in 1957 – well, if you look at the column that says grades, it says K, 1, 2, and 3, and

starting in '57, you see SP, SP, SP. That's an indicator of special education, isn't it?

A. Yes.

Q. So Mr. Rompilla, then, starting at the age of nine years old would be in special education class?

A. Yes, and that would be commensurate based on his scores in 1957.

Q. So everything you're seeing on this school record is consistent with either abuse, organicity, or both?

A. Well, we were talking about hypotheticals, now we just switched to reality. What's happening here is that they're recognizing that based on his achieved scores and his grade performance he was placed in special ed. I don't know if anybody drew the connection of organicity; and, again, I would have to see all of the subscales in order to look at the scatter and see what that determines

Q. Fair enough. If you were to view this record, [80] this school record by itself as a clinician, would you want to rule out organicity as a cause for the underachievement, for the retardation scores and for the placement in special ed?

A. I definitely would.

Q. Would you certainly want to rule out an abusive dynamic at home?

A. Absolutely.

Q. No doubt about that?

A. No doubt about that.

Q. Now, would it surprise you if I told you that Dr. Cook testified that if he had these school records when he was evaluating Mr. Rompilla – well, withdraw.

Dr. Cook testified he did not have these school records when he evaluated Mr. Rompilla in 1988?

A. Correct.

Q. Would it surprise you if I told you that he also testified that if he had the school records, he would have done neuropsychological screening, which he did not do in 1988?

A. It wouldn't surprise me.

Q. It would be expected?

A. Sure.

Q. Now, Dr. Cook also testified that the neuropsychological screening he would have done would have [81] consisted of Trails A and B?

A. Yes.

Q. That would surprise you?

A. No.

Q. It would not surprise you?

A. No.

Q. That would be an appropriate screening mechanism?

A. It would be one, yes.

Q. And I think he also testified that he would have used the tapping test of the Halstead-Reitan?

A. The oscillating finger, yes.

Q. And that would also be an appropriate screening mechanism?

A. Yes.

Q. That seems reasonable to you as a clinician?

A. So far.

Q. Now, getting back to your essential quarrel with the two defense experts regarding the identification of the commencement of the organic impairment and the etiology of it, we discussed earlier that the organicity can be caused by trauma to the head?

A. Can be, yes.

Q. And it could also be caused by disease?

A. Yes.

Q. So you could be born with an organic impairment?

[82] A. That's correct.

Q. One can develop one during their life time?

A. That's correct.

Q. And that could be either by trauma or disease?

A. That's correct.

Q. Now, in trying to determine the reasonableness of Dr. Armstrong and Dr. Crown's conclusion that Mr. Rompilla's deficits are longstanding and going back to childhood, wouldn't you agree that the school records are consistent with the – with their opinions that the organic impairment existed in childhood?

A. Well, I can see how one would want to draw that conclusion. The argument that I have is the cocksuredness that they state in their reports. I beg to differ with that because it's virtually impossible to determine that.

Q. We'll address that. My question, though, was it consistent with longstanding organicity that existed in childhood, not is it certain, is it consistent?

A. Is it consistent, yes.

Q. Okay. Now, in your testimony on direct examination you said something to the effect – I'm not sure this is an exact quote – that you didn't see a hint that either Dr. Armstrong or Dr. Crown knew anything about Mr. Rompilla from 1988 until the date of their testing?

A. That's in the report?

[83] Q. No, that's what you testified to, that you didn't see a hint in your reports or in their statements that they knew anything about Mr. Rompilla from 1988 until 1996?

A. Yes, that's correct.

Q. And that, I take it, goes to your quarrel with this certainty with which they stated their opinions?

A. That's correct.

Q. Conversely, if they had information from Mr. Rompilla about what went on from 1988 to 1995 or '96 when the testing was done, they would be in a better position to identify the etiology and the duration of the organic impairment?

A. Yes.

MR. WISEMAN: I hate to do this. I need to take a break.

MR. McINTYRE: Sure.

(Thereupon, a brief recess was taken.)

* * *

MR. WISEMAN:

Q. Now, Doctor, looking at the period of time from 1988 until, let's call it the period of testing as Dr. Crown did his testing in late 1995 and Dr. Armstrong did in early '96, from '88 until the time of the modern day testing, would you be interested in knowing if Mr. Rompilla suffered a head trauma in prison?

[84] A. What I would be interested in knowing is any records held by the infirmary, the nurse, whether there are any physical examinations by a physician, a psychologist, a neurologist during that period of time. I would be interested in knowing some of the prison records, as far as his behavior, any altercations that occurred; but, again, any injury wouldn't have been reported necessarily to the infirmary.

Q. You'd want to see the medical records?

A. I would also want to see if there was any indication, by virtue of the prison records, that he was using any substance at that time, homemade or whether it was transferred in or whatever.

Q. You're aware, or are you aware that people on death row in this state are kept in single cells?

A. Yes.

Q. And they're kept in isolation; they're not in population?

A. Yes.

Q. They're locked in all the time, you're aware of that?

A. Yes.

Q. And they're kept, obviously, under tighter security than regular inmates are?

A. Yes.

[85] Q. Or noncapital inmates, I should say?

A. Yes.

Q. And you would agree that that type of close confinement greatly diminishes or eliminates completely their ability to engage in various substance abuse, not saying it's impossible, mind you, but it obviously would reduce their chances?

MR. McINTYRE: I'm going to object to that. I don't know if he's qualified to render an opinion on that, You should have somebody from the prison here.

THE WITNESS: I've worked in prisons, I've been involved in them, and I think I know if you take lemonade and store it and fill it with sugar, over time you have something that ferments. You could make just about anything. It minimizes it, yes, it reduces it, yes.

BY MR. WISEMAN:

Q. And as far as using other types of substances, illegal substances, obviously, to the extent people don't

have contact, prisoners don't have contact with other prisoners, their chances of getting such substances are also reduced over a general population?

A. Yes.

Q. It's a matter of common sense?

A. Yes. It would have to be by the guards, who are the people that bring them in most of the time anyway.

[86] Q. So what you'd want to see, then, to try to lock in this period of time, is you'd want to see medical records, and you'd want to see some evidence about whether or not the person had been bringing or abusing drugs during the period of time they were in jail?

A. Yeah. I'd even want to know whether some lonely guard on a Saturday night noticed Rompilla was banging his head against the floor or against the wall for some unknown reason. I'd want to know anything that was peculiar or unusual.

Q. And, again, banging the head against the wall could develop to a notation on an infirmary record?

A. Yes, or Damage to Prison report.

Q. Why don't we look at Mr. Rompilla's complete Department of Corrections record. Perhaps we can mark it over the prior exhibit tab, and I'll state for the record what this is. This is the entire ambulatory medical record, including dispensary card provided to us by the Department of Corrections for Mr. Rompilla, and it is in the same order that it was given to us, with the exception that the top sheet was placed on top by me on purpose, and we'll discuss that in a moment.

MR. McINTYRE: Mike, I have to place an objection. Obviously, you can use it today, but at some point it has to be authenticated. I'm not accusing you of anything. We [87] need some custodian record at some point.

MR. WISEMAN: That's fine.

BY MR. WISEMAN:

Q. Now, the very top sheet you'll note is dated 1/18/88, and it has a section about halfway down the page, it says other pertinent information, and it says scars, and you see it says above left eye?

A. Yes.

Q. So it appears, although you can't tell from that entry what the extent of the scarring was, it appears he has – when he entered the prison in November of 1988 Mr. Rompilla had some type of marking above his left eye?

A. Yes, and this was where? What facility was he at?

Q. This is when he was received by the Pennsylvania Department of Corrections. I would state for your benefit, Doctor, that he was sentenced to death, I believe, on November the 2nd of '88. So this is approximately a week after he was sentenced, he was sent over to the Pennsylvania Department of Corrections, and we see the notation.

A. So between the 2nd and – when he was at the facility?

Q. Yes.

MR. McINTYRE: And between his arrest and the 8th, he was housed at the local facility.

THE WITNESS: Okay.

[88] MR. McINTYRE: I think he was arrested in January of '88.

BY MR. WISEMAN:

Q. Now, if you turn a few pages in, you'll see the beginning of entries, and this is roughly in verse, in chronological order with the most recent ambulatory entries first. I'll also state to the extent it will shed some light on your review of them that Mr. Rompilla's death warrant was signed in approximately June of '95. He was placed in what's known as Phase II custody, and he is seen on a daily basis by health care providers; and so the vast majority of this record covers a three month period, June, July, August of 1995.

So with that preface, what I'd like to do is turn to the back and look at the older records first. Basically, what I'd like you to do is take as much as time as you like, why don't you go through this record and show me any indication of any trauma to the head.

MR. McINTYRE: You know, I'm objecting to this. This isn't the time to do this. This doctor doesn't have a week to sit here and look at records that are approximately half an inch thick here. If you wanted him to do that, you should have sent these up ahead of time. It's not for this witness to do that, and I'm objecting to it. I have to think about this, but I may direct him not to answer it.

[89] You can do this with anybody. To do this with Dr. Dattilio and his time, it doesn't make any sense to me.

MR. WISEMAN: Let me state for the record, until I got your report at noon on Friday, I had no idea

that your expert was going to be speculating about head injuries that may have occurred in the Department of Corrections in the previous six years, and so I would have had no reason to send these to him. I'll tell you what I'm willing to do. I will ask the hypothetical question to the doctor, assuming there's no --

MR. McINTYRE: It's not fair to have him sit here and try to find something in this time.

MR. WISEMAN: And before we rest on the record, I'd like to have the district attorney's position as to whether the district attorney finds any indication of head injury.

MR. McINTYRE: I'm not going to do it today.

MR. WISEMAN: Rest on the record before Judge Wallitsch.

MR. McINTYRE: You're going to have to authenticate them, introduce them.

BY MR. WISEMAN:

Q. Doctor, assume, then, that in this stack of records which cover the entirety of Mr. Rompilla's involvement with the medical authorities, all the various [90] prisons he's been in from November 8th of '88 until 11/95 that there is no evidence at all, not a hint, not a clue, not a whisper of any trauma to the head. Would that satisfy you to some degree that Dr. Crown and Dr. Armstrong's conclusions dating the onset of the organicity and the etiology of it is accurate?

A. It would reduce some of my skepticism. I would still have, you know, other concerns.

Q. Okay.

(Defendant Dattilio Exhibit No. 1, Ambulatory Reports, was marked for identification.)

BY MR. WISEMAN:

Q. You said you would still remain somewhat skeptical. What else would reduce your skepticism?

A. This doesn't count for the county time he spent in prison.

Q. Oh, I see, from the time of his arrest until –

A. That's correct, and whether or not there was, which there would have been greater likelihood of substance abuse in county prison, which is always the case as opposed to a state penitentiary.

Q. So we haven't ruled out the possibility that he may have suffered some trauma post-dating the crime?

A. Correct.

Q. Is there anything else that causes you to remain [91] skeptical in regard to trauma?

A. No.

Q. Now, with regard to alcohol or substance abuse during this time, at least in the Department of Corrections, again, your concern is that we don't know, I think as you said, there is no hint that Dr. Armstrong or Dr. Crown had any information post-dating 1988?

A. Correct.

Q. By the way, if I told you that Dr. Crown reviewed the D.O.C. medical records before his deposition testimony,

would that cause you to still yet have skepticism about his conclusion; in other words, he reviewed these materials in your hand?

A. Before his deposition?

Q. Yes.

A. And this was after he rendered a report?

Q. After he made a statement – actually, no, I'm not sure. I'm not sure. I don't want to testify. Let me read to you his deposition, and we'll let his own words speak for themselves.

Okay. On page six, the question is asked, I want to talk for awhile about what went into your evaluation and the records and things, the records you reviewed and the things you did. What records did you look at, Doctor? Answer, I reviewed a fairly large stack that includes [92] Mr. Rompilla's educational records, which related to his early schooling. I reviewed his packet of materials, including medical materials from the Commonwealth of Pennsylvania, Bureau of Corrections. I reviewed other medical records relating to his early leave. I reviewed various reports in that packet, the consulting psychiatrist in the facility. Would that be Kate Erwin? Answer, yes.

Later on page seven the question is asked, The Department of Corrections indicated you said there were some medical records in there. Were there any other mental health records? By other records, I am referring to mental health records. That was his answer.

It appears from his testimony that he reviewed medical and mental health records from the Department of Corrections?

A. That's correct.

Q. Now, getting back to the alcohol and substance abuse in prison, let me refer you, if I could, to Dr. Armstrong's report.

A. Are we finished with these?

Q. Yeah, for now.

Okay. On page three of her report, background information, Dr. Armstrong says then at about 1965 at the age of seventeen, he began drinking Thunderbird wine until he passed out about three times a week. Then he binge drank [93] whenever he went out. Even in prison he made homemade wine. He last drank in 1988.

So it would appear that Dr. Armstrong did, in fact, question Mr. Rompilla about his drinking both inside of prison and outside of prison. That's in her report.

A. That's true.

Q. And, in fact, she has it down that he even drank wine in prison before he was a capital prisoner, i.e., before 1988?

A. True.

Q. So it's fair to say that she was not completely in the dark in regards to the question of his drinking in prison?

A. Well, yeah, as biased as it may be coming from a defendant, yes.

Q. Now, does that bit of information make you any less skeptical about the issue that we've been discussing?

A. What we just went over?

Q. Yes.

A. A little bit, yes. Once again, if I might state for the record that this information is coming from Mr. Rompilla who, you know, I don't know – we'd have to question the validity of it.

Q. Would you agree that in a forensic setting relying on the self report of a patient/defendant is not the wisest [94] course?

A. No, I would agree it's not the wisest course. Whether or not Mr. Rompilla takes the wisest course, though, is another question.

Q. I'm talking about from a clinician's point of view?

A. Yes.

Q. When you evaluate a forensic patient, you don't want to just rely on what they tell you?

A. Absolutely.

Q. You want to get collateral sources?

A. Absolutely.

Q. And that would include family?

A. (The witness nods his head.)

Q. You have to speak?

A. Yes. I'm sorry.

Q. That would include – you said just the family?

A. Yes.

Q. That would include records, school records?

A. School records, prison records.

Q. Records about prior incarcerations?

A. Correct.

Q. Now, would your skepticism diminish further if there were other evidence in the record reviewed by Dr. Armstrong and Dr. Crown which also supported the [95] position that Mr. Rompilla was not drinking in prison in 1988 onward?

A. Yes.

Q. All right. Previously marked and part of the petition in this case is the – is two reports from Dr. Kate Erwin, one of which is dated July 3rd, 1995, Access [sic] I Diagnosis of alcohol dependence, in remission due to incarceration.

MR. McINTYRE: This is objected to.

MR. WISEMAN: On what basis?

MR. McINTYRE: It's a hearsay report.

MR. WISEMAN: You missed that part, Michael. The judge allowed it.

MR. McINTYRE: All right.

MR. WISEMAN: The judge let this in so we didn't have to drag Dr. Erwin in all the way from Pittsburgh.

MR. McINTYRE: I realize there are days I wasn't there.

MR. WISEMAN: The records will show that before testimony given in this case, Judge Wallitsch specifically allowed this report in in consideration of quashing our subpoena for Dr. Erwin.

MR. McINTYRE: And I don't know if there's testimony that was relied upon by either Crown or Armstrong. I don't remember that, but I'll object on that basis.

[96] MR. WISEMAN: All right.

BY MR. WISEMAN:

Q. Now, would you agree that that Access [sic] I Diagnosis tends to show that Mr. Rompilla is not drinking from 1988 onward?

A. Yes.

Q. And does that further reduce your skepticism?

A. To some degree, that's correct.

Q. And would it further reduce your skepticism if I were to tell you that Dr. Crown and Dr. Armstrong had the mental health records, of which this report was a part, when they made their opinions about Mr. Rompilla's organicity?

A. That would reduce it, yes.

Q. Now, Mr. McIntyre asked you a number of questions about different individual pieces of evidence in this case and asked you if by themselves they would, in your view, constitute any of the two mental health mitigators in Pennsylvania?

A. Yes.

Q. And I think your answer was not by themselves?

A. Right.

Q. We have gone over the effect on personality of both abuse and organicity, correct?

A. Yes.

Q. Hypothetically speaking, if you have a severely [97] abused child who grows into adulthood and have that same child who has an organic defect of the type that Mr. Rompilla had, wouldn't you agree that that adult could act impulsively?

A. Yes, could indeed.

Q. And that adult would have basically all the personality problems conceivably that we discussed at the beginning related to lack of control of behavior?

A. That adult could.

Q. Inability to control, to predict future consequences?

A. Correct.

Q. Emotional ability?

A. Yes.

Q. All those tell-tale signs of an organically impaired, abused person?

A. Yes.

Q. So my general question to you, then, at this point is given all that you now see about Mr. Rompilla, the school records showing retardation, the school records

consistent with abuse, the consistent pattern over years of not achieving well, the MMPI, which you said is consistent with abuse and organicity, taking all that together, wouldn't you agree that Mr. Rompilla, from these records – let me rephrase that.

[98] Given all the things we just talked about, wouldn't you agree that there's some possibility that Mr. Rompilla's behavior at the time of the commission of the offense was governed by one of the two mental health mitigators that apply to it?

MR. McINTYRE: Objection to the form of the question, some possibility.

MR. WISEMAN: We'll see where we go. You can answer.

THE WITNESS: There's some possibility. It lends credence to the idea.

BY MR. WISEMAN:

Q. It's not outlandish?

A. No.

Q. Okay.

A. But at the same time it's not accurate, either.

Q. Okay. Well, fair enough.

Now, as a clinician in 1988 evaluating Mr. Rompilla, you got the schooling records, you got MMPI, you've got all the information that we've gone through today, what do you do?

A. What I would have done, I would have given him as extensive as a battery of tests that I could.

Q. And if that battery of tests showed neuropsychological deficits of the variety and the type [99] identified by Dr. Armstrong and by Dr. Crown, would you agree they would be an emotional disturbance in accordance – well, let me withdraw that and ask it a different way. Just bear with me a moment.

Would you agree that the organicity identified by Dr. Armstrong and by Dr. Cook or Dr. Crown constitues extreme emotional disturbance?

A. Yes.

Q. And given what we've discussed in terms of its impact on personality, that such an extreme emotional disturbance could, at the time of the offense, have prevented Mr. Rompilla from appreciating the criminality of his conduct or to conform his conduct to the requirements of the law?

A. It may have.

Q. And the point is, Doctor, that in 1988, if you were reviewing this stuff, you would have wanted to do additional work to answer that question?

A. Yes.

Q. Okay. By the way, Dr. Cook and Dr. Sadoff both testified in their depositions that they agree with you – well, withdraw that.

MR. McINTYRE: Is that a question?

MR. WISEMAN: That's a statement.

THE WITNESS: They agree with me?

[100] MR. WISEMAN: Yes.

THE WITNESS: Having not known that I said it, though.

BY MR. WISEMAN:

Q. I'm saying, they said something consistent with what you just said.

A. Okay.

Q. Now, in your report one of the, as we discussed, one of the quarrels you have with Dr. Armstrong's report is that on page two in the third full paragraph, you say she rules out the fact that it does not fulfill the criteria for Korsakoff 's dementia. However, it is also not necessarily conclusive that Mr. Rompilla's deficiencies are definitely alcohol related?

A. Correct.

Q. Now, Dr. Armstrong didn't say that all of his deficits or Mr. Rompilla's deficits were alcohol related?

A. No, she implied.

Q. Did she? Let's look at her report.

A. The tenor of her report seems to imply that his history of heavy alcohol abuse was a substantial contributor to.

A. If you look on page 4 of her report.

Q. All right. Let me direct you to the page that I want you to look at, if that's all right.

[101] A. Sure.

Q. On page one, the beginning of the report, The deficits, obviously talking about the organic deficits, which are consistent with the chronic effects of alcohol are visuospatial deficit, conceptual deficits, I'll skip a phrase there, short term memory and learning, normal rates of forgetting, impaired visual scanning and attention. While this can account for a number of his deficits, there are other problems which go beyond that expected in cases of chronic effects of alcohol. It should also be noted that he does not demonstrate the neurocognitive pattern of Korsakoff's dementia.

In the next paragraph she goes on to say, The deficits which go beyond the effects of alcohol include defective manual praxis, problems in word recognition and in language structure and writing. She then goes through the family history. She concludes that paragraph by saying, if learning disability can be documented in childhood records, then several of his neurocognitive deficits, including reasoning and memory impairments, may be a product of developmental learning disability primarily.

Okay. Isn't it true, then, in her report she also takes into account things that pre-date the reporting of alcohol abuse by Mr. Rompilla?

A. That's correct.

[102]Q. She's saying, in effect, he may have had organicity from the time he was born?

A. He may have.

Q. That's what she was saying?

A. Yes.

Q. And she's saying in that report that if you have any records indicating learning disability as a child, that would support her conclusion that the organicity is developmental and goes back to childhood?

A. May have been developmental, yes.

Q. Okay. Now, you would agree that the school records we've gone through fit that bill, don't they?

A. As far as I can see, yes.

Q. And the schooling records are, therefore, consistent with developmental early childhood organicity?

A. Would you repeat that, please?

(Thereupon, the court stenographer reads back the last question.)

THE WITNESS: Well, the school records are indicative of early – of developmental problems and learning disability. Whether or not it's got an organic basis is still questionable. We don't know.

BY MR. WISEMAN:

Q. But it's consistent with it? It's not inconsistent?

[103] A. It appears consistent, yes.

Q. And, in fact, when you look over the history of Mr. Rompilla, what is known about him and what is not known about him, wouldn't you agree that this is more likely that his organic deficits date the childhood than that they date something that happened to him in prison from 1988?

MR. McINTYRE: Object to the form.

THE WITNESS: I can't draw that conclusion. I can't –

BY MR. WISEMAN:

Q. You can't draw a more likely than not conclusion?

A. No.

Q. Okay.

A. Again, we're dealing with very patchy information here. There's a lot of variables involved. That's a big leap to make.

Q. Right.

A. It gives us a direction. Understandably, I can understand why one would be encouraged to investigate, but by no means is that sufficient information to make that profound conclusion as far as I'm concerned.

Q. Suffice it to say in 1988 if you were examining Mr. Rompilla for a capital case, you would have explored the things we just discussed?

A. Yes, absolutely.

[104] Q. Now, one of your quarrels with dating the etiology has to do with the issue of head trauma being reported by Mr. Rompilla to Dr. Armstrong and Dr. Crown?

A. Yes.

Q. And I think, to put it in a nutshell, tell me if this is accurate, essentially what you're saying is he didn't tell Dr. Gross about it?

A. Right.

Q. Is Dr. Gross – in your report you say you doubt Dr. Gross would have quote, unquote, lied about such a statement?

A. Right.

Q. You would agree that there's other things that could go on in a forensic interview that is short of a lie that could explain inaccuracy in a report?

A. Yes.

Q. For example, a cognitively impaired person may not have been a good historian of their life, that's one explanation?

A. Yes.

Q. A forensic examiner might not be as careful on a particular occasion to ask the questions that need to be asked to elicit the information?

A. Possibly.

Q. And as we discussed earlier, relying on self [105] reporting in a forensic setting is not a good idea to begin with?

A. Yes.

Q. You've got to get collateral information?

A. Correct.

Q. And, in fact, we know that there are certain things in Dr. Gross' report which simply aren't true, they're inaccurate, right, such as his statement that Mr. Rompilla was never hospitalized? We know that's not true.

He was hospitalized on at least one occasion when he was two years old.

MR. McINTYRE: I'm going to object to that. What's the point of this? Dr. Gross gave the information on the report that he got from Mr. Rompilla. If it was inaccurate, it was Mr. Rompilla giving him inaccuracies. What's the point?

MR. WISEMAN: That is the point.

BY MR. WISEMAN:

Q. Would you agree that Dr. Gross, who relied solely on Mr. Rompilla, and he admitted that in his deposition, he had no collateral information, his report has an inaccuracy regarding hospitalization?

A. Yes.

Q. We've seen the records. We know, in fact, he was hospitalized?

[106] A. Yes.

MR. McINTYRE: You're referring to the 1950 hospitalization when Rompilla was one and a half years old?

MR. WISEMAN: Exactly.

BY MR. WISEMAN:

Q. Now, in your practice with families and abuse, you have been exposed to the dynamic of denial; people abuse, people who are abused will often deny that they were abused?

A. Yes.

Q. And that's true in children, right?

A. That's correct.

Q. That's true in adults who are abused as children?

A. Yes.

Q. And it's also true of adults who were abusers?

A. Yes.

Q. And it's also true of siblings who witness abuse?

A. Yes.

Q. And that's something as a clinician you're on guard for when you're evaluating a potential abuse situation?

A. Yes.

Q. So you don't just sit the kid down and say, were you abused?

A. Yes.

Q. You do more than that?

[107] A. Yes.

Q. You subjectively and gently probe?

A. That's correct.

Q. And when you're examining an adult who you think may have been the victim of abuse as a child, you similarly don't just ask a blunt, open-ended question, were you abused type questions?

A. Yes.

Q. Because it's embarrassing for the victim of abuse to talk about?

A. Yes.

Q. It's painful for them to talk about?

A. That's true.

Q. And clinically there are reasons psychodynamically that they don't want to talk about it?

A. Yes.

Q. And isn't it true victims don't want to admit to themselves they were abused?

A. Yes.

Q. And that's why it's crucial to get collateral information when you're looking at the abuse dynamic?

A. Yes.

Q. I want to show you some material which I'm not sure you've seen yet. These are the three declarations of the Rompilla family, which have already been marked in this [108] case. It's just a few pages. Why don't you take a minute to look at that.

MR. McINTYRE: I'm going to object to the use of these on a couple of grounds. Number one, I don't think these were admitted. Their trial testimony was inconsistent with this. I remember impeaching one of them from it. Why don't you ask him to assume the reports from the family –

MR. WISEMAN: That's one of the ways to do this.

I thought it was generally very consistent, with a couple of minor inconsistencies you may have established.

MR. McINTYRE: I can remember one about some cage. It had turned out that Rompilla was never put in the cage, may not have even seen his brother was put in, as I recall.

MR. WISEMAN: The declaration doesn't say he was in the cage.

MR. McINTYRE: I thought that was included in the declaration. Anyway, it's on the record.

THE WITNESS: Okay.

BY MR. WISEMAN:

Q. Okay. While you were reading that, Mr. McIntyre was having a discussion with me on the record about a cage that was allegedly built.

A. Right.

Q. And the discussion we were having was whether Mr. Rompilla himself was put in the cage or just his [109] siblings. Let me ask you a question about that. In your experience as a clinician dealing with abused families and children and abusers, the dynamic that would lead a parent to build a cage for one child, is it likely in your experience that that would be an isolated incident, or is that more consistent with an abusive profile that would tend to affect all the siblings in the household?

A. No, it's more consistent with an abusive profile.

Q. People don't just build cages for one kid and then treat everybody else fine?

A. Right.

Q. Now, is this the kind of collateral information you'd want to look at, not actually these declarations, but would you want to talk to the people who completed these declarations as a clinician in exploring whether or not there is abuse in a family?

A. Yes.

Q. And these are certainly declarations that evidence severe abuse?

A. Yes.

Q. And these are the kinds of – this is the kind of abuse that would lead to organicity conceivably?

A. Possibly.

Q. And it's the kind of abuse that would lead a child to the type of profile we discussed earlier that abused [110] children have?

A. Yes.

MR. WISEMAN: I'm not sure I'm going to be past 3:00, but I'm going to be a little bit longer than, like, another half hour or so, so maybe we want to take a short break.

MR. McINTYRE: Let's get some lunch.

MR. WISEMAN: Right, but not a long one.

(Thereupon, a luncheon recess was taken.)

* * *

BY MR. WISEMAN:

Q. I think we left off discussing the need to probe very carefully when you're looking at issues related to abuse. I had shown you the family affidavits in this case.

A. That's right.

Q. Now, is there any indication in Dr. Gross' report that he consulted any collateral source about abuse or any other matter?

A. Not that I recall.

Q. Now, with regard to the question of potential head injury, Dr. Gross, as we just discussed, reported that he saw no such evidence or that none was reported to him by Mr. Rompilla?

A. Correct.

Q. Would you agree that just as with abuse, it's [111] important in a forensic setting to probe very carefully in regard to potential traumas to the head when you're looking at neurological issues?

A. Yes.

Q. And would you also agree that it's important not to ask simple, have you ever been hit in the head or have you ever lost consciousness type of questions as opposed to more careful and in depth probing?

A. Yes.

Q. And checking the collateral sources as well?

A. Yes.

Q. In your report, you have a section that discusses the issue of malingering, and you don't actually state any position on it other than to say it's generally something one has to be on the lookout for. There's no indication at all that there's any malingering in any of Mr. Rompilla's 1995 or '96 testing, is there?

A. No.

Q. As long as they're valid and accurate tests as far as you can tell?

A. Yes.

Q. Now, I just want to go over a couple of the achievement tests with you from 1975. Do you still have that in front of you, the transfer petition?

A. Yes.

[112] Q. Now, –

A. The school records or the transfer?

Q. No, these are the D.O.C. transfer petitions, the Wide Range Achievement Test scores. I can give you a copy.

MR. McINTYRE: You have it somewhere, Doctor.

THE WITNESS: Yes, I have it.

BY MR. WISEMAN:

Q. Now, the spelling score and the arithmetic score were in the 4th percentile and 3rd percentile, is that right?

A. Right.

Q. Now, those percentiles in those two areas are consistent with the low scoring that Mr. Rompilla achieved both on achievement tests and on IQ tests when he was a child, aren't they?

A. Correct, yes.

Q. You mentioned, in addition, the 1988 Jastak Wide Range Achievement Tests, where I think you said the D.O.C. record showed he scored in the 1st percentile in reading?

A. Yes.

Q. That also is consistent with the 1975 scores and with the childhood scores, aren't they?

A. Yes.

Q. So would it be fair to say we have a lifelong record in Mr. Rompilla's case of significant [113] underachievement in both IQ testing and achievement testing?

A. That's correct.

MR. McINTYRE: I'm going to object to that. You just asked him for WRAT scores, and now you're asking him about IQ.

MR. WISEMAN: I'll ask them separately.

MR. WISEMAN:

Q. We have a consistent, a consistent lifelong history of cognitive impairments based on both types of scoring?

A. Yes.

Q. So he's been cognitively impaired for as long as he's been tested from childhood all the way up through 1988?

A. Yes.

Q. Does that consistency cause you to feel a little bit – a little more amenable to the dating of the organicity to childhood?

A. Yeah, possibly.

Q. And in that regard, the fact that he scored poorly in 1988, in the 1st percentile in reading –

A. That's consistent, yes.

Q. And it's consistent, and, in effect, it eliminates to some degree the period of 1988 to 1995 as a possible cause for this impairment?

A. Yes.

[114] Q. Now, you looked at the MMPI, and you, based on the scale, called Mr. Rompilla like a raging antisocial person, sociopath, something to that effect?

A. Yes, same thing.

Q. Same thing?

A. The word antisocial personality has now replaced the old term, which is sociopath.

Q. You would agree, would you not, with the – you would agree with the proposition, wouldn't you, that children who suffer abuse often are involved in antisocial behavior?

A. They can be, yes.

Q. So from that perspective, isn't the scoring of a high score on the antisocial scale to some degree consistent with abuse?

A. Yes.

Q. In Mr. Rompilla's case?

A. Yes.

Q. So, again, if you were looking at his MMPI in 1988, either 1975, looking at it in 1988 combining it with the school records, that antisocial score would be further, a further indication to examine abuse as a possible explanation?

A. Yes.

Q. You also stated that some of the differential in [115] the school records between the verbal and the performance indicated a possibility that the low scores might have been a result of his not paying attention. I forgot what you called it, something academically based?

A. Impoverished.

Q. Academic impoverishment. Now, looking at what you know about Mr. Rompilla now, wouldn't you agree that those scores – well, you already said those scores are also consistent with abuse and possible organicity and all the other things we've gone through. Would you say it's more likely than not that the school scores are reflective of an abusive organic child or one who, just because they aren't a very good student, doesn't pay attention?

MR. McINTYRE: Object to the form. You may answer.

BY MR. WISEMAN:

Q. What seems more likely to you at this point?

MR. McINTYRE: Object to the form.

THE WITNESS: Both possibly.

BY MR. WISEMAN:

Q. Both possibly. And, again, the point being that in 1988 you would have wanted to dig deeper to try to sort out that question?

A. Absolutely.

Q. We talked about the Beta exam or you talked about [116] it on direct, the score of 93 in 1975. Do you use the Beta in your work?

A. No.

Q. Do you know of any private clinician who uses it?

A. Yes.

Q. It's used in an institution-type setting where you need to get a large number of people in a –

A. It was originally called the Army Alpha Beta testing. It was used in World War II or World War I.

Q. You don't use it because it's not as reliable as WAIS?

A. Right, and it doesn't give you a subscale scatter.

Q. And that's because it doesn't have a performance portion?

A. Correct.

Q. It just has a verbal?

A. Yes.

Q. So on your direct exam when you said its an alternative to the WAIS, wouldn't it be correct to say it's a poor alternative?

A. Yes. At this point in time, yes.

Q. Now, you were asked who would be in a better position, by Mr. McIntyre that is, to give an opinion as to whether or not Mr. Rompilla fit into any of the statute mitigators in Pennsylvania, and I think you said the doctors [117] in 1988 would be in a better position than the present day physicians or the present day provider, rather?

A. Correct.

Q. Wouldn't you agree that that opinion would be based on an assumption on your part that those folks in 1988 were on the lookout for mitigating evidence? In other words, they were examining Mr. Rompilla to determine if there was mitigation?

A. Yes.

Q. And if I told you that Dr. Gross said in his deposition that he specifically was not looking for mitigation, would you agree that he was not in a particularly good position to find it?

A. Probably.

Q. Okay. And if I were to tell you that Dr. Sadoff in his deposition said that his understanding of mitigation in Pennsylvania is limited only to the two mental health

mitigators as opposed to the catch-all, would you agree that he may have been laboring under a misimpression?

A. Yes.

Q. And what's your understanding of the catch-all indicator in a forensic setting in Pennsylvania?

A. Essentially, it's a question of whether an individual is competent at the time of the act that they're involved.

[118] Q. Okay.

A. Is that what you're referring to?

Q. Well, the mitigating factors that Mr. McIntyre read to you earlier on I refer to as the mental health mitigators, extreme emotional disturbance, inability or lack of capacity to appreciate the criminality of your conduct or to control the criminality.

A. Right.

Q. The eighth mitigating factor in Pennsylvania is the catch-all, anything else about the defendant's background or the commission of the offense that tends to mitigate. That's what we call in the trade the catch-all.

MR. McINTYRE: I'm going to object to your characterization. Why don't we read it, any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

BY MR. WISEMAN:

Q. Would you agree that abuse, organicity, any of the things we talked about today, wouldn't you agree as a

clinical forensic psychologist that evidence of abuse is mitigating in terms of the catch-all?

A. Yes, it could very well be included, yes.

Q. So in other words, letting a jury know that the person who committed the crime was abused as a child could be mitigating?

[119] A. Yes.

Q. And letting the jury know that that person has organic defects could be mitigating?

A. Yes.

Q. And I guess getting back to Dr. Sadoff, assuming that Dr. Sadoff was not labororing [sic] under that impression, would you agree that he, too, was not in a particularly good position to or not in a better position than Dr. Crown, Dr. Armstrong, to make a call as to whether or not there were mitigating circumstances?

A. I don't know. My understanding, what I know about Dr. Sadoff is he's very thorough. I know he looks at all sides when he does an evaluation. I would be a little hard pressed to say he wasn't in a good position. Again, I can't attest to what his frame of mind was at the time; but knowing him, I know he's very thorough. If he considers it, he'll look for it.

Q. All right. But you would agree, though, that if he was not looking for mitigation related to the catch-all, that the chances that he would identify any were diminished?

A. Possibly, yes.

Q. In terms of all the discussions we've had about the etiology of the organic impairment, we haven't discussed fetal alcohol. I think that's in Dr. Armstrong's report, Dr. Crown's statement, and I think it's mentioned in your [120] report. Would you agree that considering all the uncertainties you may have about dating it and placing it, that fetal alcohol syndrome is also a potential explanation for Mr. Rompilla's deficits?

MR. McINTYRE: Let me place this objection on the record. There is no evidence in this case of fetal alcohol.

BY MR. WISEMAN:

Q. All right. Assuming that there is?

A. Assuming that there is, yes, it's possible.

Q. Now, in regard to your report and a discussion of the EEG, you would agree – well, EEG, the MRI, and the CAT scan, you would agree, Doctor, that EEG's fail to show organicity in a third of the cases. That's a standard statistic?

A. Yes.

Q. And the MRI and a CAT scan will only show so-called hard defects in the brain?

A. Yes.

Q. And by that we mean lesions or tumors?

A. Yes.

Q. So it's quite possible that someone could have a substantial debilitating organic defect, and it would not show up on an MRI?

A. Possibly.

Q. And so we could very well perform an MRI on Mr. [121] Rompilla, and it would eome up negative?

A. Possibly.

Q. But that wouldn't mean he didn't have a defect?

A. Sure.

Q. By the way, was an MRI available in 1988? Were they widely used or used at all?

A. They were just coming into use in the area. I don't particularly recall whether or not one was here. '88, '89, around that time they were here.

Q. Here meaning this area?

A. Yes.

Q. It wasn't like they are now; it wasn't as popularly used, as readily available?

A. Correct.

Q. And, finally, there was some discussion on your direct examination related to brain deterioration due to age. Is the – most people at the age of mid-40's don't have the kind of deficits that Mr. Rompilla has?

A. I hope not.

Q. I think we all concur.

A. No.

Q. It's unusual, his deficit?

A. Extremely.

Q. And in regard to these deficits being caused solely by his incarceration, that also doesn't explain it?

[122] A. That's correct.

MR. WISEMAN: I have no other questions. Thank you, Doctor.

MR. McINTYRE: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. McINTYRE:

Q. You used the word, expression, consistent with throughout your cross-examination by Mr. Wiseman. I take it by consistent with you do not mean causily [sic] related to?

A. No.

Q. All right. Consistent with implies that there could be other causes?

A. Correct.

Q. For that particular condition, correct?

A. Yes.

Q. And I take it you just don't know what those causes are?

A. That's correct.

Q. One other thing, and it's the only other area I have to ask you about, Doctor. Mr. Wiseman asked you a question, he was talking about the WRAT testing being consistent, the grade school WRAT test and the 1988 test,

but then he asked you whether or not the IQ test scores had been consistent. Now, reminding you of the WISC IQ tests from 1957 to '61, which showed basically, I think the first [123] one was 75 verbal, and then it was a 64 total and a 69 total, correct?

A. Yes.

Q. And then the '76 Beta score of 93?

A. Yes.

Q. And then the 1988 WAIS test of 79, are those consistent?

A. Well, when he said consistent, we're talking about different tests. I mean, there were different forms of the test given over a period of time. There is the WISC and then the WISC-R, and you're talking about the Beta, which is completely different. Gross inconsistency would be something fifteen to twenty points out of the range; so for the most part, they are consistent in the sense that they're falling within the same region or area.

Q. But yet they were lower, actually getting into the retarded area, back in the grade school age?

A. Right.

Q. But they weren't in '76 or '88, correct?

A. Correct. Now, typically, the way it goes is that as the – as the tests are revised and improved, the scores tend to get a little lower, okay. So in other words, he would normally have necessarily scored higher on earlier versions of the WISC than later, but it went actually the opposite I think.

[124] Q. Let me ask you this. If it was an organic brain defect causing the low scores back in grade school, wouldn't those scores stay the same throughout his life?

MR. WISEMAN: Objection, assuming that the scores have changed.

MR. McINTYRE: You may answer the question.

THE WITNESS: If you're performing the same test over time, but we've got to account for the variations and the different types of tests that were administered.

BY MR. McINTYRE:

Q. All right. But we have in grade school, we've got them being measured in a retarded area?

A. Yes.

Q. And we don't have that in '76 or '88?

A. Would it have gotten better? No.

Q. And my question to you is if an organic brain defect were causing those scores in a retarded area in a grade school test, how could that ever be corrected over time?

A. It couldn't.

Q. Doesn't that exclude organic brain defect as being the cause of those low scores in the grade school IQ?

A. On that measure, potentionally, yes.

Q. Now, there's other reasons why a grade school child could have low IQ tests?

[125] A. Yes.

Q. Besides brain defects?

A. Maybe emotional issues.

Q. Besides child abuse?

A. Could even had to do with the lack of experience of the examiner. I mean, it depends on who examined him.

Q. This would be my final area, I promise. You were talking about – forget that.

MR. McINTYRE: I have no further questions.

MR. WISEMAN: Just a couple follow-up.

RECROSS EXAMINATION

BY MR. WISEMAN:

Q. The lack of experience of the examiner wouldn't explain low IQ testing over a period of six years?

A. No.

Q. And when you say the scores couldn't be corrected over time, in other words, even assuming that we have scores that were lower in childhood than they were as an adult, Mr. McIntyre asked you if that, in some sense, undercuts the notion or the conclusion that it was organicity as a child, assume you have an organic child in an abusive household, if you take away the abusive household, put the child into adulthood, they might score higher then even though they're organic?

A. Yes.

[126] MR. McINTYRE: No further questions. Thank you. I'm going to attach P-3, 4, 5 and 6.

(Thereupon, the deposition was concluded.)

* * *

[127] I HEREBY CERTIFY that the proceedings are contained fully and accurately in the notes taken by me in the hearing of the above cause, and that this is a correct transcript of the same.

/s/ Robyn L. Berner
ROBYN L. BERNER
REGISTERED PROFESSIONAL
REPORTER

(3)

No. 04-5462

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME VI, PAGES 1280 TO 1453

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
(215) 928-0826 Fax
Counsel for Petitioner

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania
RICHARD A. SHEETZ, JR.
Executive Deputy Attorney General
Director, Criminal Law Division
AMY ZAPP*
Chief Deputy Attorney General
Appeals and Legal Services Section
OFFICE OF ATTORNEY GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-4487
(717) 783-5431 Fax
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 23, 2004
Certiorari Granted September 28, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Relevant District Court Docket Entries 1

Notes of Testimony (11/1/88, penalty-phase)..... 2

Notes of Testimony (11/2/88, penalty-phase)..... 120

Notes of Testimony (11/3/88, penalty-phase)..... 211

Pennsylvania Supreme Court direct appeal opinion, *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) 241

Court of Common Pleas post-conviction opinion 257

Volume II

Pennsylvania Supreme Court post-conviction opinion, *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998)..... 269

Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 5) 288

Commonwealth's Response to Petition for Writ of Habeas Corpus (relevant portions) (District Court docket entry 9)..... 441

Volume III

Relevant District Court Exhibits (District Court docket entry 17):

Notes of Testimony (3/28/96) 456

Volume IV

Notes of Testimony (3/29/96) 653

Deposition of Dr. Barry Crown 824

TABLE OF CONTENTS – Continued

Page

Volume V

Deposition of Dr. Carol Armstrong 939
Deposition of Dr. Paul Gross 1015
Deposition of Dr. Gerald Cooke 1057
Deposition of Dr. Robert Sadoff.....1102
Deposition of Dr. Frank Dattilio.....1162

Lodging

Sacred Heart Hospital Records on Ronald Rompilla ... *L1
School Records on Ronald Rompilla..... L11
Pennsylvania Department of Corrections Records (Initial Transfer Petition and Initial Classification Summary) L31
Juvenile Court records on Ronald Rompilla L41
Juvenile Court records on Nick Rompilla L49
Police reports provided to trial counsel through discovery L111
Reports and Commutation Recommendation prepared by Dr. Kate Erwin (1995) L121

Volume VI

District Court Opinion 1280
Third Circuit Panel opinion and dissent 1325
Third Circuit *en banc* ruling and dissent 1448

* Items paginated with L numbers are bound in a separate volume.

2000 WL 964750 (E.D. Pa.)

United States District Court, E.D. Pennsylvania.

Ronald ROMPILLA, Petitioner,
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections; Philip L. Johnson, Superintendent of the State Correctional Institution at Greene, and Joseph P. Mazurkiewicz, Superintendent of the State Correctional Institution at Rockview, Respondents.

No. CIV.A.99-737.

July 11, 2000.

MEMORANDUM

BUCKWALTER

On February 12, 1999, Ronald Rompilla (Petitioner) filed a Motion to Proceed *In Forma Pauperis;* For Stay of Execution; For Appointment of Federal Habeas Corpus Counsel; and for 120 days to file his habeas corpus petition.

This motion was granted and ultimately, all briefs, exhibits and records necessary to render this decision were filed no later than February 8, 2000.[1]

[1] The court also received a letter dated February 3, 2000 from counsel for petitioner which follows:

> We are writing to address the issue discussed in the telephone conference convened by the Court on January 21, 2000. In that conference, your Honor alerted the parties that the son of the Lehigh County District Attorney who was in office at the time of Mr. Rompilla's trial is presently one of your law clerks. The Court also indicated that this clerk has not had, and will not have, any involvement with

(Continued on following page)

Before proceeding with my review of this case, I awaited a decision then pending before the United States Supreme Court in *Terry Williams v. Taylor,* 120 S.Ct. 1495 (2000), which was decided April 18, 2000. This case will be referred to both in the Standard of Review and the Claim I discussion. In light of *Williams, supra,* I accepted additional briefing and held oral argument on July 10, 2000.

I. BACKGROUND

Petitioner, represented by court-appointed counsel, was convicted of first degree murder and related offenses, and was sentenced to death, in the Lehigh County Court of Common Pleas, No. 682/1988 (Honorable David E. Mellenberg, J.). The conviction and sentence were affirmed on direct appeal to the Pennsylvania Supreme Court. *Commonwealth v. Rompilla,* 539 Pa. 499, 653 A.2d 626 (1995).

While his case was still pending on direct appeal, Petitioner filed a petition for writ of habeas corpus in this court, which was dismissed without prejudice for lack of

---

Mr. Rompilla's case. Finally, the Court requested that we discuss these circumstances with Mr. Rompilla to determine whether a recusal motion, or a similar application, would be appropriate.

We discussed these facts with Mr. Rompilla by telephone on January 27, 2000. Based upon the telephone conference with the Court and our discussion with Mr. Rompilla, Petitioner is satisfied with the Court keeping this matter and will make no application for recusal or related relief.

NOTE: The clerk referred to has had no involvement in this opinion. Indeed, the only involvement of my other law clerk has been the securing of copies of the opinion of the court in *Williams v. Taylor, supra.* and the ABA Standards.

exhaustion on September 19, 1994. *Rompilla v. Love,* No. 94-CV-4194 (E.D.Pa.).

On December 5, 1995, Petitioner filed a petition for state post-conviction relief in the Lehigh County Court of Common Pleas. On March 28 and 29, 1996, the Court of Common Pleas (Honorable Thomas A. Wallitsch, J.) held an evidentiary hearing on Petitioner's post-conviction claims. Further evidence was taken (with the consent of the parties and the court's permission) by way of depositions, which were filed with the Court. *See* Deposition of Carol Armstrong, Ph.D. (April 2, 1996) (Exhibit 3); Deposition of Barry Crown, Ph.D. (April 2, 1996) (Exhibit 4); Deposition of Paul K. Gross, M.D. (April 1, 1996) (Exhibit 5); Deposition of Gerald Cooke, Ph.D. (April 3, 1996) (Exhibit 7); Deposition of Robert Sadoff, M.D. (April 23, 1996) (Exhibit 8); Deposition of Frank M. Dattilio, M.D. (May 7, 1996) (Exhibit 9). Numerous exhibits were introduced.

On August 21, 1996, Judge Wallitsch issued an Opinion and Order denying Petitioner's claims for post-conviction relief. The Pennsylvania Supreme Court affirmed on December 10, 1998 and denied reargument on January 19, 1999. *Commonwealth v. Rompilla,* 554 Pa. 378, 721 A.2d 786 (1998).

Pennsylvania Governor Thomas Ridge issued a death warrant, scheduling Petitioner's execution for March 16, 1999, after which the February 12, 1999 petition referred to above was filed.

The date of petitioner's murder conviction was November 1, 1988.[2] The Supreme Court of Pennsylvania, in petitioner's direct appeal, wrote this about the evidence in the case:

> In the early morning hours of January 14, 1988, the victim, James Scanlon, was murdered in his bar, the Cozy Corner Café, located in Allentown, Pennsylvania. At approximately 6:30 a.m. on that same morning, the victim's son discovered the body of his father lying behind the bar in a pool of blood. The victim had been stabbed repeatedly and set on fire. The victim's wallet had been stolen and approximately $500 to $1,000 had been stolen from the bar.
>
> The Commonwealth's case consisted almost entirely of circumstantial evidence as there were no eyewitnesses to this killing. Appellant was seen in the Cozy Corner Café on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.
>
> When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he had been in the Cozy Corner Café on the night of the murder and left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only $2.00 to buy breakfast at a local diner. A cab driver testified that he picked

[2] In all, petitioner was convicted of murder in the first degree, burglary, criminal trespass, two counts of theft and two counts of receiving stolen property.

> up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of $9.10.
>
> Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid $121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.
>
> The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.
>
> The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr. Scanlon's wallet was found by a grounds keeper in the bushes, six to eight feet outside the room that Appellant had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives that was used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told police concerning his activities on January 14 and 15, 1988, and the testimony of other witnesses.
>
> When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence clearly supports Appellant's conviction for first degree murder.

Petitioner now makes 11 claims which he contends merit habeas corpus relief.

II. STANDARD OF REVIEW

Before undertaking an analysis of petitioner's claim, it is appropriate to set forth the standard of review for § 2254 petitions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West Supp.1998).

Moreover, "a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In accordance with *Matteo v. Superintendent S.C.I. Albion,* 171 F.3d 877 (3d Cir. 1999), *cert. denied.,* 120 S.Ct. 73 (1999), this court should first review a State court decision to determine if it was contrary to Supreme Court

precedent governing the claim for relief, such that a contrary outcome is required. If the initial review finds that the State court decision is not contrary to the precedent, then no habeas relief should be granted "unless the State court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified under existing Supreme Court precedent." The court went on to say in *Matteo* that even if the federal habeas court disagrees with the State court decision, relief is not appropriate. Thus, we must undertake a two-step review under the "contrary to" clause and the "unreasonable application" clause. *Matteo* further warns that although a reviewing court may consider "the decisions of inferior federal courts" when deciding whether the State court reasonably applied Supreme Court precedent, "federal courts may not grant habeas corpus relief based on the State court's failure to adhere to the precedent of a lower federal court in an issue that the United States Supreme Court has not addressed."

Finally, § 2254(d) refers to "any claim that was adjudicated on the merits in State court proceedings." If a claim was disposed of by a State court without an explanation as to the legal or factual basis for its disposition, my view is that a habeas court may then undertake a *de novo* review.

In *Williams,* Justice O'Connor, delivering the opinion of the court as to Part II, summed up the above, as follows:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a

decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

I will now discuss each claim in order.

CLAIM I. TRIAL COUNSEL WERE INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT MITIGATING EVIDENCE RELATED TO PETITIONER'S TRAUMATIC CHILDHOOD, ALCOHOLISM, MENTAL RETARDATION, COGNITIVE IMPAIRMENT AND ORGANIC BRAIN DAMAGE.

For purposes of analyzing Claim I, it is important to know just exactly what evidence trial counsel did produce at the sentencing hearing. The record reveals that Petitioner's counsel called five witnesses on his behalf at that hearing: Darlene Rompilla, his sister-in-law; Nicholas Rompilla, Junior, an older brother; Robert Rompilla, a younger brother; Sandy Whitby, a sister; and Aaron Rompilla, a son who was 14 at that time. The total examination of those witnesses is encompassed in about 26

pages of Notes of Testimony, Volume VII. Not one witness discussed Petitioner's traumatic childhood, his alcoholism, mental retardation, cognitive impairment or organic brain disorder. What they did say were, "He was a good family member"; "We never had a problem"; "I don't think my brother did it"; "Have mercy on him"; "I was close to him, he loved my family, he just didn't have a chance"; "They didn't give him no rehabilitation"; "Why can't he get help like all the rest of the people get help"; "I love him very much" (crying); "I've never seen the bad side of my brother, never"; "He just loves us like we love him."

The testimony was apparently presented to engender sympathy for the Petitioner. From the record, it appears that it may have been uncomfortable for all involved. A person identified on the record as Ms. Hass says (referring to the jury, apparently), "They said they need a break. They said that they can't take no more of this right now." At side bar, the court said, "They wanted a break" to which trial counsel replied, "Me too."

The recitation above is to explain the nature of the sentencing hearing. It seemed to be designed primarily as an emotional appeal to the jury to show mercy to Petitioner – he wasn't as bad as he seemed and his family loved him. On its face at least, the hearing seems unreasonably brief and lacking in real substance considering the nature of the proceedings.

Indeed, in an opinion written after a PCRA hearing, the Honorable Thomas A. Wallitsch, Judge of the Court of Common Pleas of Lehigh County, presiding over that hearing in place of his late colleague, The Honorable David E. Mellenberg, the trial judge, found that the Petitioner was entitled to have relevant information of

mental infirmity presented to a jury. In applying Pennsylvania law, *Commonwealth v. Buehl,* 450 Pa. 493, 658 A.2d 771 (1995), he nevertheless found that counsel had a reasonable basis for proceeding as they did. In affirming Judge Wallitsch, the Supreme Court of Pennsylvania stated as follows:

> "It [the PCRA court] explained that trial counsel employed two recognized experts in the field of psychiatry and psychology who administered tests, evaluated Appellant, and reported that there was nothing that could be used as mitigation evidence. Rather, the experts told counsel that Appellant was a sociopath. Counsel also obtained an evaluation by another psychiatrist who after evaluating Appellant, found nothing that would be beneficial in the penalty phase. Although counsel did not obtain the records identified above [records that Petitioner maintains would have aided the mental health experts, including school records reflecting a low IQ, a hospital record reflecting a fever at age two, and Department of Corrections records reflecting low achievement test scores and alcohol abuse], the PCRA court found them not entirely helpful to Appellant and further found that counsel gave the experts whatever information they requested.
>
> With respect to Appellant's siblings' testimony about his childhood, the PCRA court accepted trial counsel's testimony that when they questioned Appellant and his family before trial, they did not reveal the information that they now claim should have been told to the jury. The court rejected the siblings' testimony to the contrary. The court also stated that Appellant made contradictory statements to counsel during his representation and that counsel was reasonable in

> believing that their only avenue was to ask the jury to have mercy on him.
>
> We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. In addition to concluding that counsel acted reasonably, we further find that Appellant's claim lacks arguable merit. As recognized by the PCRA court, trial counsel employed three experts to evaluate Appellant. N.T., 3/28/96 at 68-69, 120-21. Based upon their testing, the experts found nothing helpful to Appellant's case and diagnosed him as a sociopath. *Id.* at 122-23. The fact that Appellant now has found two experts who conclude that he has brain damage does not negate the fact that trial counsel investigated Appellant's cognitive abilities with other experts. In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances. *See* N.T., 3/29/96 at 27-28, 33, 38-39. Thus, Appellant's claim that trial counsel failed to investigate his mental health is without arguable merit.
>
> With respect to the mitigation evidence brought forth by Appellant's siblings, the PCRA court accepted as credible trial counsels' testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-19, 133, 143; N.T., 3/29/96 at 111. Thus, Appellant's claim that trial counsel failed to investigate his family background also lacks arguable merit.

> Related to this claim, Appellant next argues that because trial counsel failed to investigate his background, he received inadequate evaluations by mental health professionals in violation of his constitutional rights. Having found above that trial counsel did not fail to investigate, this claim similarly has no merit.

In testimony at the PCRA hearing, Maria Dantos, Esquire, who handled the sentencing hearing (penalty phase), testified that she graduated from law school in 1985, was then employed by the Lehigh County Office of the Public Defender and undertook representation of Petitioner (together with Chief Public Defender Frederick Charles) sometime after his arrest in January of 1988. She described her role as handling the penalty phase including making the arguments and presenting witnesses. Attorney Charles, as her supervisor, was involved in all of the decisions and the discussions on how to proceed. This was Ms. Dantos' first capital case, and first homicide trial. She contacted three mental health professionals; Drs. Cooke, Sadoff and Gross prior to the trial to initially see if there was any issue of mental infirmity or mental insanity for the guilt phase and, mental infirmity for the penalty phase if the jury returned a first degree verdict. Apparently, she did not get Petitioner's school records and those records were never furnished to the three doctors aforesaid. The school records revealed, among other things, that Petitioner was in special education class and that his I.Q. was below the mentally retarded range at certain ages. The medical records of Petitioner were not obtained by trial counsel either. Those records revealed that at age 2, Petitioner was admitted to the hospital with a 105° fever and diarrhea. Finally, the Department of Corrections records, discussed at page 18, were not obtained by counsel.

Ms. Dantos did talk to family members, but nothing exceptional was presented to her about alcoholism within the family. Also, it was never indicated that there was any sort of abuse within the family. Ms. Dantos did agree that if someone were an alcoholic, that might be potentially mitigating value.

Chief Public Defender Frederick E. Charles was also examined at great length at the PCRA hearing before Judge Wallitsch. My examination of his testimony leads me to conclude that he was a veteran attorney with significant criminal trial experience as a defense lawyer at the time of Petitioner's trial; that he was knowledgeable with regard to the law and savvy with regard to trial techniques and strategy. While not dispositive of the ineffectiveness issue, a letter sent by Sandra Whitby to Maria Dantos shows the impression the representation of Mr. Charles and Ms. Dantos made upon someone close to the case.

> "Dear Maria. It is the next day, and the pain and word "death" is still alive in my mind, but I had to take the time and write and tell Fred and you what supurb [sic] human beings you both are. You fought and felt everything our family did, and when we cried you cried along with us. You left a feeling in me I can't explain, and I want to thank you both for caring and for being there with us all the way. I'm sure I speak for all my family.
>
> I only hope that some day, as Fred promised, the word "death" can be erased from the sentence so we can live in peace that Ron will be there to write, visit and talk with. If he should die, a part of us will, too, cause in our hearts we feel he is innocent, and nothing will change that.

Maria, I know at this point you want to put this matter aside and get on with your work, but I hope you don't give up on Ron, cause he called me and said you woke up feelings in him, and he trusts you with all his heart. We both know that was hard for him to say.

I can't say it enough that Fred and you are both wonderful, caring people. Thank you again for everything, and please, please help us, and don't forget us.

Love, Sandra Whitby."

The following excerpt from the lengthy testimony of Mr. Charles puts into perspective what was done on behalf of Petitioner compared to what Petitioner claims should have been done:

Q. Okay. That's fine. Just so I fully understand – getting back to the penalty phase, just so I understand your position, you investigate based upon what your client tells you?

A. No, that's not my position. Okay. I know how you want to simplify this. But – and so I don't know if I can answer you in the terms of your question. But I'll try. We investigate the evidence that we have, the evidence that's given in a preliminary hearing. We look at the probable cause affidavit. We look at the examination that we took in this case from the preliminary hearing. We looked at the evidence that came forth during the suppression hearing. We looked at the evidence that –

Q. I'm talking about the penalty phase.

A. But whatever came, we – you know, you don't – we don't sit and separate it. It's an investigation.

The penalty phase is something that we keep an eye on. But I have to tell you in this case you had a very, very objecting client. Whenever we tried to talk penalty phase and death penalty with him, he was resistant to that.

Q. Let's discuss that.

A. Sure.

Q. Let's discuss that. What I thought you said just before was that you sit down with your client and you say, "Tell me how you schooling was," and your client would say, "I did okay in school." We're talking hypothetically. All right? If you have a client who is reluctant to discuss how his schooling was because he doesn't really want to talk about the penalty phase, do you, as counsel, have a duty to go further than just talking to your client about it?

A. It depends.

Q. Depends on what?

A. It depends on what evidence you have in the case. It depends on what he's told you.

Q. You –

A. Let me finish, Mr. Wiseman. He didn't tell us, "I'm not willing to talk to you about my schooling. I'm reluctant to talk about my this." He said there was nothing wrong. "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, very smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me." He

said, "I have home box in my room that I can watch, and I'm bored being here listening to it, and I'm going to go watch home box," and he walked out. That's why, when we tried to go through the death penalty phase with him and he left, we wrote it in that letter. And I said, "Since you won't hear it when we sit there, it bores you, I want you to at least read it." His reluctance wasn't an overall reluctance where he said, "I don't want to talk about my childhood, because it's too painful." There was no indicator from anything he told us that would send us searching for elementary school records, high school records, any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. And so no, we didn't go beyond that. And my professional opinion is that, given what Ron Rompilla told us during the numerous discussions we had with him and the countless discussions that John Whispell, our deceased investigator, had with him and was over to see him constantly, there was nothing that came across our table that would make us go looking for his elementary school records, his home life records or anything. And if he knew of anything or his family knew of anything, they never told us. And I know most certainly that we asked, and I know Miss Dantos asked.

Q. Asked what?

A. "What can you tell me about Ron? What was it like for him? What was his life like? What was it like growing up? What was his relationship? What kind of a brother was he? What kind of a brother-in-law was he? What do you know?" Their response was they hardly know him. I mean one said, "He was in a reformatory. He's been away the whole time. We didn't know him

that well." Things of that nature. But I remember her specifically going one by one and talking to him. "Is there anything you can tell me? Tell me about yourself. Tell me about your background." She was, you know, meticulous to cover points. And she had a way of doing that, because she was legitimately concerned. And I thought it was disarming. They engaged in numerous what I considered to be cordial conversations. Some of the times I felt like I was in the way even being in the room, and I'd go get coffee. And she would sit down, and so would John Whispell. John Whispell was like a buddy with them, and they would go over and talk. "Tell me about yourself." We undertook to try and determine from him and his family whatever information we could. Nothing came across to us that made us do what you're asking about.

Q. All right. Are you aware of the dynamics that exist among people who are subject to child abuse, that they don't readily like to talk about those kinds of things? Is that something that you –

A. Sure.

Q. – see in your experience?

A. Sure.

Q. So you go to an adult – well, let's say – well, you go to an adult who may have had an abusive childhood, and you say, "How was your childhood?" and the person says it was fine. Would you agree that, given your awareness of the abuse dynamics, that maybe it would be more prudent to go beyond the client and beyond those who may have abused the client to look for other indications of abuse?

A. It may in a vacuum. But, my goodness, you have – with 2,000 defendants you have over 50 percent that tell you, "Yes, I've been beaten. I've been raped. I've been molested." I mean, what's the difference? It's hard to determine when someone says, "No, I had a great childhood. I had no problems," the difference between that and being in denial. I mean we talked to him more than once, and we believed that there was nothing outstanding. His family didn't tell us anything. I mean maybe the family would say, "Hey, you know don't believe him, because he was one heck of an abused kid." That never was volunteered. It was never told during any of the times that we talked to them. You know, even if Ron denied it, I mean, somebody in the family would have known it. His wife would have known it. Somebody would know it to tell us. And I don't think that it's looking back and I really think it's classic. I don't want to say that. You're looking back at it in a vacuum. Because when he says, "No, there's nothing there," you know, what's the difference between the truth, there was nothing there, and classic denial. I'm not an expert. That's why I send them to an expert.

Q. All right.

A. And I figure that Dr. Cooke or Dr. Sadoff or Dr. Gross, who do this for a living, might be able to say, "There's something in the way he denied this that shows it's classic denial syndrome, and we ought to explore it a little bit." So I get him away from me making that call. I'm a lawyer. I'm not a psychiatrist or a psychologist. And so I get him to a pro, and then I get on with the business of preparing the rest of my case. And that's what we did with Ron Rompilla's case.

Petitioner argues now that this investigation did not fulfill counsel's obligation to conduct a thorough investigation of Petitioner's background. More specifically, trial counsel for Petitioner, his present counsel argue, should have obtained his school, medical, court and prison records as part of their investigation. The school records would have shown he was in special education and mentally retarded or borderline mentally retarded; the medical records would have revealed his early hospitalization at age 2; and the prison records would have shown scores on other tests, as well as other background information. There is reason to believe, from my reading of the depositions of Drs. Cooke, Sadoff and Gross, that information from those records may have been important in their respective diagnoses.

At the beginning of this analysis, I said that the penalty hearing appeared to be unreasonably short and lacking in substantive evidence. The explanation of trial counsels' conduct is two-fold, it seems to me. First and foremost, Petitioner himself was not forthcoming; he just was of virtually no help in the penalty stage (*see* testimony of Attorney Charles at pp. 10-13 of this opinion). Second, despite the lack of cooperation of the Petitioner and his family members' failure to reveal anything about his life other than he was a good guy, trial counsel had three doctors examine Petitioner. None of these experts were able to offer any mitigating factors and one even concluded the Petitioner was a sociopath; hardly something counsel could use.

My review of the record reveals that trial counsel were intelligent, diligent and devoted to their task of representing Petitioner. But, did trial counsel comply with their obligation to conduct a thorough investigation? We know

that they did not develop and present any mitigating evidence about Petitioner's childhood, alcoholism, mental retardation or possible organic brain damage.

Certainly, with regard to the first two, Petitioner himself and his relatives simply did not supply counsel with any meaningful information prior to the penalty hearing. As to the mental retardation and organic brain damage, counsels' response is that the three experts never requested this information and therefore they never sought it. Judge Wallitsch concluded in this regard that, "Given the fact that three health care professionals, all of whom were experienced forensic experts, had provided opinions to defense counsel, and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions." (Opinion of Thomas A. Wallitsch, J., p. 8).

In affirming Judge Wallitsch, the Supreme Court of Pennsylvania stated, "We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. . . . In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant (Petitioner) and upon their experts to determine the records needed to evaluate the mental health and other potential mitigating circumstances." The Pennsylvania Supreme Court concluded that trial counsel did not fail to investigate.

What is missing from the court opinions in this case is at least two matters of concern. First, there is no in depth analysis of what the duty to investigate consists of in a

case of this nature; and second, there is a lack of discussion of alcoholism as pertaining to the Petitioner.[3] A discussion of the duty to investigate should include reference to the ABA Standards for Criminal Justice. These standards were cited in *Williams v. Taylor, supra.* Writing for the majority on the particular issue of ineffective assistance of counsel, Justice Stevens said, referring to certain conduct of defense counsel:

> Whether or not those omissions were sufficiently prejudicial to have affected the outcome of the sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary p. 4 .55 (2d ed.1980).

The ABA Standards for Criminal Justice 4-4.1, Duty to Investigate, and commentary 4.55 (2d ed.1980) provides as follows:

---

[3] The overall analysis of this Claim I involves clearly established federal law, namely *Strickland v. Washington, infra.* Justice Kennedy explained that rules of law may be sufficiently clear for habeas purposes even if it is a generalized standard. He said:

> "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West,* 505 U.S. 277, 308-309, 112 S.Ct. 2482, 120 L.Ed .2d 225 (1992) (opinion concurring in judgment).

Standard 4-4.1. Duty to investigate

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

The commentary to the above standard includes the following:

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

As early as *Strickland v. Washington,* 466 U.S. 688, 104 S.Ct. 2052 (1984), the Supreme Court referred to ABA guidelines when it said:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.,* ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are

> guides to determining what is reasonable, but they are only guides.

Clearly in the *Williams* case, *supra,* that duty was breached. In *Williams,* evidence not presented at the sentencing hearing included:

> (1) documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse and neglect during his early childhood;
>
> (2) testimony that he was "borderline mentally retarded"; and
>
> (3) had suffered repeated head injuries and might have mental impairments organic in nature.

Trial counsel in the *Williams* case failed to ascertain the social service records regarding number (1) above because he erroneously believed that the state law didn't permit it. Counsel also "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school." *Williams* at p. 30. The court said

> It is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer, *id.* at p. 29.

Was Petitioner denied that right in this case because counsel was ineffective in performing their duty to investigate?

I am not sure why counsel did not seek out school or prison records in this case. It appears that they thought

they could rely on the experts to determine Petitioner's general mental ability or capacity. Also bothersome is the apparent ignoring of Dr. Gross' advice (Exhibit 6 to Petition for Writ of Habeas Corpus) at the end of his letter:

> The possibility does remain, however, that Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior, although he himself strongly denies this. *My recommendation is that this area should be further evaluated before any definite conclusions are drawn.*

While acknowledging some potential mitigating value in one's being an alcoholic (N.T. 3/28/96, p. 54), counsel did nothing to further explore it. Petitioner was, however, sent to Drs. Cooke and Sadoff. Counsel was also aware that Petitioner had spent quite a lot of time in jail (about 14 years prior to being released, three months before his arrest on this charge) (N.T. 3/28/96, pp. 47, 48), but never sought prison records, some of which would have alerted counsel to possible mitigating evidence.

For example, Exhibit 12 of Petitioner's Exhibits to Petition for Habeas Corpus, in an Initial Classification Summary dated March 3, 1976 identifies alcohol as a past or present problem area. This summary was prepared by the Bureau of Corrections, Commonwealth of Pennsylvania in connection with Petitioner's incarceration for rape. In Petitioner's Legal History Prior to Present Confinement and Offense Pattern, alcohol is also checked.

In a Program Planning and Expectations dated March 11, 1976 concerning his initial classification, under Other Programs, the following appears:

> Because of his abuse of alcohol, regular participation in the Alcoholic Anonymous program is strongly recommended.

The counselor's evaluation in that same report concludes:

> This 28 year old married non-veteran was the 6th of nine children reared in the slum environment of Allentown, Pa. vicinity. He early came to attention of juvenile authorities, quit school at 16, started a series of incarcerations in and out Penna. often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.

A summary prepared November 27, 1964 in connection with charges against Petitioner as a juvenile revealed the following family background:

> HOME AND FAMILY: In 1945 the City Health Department of Allentown, Pennsylvania became interested in this family then residing at 203 Green Street, Allentown, Pennsylvania. Following this, the Probation Office was alerted of neglected children. At this time, Miss Hahner of the Catholic Children's Bureau was interested in the family group and pleaded with the Probation Office that the family be given an opportunity to correct its home condition.
>
> September 6, 1945 the mother was picked up by the police in a drunken condition at which time the Probation Office was obliged to enter into the home and family; the children were placed in a hospital and the home of relatives at that time; at this time the husband and father of this family was in the United States Army.

June 27, 1946 the children were returned to the mother were [sic] they resided in a basement apartment at 11 No. Fourth Street, Allentown; upon the husband's return home, upon discharge from the U.S. Army, things improved slightly.

Over a period of years the mother was missing from home frequently for a period of one or several weeks at a time; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. Always upon return home the husband took her back into the house even though he complained about her absence; there was never any prosecution for her desertion of the family for her moral episodes. She has been reported over a period of years to be frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.

PROBATION OFFICER'S NOTE: Ronald comes from the Notorious Rompilla Family which has been known to the Lehigh County Courts on many occasions. The parents appeared to be cooperative but their past record indicates failure of handling there [sic] off-spring.

This court is aware that Petitioner was born on April 14, 1948. Nevertheless, this information would have certainly been of assistance to trial counsel, had they known it, in evaluating Petitioner's background.

Once again, an answer from Mr. Charles puts in perspective the dilemma of public defenders, at least in 1988, when this case was tried:

Q. Let me ask my question. What – leaving aside your resource question, do you have any reason why you wouldn't investigate whether your client was raised as a homeless child?

A. I would investigate by asking my client, "How was your childhood? Were there any problems that you suffered? Any kind of abuse? Tell me something about – is there anything you can tell me from your youth till now that can help us? Tell me, is there anything that sticks out? Don't think whether it's important or not. You just tell us, and then we'll determine whether or not we can use it." Investigate it that way. Would I send somebody to the person's elementary school to talk to the teacher to see if they remember him from 25 years or 40 years before? No. I didn't have those resources in the office. So I would do an investigation. But again, "investigate" is a subjective term. Investigate given what your resources are in light of the office. I had two investigators and 2,000 cases. And I'm sure you know the difficulties with budgeting caseloads and having to get investigations done given the resource you have. I will talk to the client, talk to the family, and see if anything developed from there. If something did, we would then amplify on it and develop it. If it didn't, we would go from there. There's a certain point in time when you have two or three thousand cases in a year that you have to deal with some of the things your client tells you and give that some full faith and credit and rely on it.

Acknowledging the difficulties of a public defender as explained by Mr. Charles, it seems to me on balance that they were obliged to go a bit farther to fulfill their duty to investigate. It is true, as the U.S. Supreme Court acknowledged in *Williams* that a lot of information they

would discover would not be helpful to their client. It is also true that *Strickland* reminds us:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

In this case, however, there were pretty obvious signs, at least superficially from what counsel knew of Petitioner's criminal past, including his rape conviction, that Petitioner may have had a drinking problem, may have had a poor school record, and probably had a difficult childhood. More investigation into those areas would have uncovered information that at least counsel should have considered relative to mitigation, *i.e.*, his possible alcoholic problem, his family past, his borderline mental retardation. Obviously, we cannot consider the question of sound trial strategy when counsel did not have the information

before it upon which to strategically decide how it should or should not be used.

It is a very close call in this case because trial counsel performed so admirably according to my review of the record. But, I think they had reason to know of Petitioner's past and should not have relied on defendant alone or his family to reveal the true nature of his background. Case law referred to in Petitioner's brief support his argument that in a capital case, courts have recognized a particular duty of counsel to thoroughly investigate defendant's background for any possible mitigating circumstances.

Even if counsel did not pass muster with regard to the first prong of the *Strickland* test in that their representation fell below an objective standard of reasonableness in regard to their duty to investigate Petitioner's background in preparation for the penalty phase, Petitioner must still show prejudice. To establish this, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984).

The penalty phase of a first degree murder trial, it seems to me, is in many respects the same as a sentencing hearing in a non-capital case except the jury is for all practical purposes doing the sentencing in a capital case. To the extent the sentencing authority (whether judge or jury) does not have essential background information, the sentencing may be influenced one way or another. In this case, what the sentencing authority (the jury) lacked was the background history involving Petitioner's mental

capacity and possible alcoholism. It also lacked information about his possible abusive childhood, although counsel was somewhat misled in this regard. The lack of information about these items is sufficient to undermine the confidence in a decision which was made in the absence of arguably important mitigation evidence.

Because I believe the correct governing legal principle (*i.e.*, *Strickland*) was clearly established but unreasonably applied, Petitioner is entitled to relief on this claim.

CLAIM II. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND DEATH SENTENCE BECAUSE OF THE TRIAL COURT'S IMPROPER INSTRUCTION ON ACCOMPLICE LIABILITY.

Sometime after the jury began it deliberations, it forwarded the following question to the trial court:

> If defendant was an accomplice to the charge of Criminal Homicide, can he be charged with Murder in the First Degree?

Defense counsel, Mr. Charles, properly objected to the giving of the charge because accomplice liability was never part of the case and defendant therefore was neither alerted to address it through cross examination or otherwise. The trial court felt the jury was entitled to an answer and thus gave an answer including an incomplete charge on accomplice liability. He began his charge with this:

> Well, preliminarily, let me say this. If you recall, the Court, in it's Charge, at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice.

and concluded with this:

> I can only say this to you, that you should determine this case based on the Charge of the Court as it had given you originally. There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but it requires other proof or findings on your part that were not a part of this case nor were they made a part of this case.

As previously stated, I agree with Petitioner that the accomplice instruction was incomplete, but it did not, as Petitioner suggests, prevent the jury from considering and giving effect to exculpatory and mitigation evidence. Moreover, the incompleteness of the charge was cured by the admonition that it did not apply. Petitioner's argument that there was evidence of an accomplice is not supported by a careful reading of the record. His reference to the forensic evidence at p. 37 footnote 18 of his reply brief do not support an accomplice theory because:

(1) Consistent with the location of the murder being a public bar, finding lots of hair and fibers not being identified as Petitioners is not unusual (Vol. I, 11/25/88 N.T., p. 111);

(2) Moreover, while Petitioner's blood was not found at the scene, the only blood that was found there was the victim's, nobody elses; *id.*, p. 146; and

(3) The finding of other shoe impressions at a crime scene other than the alleged defendant's is normal (Vol. III, 11/28/88 N.T., p. 50).

CLAIM III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE, EVEN AFTER THE JURY REPEATEDLY ASKED ABOUT PAROLE ELIGIBILITY; AND THE TRIAL COURT'S PROVISION, INSTEAD, OF INACCURATE AND MISLEADING INFORMATION, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This claim evolves around the following occurrence. Shortly after the jury had retired to consider the penalty, it requested the court to answer this question: If a life sentence is imposed, is there any possibility of the defendant ever being paroled? The court's response follows:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

Petitioner argues that under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187 (1994), where the state secured the death sentence, at least in part, based upon defendant's future dangerousness, failing to instruct the jury that under South Carolina law, life imprisonment meant no possibility of parole, denied defendant due process.

The prosecutor's summation in this case covers 16 pages of the notes of testimony and a fair reading of it

leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable, savage and cowardly beating the Petitioner inflicted upon his victim. This is a close issue, however, but the Supreme Court of Pennsylvania's decision in the PCRA case was not an unreasonable application of federal law.

CLAIM IV. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(8) AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED.

Petitioner in this claim asserts that the following instruction on torture was unconstitutionally vague:

> The second aggravated circumstance advanced by the Commonwealth was that the a – the offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not – the killer is not satisfied with the killing alone.

Petitioner relies on *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853 (1988) which the Supreme Court of Pennsylvania reasoned was not applicable to this case. The court wrote:

> Appellant appears to concede that the trial court gave an instruction defining torture that comports with *Pursell* and its progeny. Nonetheless,

Appellant argues that the definition employed by the court is unconstitutionally vague under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Maynard,* however, found vague an aggravating circumstance in the Oklahoma death penalty statute that provided that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at 363-64, 108 S.Ct. 1853. The Court explained that these words alone did not guide the jury as almost every murder could be characterized as especially heinous, atrocious, or cruel. *Id. Maynard* did not involve an aggravating circumstance that an offense was committed by means of torture. In addition, the Court in *Maynard* agreed that a limiting instruction that the aggravating circumstance at issue required torture would be constitutionally acceptable. *Id.* at 364-6, 108 S.Ct. 1853. Thus, *Maynard* does not preclude defining torture as the infliction of pain that is unnecessarily heinous, atrocious or cruel, with the intent to cause pain and suffering in addition to the intent to kill. Appellant's claim is without merit.

I agree.

CLAIM V. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(9) "SIGNIFICANT HISTORY" OF FELONY CONVICTIONS AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE; THE JURY INSTRUCTIONS DID NOT CURE THIS VAGUENESS; AND THE JURY INSTRUCTIONS, TO THE EXTENT THEY PROVIDED GUIDANCE AT ALL, DIRECTED A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

The jury instruction involving this claim follows:

> And the third aggravating circumstance appointed to, by the Commonwealth, is that the Defendant has a significance history of felony convictions involving the use or threat of violence to the person. And in this regard, a significant history of prior criminal convictions involving the use or threat of violence to the person means one – more than one prior conviction. In other words, at least two prior convictions before that can become an aggravating circumstance.

Petitioner's claim of unconstitutionally vague must be viewed, as Petitioner agrees, by the standard, "did the adjudication by the state court result in a decision that involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States?" The thrust of Petitioner's argument is that in finding that the aggravating factor in question, namely; "The defendant has a significant history of felony convictions involving the use or threat of violence to the person", was not unconstitutionally vague, the Supreme Court of Pennsylvania relied on a U.S. Supreme Court case which dealt with a mitigating factor. *See Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960 (1976). Petitioner is correct that *Proffitt* dealt with a mitigating factor. Specifically, Petitioner in *Proffitt* argued that neither a judge or jury was capable of determining whether he had a "significant history of prior criminal activity."

In answering this and similar objections, the Supreme Court said

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a lawsuit.

For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed. *Id.* at 257-58.

Again, I do not find an unreasonable application of the law on the vagueness issue.

More problematical is the actual charge of the court. While I have found that it was reasonable to conclude that the phrase "significant history" was not unconstitutionally vague and thus, there was in effect no vagueness for the jury instruction to cure, the charge of the court quoted above, when read alone, might support Petitioner's third argument in this claim. But I think that the entire charge makes it clear that the court is not in any way directing a finding on this issue. The charge makes the burden of proof on issues of aggravation quite clear.

CLAIM VI. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE OF IMPROPER PROSECUTORIAL ARGUMENT AT THE PENALTY PHASE.

As mentioned in *Lesko v. Lehman,* 925 F.2d 1527 (3d Cir. 1991), Justice Sutherland's oft-quoted phrase about the role of a United States Attorney is a good starting point for review of Claim VI. Justice Sutherland said

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

In reviewing the 16-page closing of the prosecutor in this case, I find that it borders on but does not transgress the line which separates fair play from foul. Nevertheless, I am puzzled as to why prosecuting attorneys do not limit their closing argument to the framework of a capital case within the Pennsylvania statutory scheme of aggravating and mitigating factors. Without passion, but with cool, calm objectivity, a prosecutor in a case like the one now before the court can simply stress how clearly the Commonwealth has proven the aggravating factors and why any mitigating factors are far outweighed by the aggravating ones. The

point can be made, the argument delivered, without resort to personal feelings or reference to inflammatory matters not within the record of the case.

Petitioner states on p. 54 of his reply brief that the Pennsylvania Supreme Court noted that it provides *less searching* review of the prosecutor's capital sentencing phase arguments. I did not find any such notation but in fact found the court's opinion to have thoroughly covered, with discussion, the alleged inappropriate remarks of counsel. Remarks of the prosecutor such as, "its not easy for me to argue for the death penalty" (a personal and unnecessary remark); "if you don't do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that's all I'm asking for . . . ." do not unfairly vouch for the propriety of the death sentence. The statement of the prosecutor to the effect that the jury should not show any mercy to Petitioner because, "did Petitioner show any mercy to the victim", does not entitle Petitioner to relief. *See Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 597 (1991). The prosecutors delved into areas not necessarily supported by the record, i.e., the Petitioner killed the victim so that there would be no witness and speculation on the impact on the victim's family. As I stated earlier, counsel should stick to the record in closing argument. But, even viewing the closing in its entirety, I believe the Pennsylvania Supreme Court's finding of no prejudice is a reasonable application of the law.

CLAIM VII. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTOR TO READ TO THE JURY THE INFLAMMATORY AND PREJUDICIAL TESTIMONY OF THE VICTIM OF A PRIOR RAPE AND COUNSEL WERE INEFFECTIVE

FOR FAILING TO CITE CONTROLLING AUTHORITY THAT WOULD HAVE PREVENTED THE INTRODUCTION OF THE INFLAMMATORY AND PREJUDICIAL EVIDENCE.

The second part of this claim is not correct. Indeed, trial counsel attempted to stipulate that burglary was inherently a violent crime in order to prevent a reading of the record, but the prosecutor insisted upon it and the trial judge permitted it. Petitioner argues that trial counsel should have been aware of and cited to the trial court the case of *Commonwealth v. Rolan,* 520 Pa. 1, 549 A.2d 553 (1988) decided October 18, 1988, roughly two weeks before his trial. The *Rolan* case declared that burglary was a violent crime. It did not go on to say that therefore, the prosecutor could not reveal to a jury the underlying facts of the crime during the penalty phase. It was not improper to permit the reading of the testimony of the victim. Defense counsel appropriately argued strenuously against its use.

CLAIM VIII. THE SEATING OF THE JUROR WHO VISITED THE SCENE OF THE CRIME TEN TIMES, INCLUDING, DURING THE TRIAL PROCEEDINGS, WHO KNEW THE VICTIM OF THE OFFENSE AND THE VICTIM'S SON, WHO KNEW AN EMPLOYEE OF THE PROSECUTOR'S OFFICE AND WHO EXPRESSED SUBSTANTIAL DOUBTS REGARDING THE PRESUMPTION OF INNOCENCE; AND TRIAL COUNSEL'S FAILURE TO CHALLENGE THIS JUROR FOR CAUSE, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The claim as worded is somewhat of a distortion of the examination of the juror in question. It also doesn't mention

the fact that this particular juror apparently got a ticket from a police officer and was found guilty. The police officer was from the Allentown Police Department, the same department of which the detective prosecuting the case belonged. Moreover, the following exchange took place during voir dire:

> Q. Okay. Now the judge told you this is going to last about two weeks starting tomorrow, probably. Say that you're in the end of the second week, you've been here for a long time, you've been deliberating and you are in the minority in your view. Okay? Your one view differs from the eleven others. Would you change your opinion simply because of the pressure from the other jurors on the lateness of the hour or would you hold firm to your beliefs?
>
> A. I would stick to my belief.
>
> Q. Okay. Are you sure about that?
>
> A. I don't think time would have anything to do with it.
>
> Q. Okay. Good. Because I'm sure that you realize this is a serious case. We want your mind focused on the evidence, okay, and not on the lateness of the hour or other pressures. So can I have your word that you'll hold firm?
>
> A. Yes ma'am.

The entire examination of this particular juror appearing at pages 220 to 247, Notes of Jury Voir Dire 10/24/88, makes it clear that the concerns raised in this claim are exaggerated. It appeared that he had been in the bar owned by the victim about 10 times over the last eight years (N.T. 222). About one week before his voir dire

examination, he stopped in the bar for a six pack. He hadn't sat down and had a drink in the bar since about three years before the homicide (N.T. 225). He barely knew the owner, had no relationship with him other than to say hi (N.T. 226), and didn't think he ever met the owner's son except maybe one time (N.T. 226). He also said he knew an Emil Cantro (apparently an Assistant D.A.). The juror said, "I don't know who he is, I just met him one time" (N.T. 231). This juror did express a lack of understanding of the presumption of innocence initially, but his examination makes it clear that he understood it and could apply it after it was explained to him (N.T. 241-246). This claim is without merit.

CLAIM IX. PETITIONER'S DEATH SENTENCE SHOULD BE VACATED BECAUSE THE ARBITRARY "PROPORTIONALITY REVIEW" PERFORMED BY THE PENNSYLVANIA SUPREME COURT VIOLATED HIS EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHTS.

The Petitioner points to no federal case law in support of this argument. As pointed out by the Supreme Court of Pennsylvania in *Commonwealth v. Gribble,* 550 Pa. 62, 703 A.2d 426 (1997), the United States Supreme Court has held that the Eighth Amendment as applied to the states through the Fourteenth Amendment does not require that a state death penalty statute contain proportionality review. The state court's decision in *Gribble* was not an unreasonable application of *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871 (1984). Referring to *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909 (1976); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2690 (1976); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, the court in *Pulley* said, " . . . Examination of our 1976 cases makes clear that they do not establish

proportionality review as a constitutional requirement." *Pulley* at 44-45, 876.

CLAIM X. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT THE PROSECUTION VIOLATED HIS DUE PROCESS BY INTRODUCING FALSE AND MISLEADING EVIDENCE.

This claim, according to counsel for Petitioner, is described in the Petition itself in numbers 503-511.

What Petitioner is arguing is that the knife the Allentown police located broken in two in a snow bank outside the bar, had a brown handle according to testimony at the preliminary hearing. At the trial itself, the knife recovered at the scene had a black handle, according to testimony. Thus, Petitioner concludes that the knife identified at the trial was not the same one that was found in the snow bank.

The Notes of Testimony reveal that more than one knife was found at the scene and the identity of one of them as a *black*-handled knife found in the snow bank is acknowledged by the victim's son as one of the knives used at the bar (N.T. 10/25/88, p. 45). Another knife found at the scene was described by the victim's son as having "like a burned-orange type color" handle (N.T. 10/25/88, p. 57). Since the fingerprints of Petitioner were found on evidence that was not recovered at the scene (the black-handled knife), false evidence has been introduced, Petitioner argues. This is totally unsupported by a reading of the Notes of Testimony and appears to be based entirely on paragraphs 507 through 510 which follow:

507. In addition to the above-described fingerprint evidence, the FBI had extensive involvement in the investigation and prosecution of this case. Recent revelations of

possible malfeasance and incompetence in the FBI labs raise the possibility that other false and misleading evidence was introduced at Petitioner's trial.

508. Over fifty items of evidence, including fibers, blood, hair, potential weapons (e.g., glass bottles, knives) broken glass, floor tile, sneakers, photographs, fingerprints, and clothing, were submitted to the FBI for analysis. (Copies of April 4, 1988 and May 5, 1988 reports from the FBI to Allentown's Chief of Police, listing evidence submitted for analysis in this case, are appended as combined Exhibit 19).

509. In addition to the lab work done in this case, five FBI agents testified for the prosecution. Paul A. Bennett, employed in the FBI's Laboratory Division, testified as to analysis of fibers found on some of the evidence gathered in this case. NT 10/25/88 at 96, 106-11. Robert R.J. Grispino, employed as a Supervisory Special Agent conducting forensic serology for the FBI, testified as to the origins and types of various blood samples that had been submitted to the FBI. *Id.* at 119, 124-36. As described above, Leonard P. Dreibelbis testified as an FBI fingerprint specialist and indicated that one of Mr. Rompilla's prints matched a latent print found on the alleged murder weapon. NT 10/26/88 at 6, 19-28. Richard Crum, a special agent employed in the Firearms and Tool Mark Identification Unit of the FBI laboratory, testified as to the origins of different pieces of knife that was purportedly the murder weapon. *Id.* at 152, 155-57. Gary Kanaskie, a special agent assigned to the Document Unit of the FBI lab with additional specific duties regarding shoe and tire print analysis, testified regarding the origins of various impressions left at the crime scene. NT 10/27/88 at 28-29, 32-50.

510. Given the FBI's pivotal role in the investigation and prosecution of this case, the integrity of the FBI's lab work and agent testimony is obviously a matter of great importance. There has been recent public disclosure of far-ranging allegations made by high level employees of the FBI that agents employed in the Bureau's Laboratory Division have routinely, and over a period of years, engaged in a multitude of corrupt practices. These allegations assert that FBI laboratory agents have falsified lab results and reports to meet the needs of prosecuting agencies; have suppressed exculpatory lab results, and have engaged in sub-standard laboratory practices effecting the substantive outcome of their work.

Such broad sweeping allegations form no grounds for an evidentiary hearing much less relief from conviction.

CLAIM XI. PETITIONER IS ENTITLED TO RELIEF BECAUSE OF CUMULATIVE PREJUDICIAL EFFECTS OF ERRORS IN THIS CASE.

This case in terms of having a fair if not perfect trial is almost error free. Only in the sentencing phase does the concept of a fair hearing come up somewhat short.

III. CONCLUSION

None of Petitioner's claims entitle him to relief from the jury's verdict of guilty of murder in the first degree. None of his claims make a substantial showing of the denial of any constitutional right with regard to the guilt determining phase of his trial. Those claims are:

(1) Improper instruction of accomplice liability (Claim II);

(2) Improper seating of a juror (Claim VIII);

(3) Introduction of false and misleading evidence (Claim X); and

(4) Cumulative effect of errors (Claim XI).

With regard to Claim III, the court believes that Petitioner has made a substantial showing relative to the trial court's failure to instruct the jury that life imprisonment means life without the possibility of parole, and therefore would grant a certificate of appealability with regard to that claim only. Claim III, together with Claims I, IV, V, VI, VII and IX deal with defects in the sentencing procedure. The relief hereafter granted may make the granting of a certificate of appealability as to Claim III superfluous.

ORDER

AND NOW, this 11th day of July, 2000, to the extent that the Petition addresses the guilt-determining phase of the trial, and the verdict convicting Petitioner of Murder in the First Degree, the Petition is DENIED; to the extent that the Petition addresses the penalty phase of the trial, and the death sentence imposed upon Petitioner, the Petition is GRANTED. The death sentence imposed upon Petitioner is VACATED, without prejudice, to the right of the Commonwealth of Pennsylvania to sentence the Petitioner to life imprisonment, or to conduct such further proceedings as may be appropriate under state law (including a new sentencing hearing), if initiated within 270 days of this order.

A certificate of appealability will issue to Petitioner (Appellant) under 28 U.S.C.A. 2253(c)(2) as to Claim III.

United States Court of Appeals,
Third Circuit.

Ronald ROMPILLA
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections Martin Horn,
Appellant/Cross-Appellee.

No. 00-9005, 00-9006.

Argued May 22, 2002.
Filed Jan. 13, 2004.

Amy Zapp (Argued), Senior Deputy Attorney General, Office of Attorney General, Harrisburg, PA, for Appellant/ Cross-Appellee.

Billy H. Nolas (Argued), David W. Wycoff, Michael Wiseman, Defender Association of Philadelphia, Federal Court Division, Philadelphia, PA, for Appellee/Cross-Appellant.

Before SLOVITER, ALITO, and STAPLETON, Circuit Judges.

OPINION OF THE COURT

ALITO, Circuit Judge.

The Commissioner of the Pennsylvania Department of Corrections (hereinafter "the Commonwealth") appeals from a District Court order granting the petition for a writ of habeas corpus that was filed by Ronald Rompilla, a Pennsylvania prisoner who was sentenced to death. The District Court ordered that Rompilla be released unless he is either resentenced to life imprisonment or a new penalty phase trial is held. Rompilla cross-appeals from the denial of his petition insofar as it challenged his conviction. We

conclude that the Pennsylvania Supreme Court's decision regarding Rompilla's sentencing proceeding was not contrary to and did not involve an unreasonable application of clearly established Supreme Court precedent, and therefore we reverse the decision of the District Court with respect to Rompilla's sentence. We affirm the decision of the District Court with respect to his conviction. By separate order, however, we have granted Rompilla's application to file a successive petition for a writ of habeas corpus so that he will be able to assert his claim that, under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), he may not be executed because of mental retardation.

I.

In 1988, Rompilla was tried for the murder of James Scanlon. Scanlon's body was found lying in a pool of blood in his bar, the Cozy Corner Café in Allentown, Pennsylvania. Scanlon had been stabbed repeatedly and set on fire. There were no eyewitnesses to the killing, but the Commonwealth introduced substantial circumstantial evidence of Rompilla's guilt. In its opinion on direct appeal, the state supreme court summarized the prosecution's evidence as follows:

> Appellant was seen in the Cozy Corner Café on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.

When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he had been in the Cozy Corner Café on the night of the murder and left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only $2:00 to buy breakfast at a local diner. A cab driver testified that he picked up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of $9.10.

Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid $121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.

The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.

The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr. Scanlon's wallet was found by a groundskeeper in the bushes, six to eight feet outside the room that Appellant had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told the police concerning his activities on January 14

and 15, 1988, and the testimony of other witnesses.

Commonwealth v. Rompilla, 539 Pa. 499, 653 A.2d 626, 629 (1995). The jury found Rompilla guilty of first degree murder and other related offenses.

At the penalty phase of the trial, the prosecution attempted to establish three aggravating factors: (1) that Rompilla committed the murder while perpetrating a felony, 42 Pa.C.S. § 9711(d)(6), namely, the burglary and robbery of the bar; (2) that he committed the murder by means of torture, 42 Pa.C.S. § 9711(d)(8); and (3) that he had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9). To establish torture, the Commonwealth called Dr. Isidore Mihalakis, a forensic pathologist, who testified to the multiple wounds inflicted on Scanlon and opined that Scanlon was conscious and alive when many of those wounds were inflicted. App. 698-707. Based on the nature of the wounds, Dr. Mihalakis also opined that Scanlon's killer had deliberately attempted to inflict pain before Scanlon died. *Id.* at 707-08. To show the defendant's prior history of violent felonies, the Commonwealth proved that he had been convicted in 1976 of rape, burglary, and theft. App. 651-52. *Commonwealth v. Rompilla,* 250 Pa.Super. 139, 378 A.2d 865 (1977). The testimony of the rape victim, which was read into the record, showed that Rompilla had burglarized a bar after closing and had raped the bar owner and slashed her with a knife. App. 662-696.

The defense presented the testimony of five members of the Rompilla family. Rompilla's older brother, Nicholas, and his wife, Darlene, testified that Rompilla had lived in

their home with their children for the three and one-half months before the killing. Nicholas testified that he and the defendant had grown up together, that the defendant had worked for him as a house painter before his arrest, and that the defendant had also helped out around the house. App. 738-41. Nicholas said that he had visited his brother frequently in prison and that they had a good relationship. *Id.* at 739. Nicholas added that he did not think that his brother had killed Scanlon, whom he had known for about 10 or 11 years, and that his heart went out to the Scanlon family. *Id.* at 740. He concluded his testimony by asking the jury to have mercy on his brother. *Id.* at 741.

Darlene Scanlon testified that her children were "very attached" to the defendant and that he "was very good in our house." App. 734-35. Darlene said that he helped out in the home and that "he was a good family member" who felt "strongly about family" and "respected the family very well." *Id.* at 735. While the defendant was in prison, Darlene testified, he frequently wrote to her and spoke about "[f]amily, his son, his wife, his brothers and sisters." *Id.* She stated that the defendant's relationship with his son was good. *Id.* at 736. Like her husband, Darlene testified that she had known Scanlon, that she did not believe that the defendant had killed him, and that she felt for the Scanlon family "[v]ery, very much." *Id.* Weeping, she concluded her testimony by telling the jury: "We go to bed crying, we wake up crying, it's been very hard on my children. . . . [W]e want Ron alive even if it's in jail, we want him alive." *Id.*

Another brother, Bobby, also took the stand. Bobby testified that during the time when the defendant was out of prison they had an "[e]xcellent relationship" and were

"[v]ery close." App. 745. Before then, according to Bobby, he had visited the defendant in prison and the defendant had written him letters in which he expressed great concern for his son and other family members. *Id.*

The defendant's sister, Sandra Whitby, testified that she had grown up with the defendant. App. 754. Crying, she said that she loved him very much and that she thought that he was a "good person." *Id.* at 755. Asked what things were important for the defendant, she answered: "Family, his son, his wife, things my children were doing, my brothers." *Id.* She testified that she was praying for the Scanlon family and for her brother's life. *Id.* at 756. She added: "[W]e're not God, and we can't take people's lives (crying) . . . I love my brother. Taking one life is never going to replace another life." *Id.*

Finally, Aaron Rompilla, the defendant's 14-year old son testified. He said that after his father's release from prison they had regular visits, which he enjoyed, that his father was proud of him, that he loved his father, and that he would visit him if he was sentenced to prison. *Id.* at 757-59. He said that he did not think it would be "right" to sentence his father to death, and when he was asked whether there was anything else he wanted to tell the jury, he simply cried. *Id.* at 759.

In her closing argument, defense counsel made an impassioned plea for Rompilla's life. Her closing appears to have had three major themes. First, she repeatedly stressed that, although the jury had found the defendant guilty, they must have had at least some lingering doubt about what had happened, and therefore they should not sentence him to death, which "is final, irreversible." *Id.* Second, she reminded the jury of the good qualities

mentioned by Rompilla's family members. She argued that Rompilla was "more than this act that you have found him to have committed," *id.* at 769, and she emphasized the love of Rompilla's family members. *Id.* at 773. She particularly asked the jury to keep in mind the defendant's 14 year old son, who had come to court to ask the jury "not to kill his father." *Id.* Third, she pled for mercy and warned the jury: "I tell you this from the bottom of my heart, if you order death, it will take a part of your life away. Don't stain your hands and your souls with this man's blood, don't do it please." *Id.* at 772.

After deliberating, the jury unanimously found all three of the aggravating circumstances alleged by the prosecution, and the jury stated that one or more members found two mitigating factors under the "catchall" provision of 42 Pa.C.S. § 9711(e)(8), i.e., "Rompilla's son being present and testifying" and the possibility of rehabilitation. The jury found that the aggravating circumstances outweighed the mitigating factors and sentenced Rompilla to death.

The Pennsylvania Supreme Court affirmed the conviction and sentence. *Commonwealth v. Rompilla,* 539 Pa. 499, 653 A.2d 626 (1995) (hereinafter "*Rompilla-1*").[1] In December 1995, Rompilla filed a petition under the Pennsylvania Post-Conviction Relief Act ("PCRA"). After an evidentiary hearing, the PCRA denied the petition, and the Pennsylvania Supreme Court affirmed. *Commonwealth v.*

[1] While the case was pending on direct appeal, Rompilla filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The District Court dismissed the petition without prejudice for lack of exhaustion. *Rompilla v. Love,* No. 94-cv-4196 (E.D.Pa.).

Rompilla, 554 Pa. 378, 721 A.2d 786 (1998) (hereinafter "*Rompilla-2*").

Rompilla then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. Rompilla's petition raised 11 claims. *Rompilla v. Horn,* No. Civ.A.99-737, 2000 WL 964750 (E.D.Pa. July 11, 2000).[2]

[2] The claims as identified by the District Court were as follows:

(1) Trial counsel were ineffective at the capital sentencing phase for failing to investigate, develop and present significant mitigating evidence related to petitioner's traumatic childhood, alcoholism, mental retardation, cognitive impairment and organic brain damage;

(2) Petitioner is entitled to relief from his conviction and death sentence because of the trial court's improper instruction on accomplice liability;

(3) The trial court's failure to instruct the jury that "life imprisonment" means life without possibility of parole, even after the jury repeatedly asked about parole eligibility; and the trial court's provision, instead, of inaccurate and misleading information, violated petitioner's Sixth, Eighth and Fourteenth Amendment rights;

(4) Petitioner is entitled to relief from his death sentence because the (d)(8) aggravating circumstance was unconstitutionally obtained;

(5) Petitioner is entitled to relief from his death sentence because the (d)(9) "significant history" of felony convictions aggravating circumstance is unconstitutionally vague; the jury instructions did not cure this vagueness; and the jury instructions, to the extent they provided guidance at all, directed a finding of this aggravating circumstance;

(6) Petitioner is entitled to relief from his death sentence because of improper prosecutorial argument at the penalty phase;

(7) Petitioner is entitled to relief from his death sentence because the trial court improperly allowed the prosecutor to read to the jury the inflammatory and prejudicial testimony

(Continued on following page)

The District Court denied relief as to the guilt phase but granted relief as to the penalty phase based on its conclusion that counsel had been ineffective in failing to investigate and present mitigating evidence. *Id.* at *14. The District Court thus ordered that a writ of habeas corpus would be granted unless the Commonwealth conducted a new sentencing hearing or resentenced Rompilla to life imprisonment. *Id.* at *21. The Commonwealth appealed, and Rompilla cross-appealed. Three questions are presented on appeal: (1) whether Rompilla's trial counsel was constitutionally ineffective during the penalty phase; (2) whether the trial court committed constitutional error in giving an accomplice liability instruction; and (3) whether the trial court erred in failing to instruct the jury that "life

of the victim of a prior rape and counsel were ineffective for failing to cite controlling authority that would have prevented the introduction of the inflammatory and prejudicial evidence;

(8) The seating of the juror who visited the scene of the crime ten times, including, during the trial proceedings, who knew the victim of the offense and the victim's son, who knew an employee of the prosecutor's office and who expressed substantial doubts regarding the presumption of innocence; and trial counsel's failure to challenge this juror for cause, violated petitioner's sixth, eighth and fourteenth amendment rights;

(9) Petitioner's death sentence should be vacated because the arbitrary "proportionality review" performed by the Pennsylvania Supreme Court violated his Eighth Amendment and Fourteenth Amendment rights;

(10) Petitioner is entitled to an evidentiary hearing on his claim that the prosecution violated his due process by introducing false and misleading evidence; and

(11) Petitioner is entitled to relief because of cumulative prejudicial effects of errors in this case.

Rompilla, 2000 WL 964750.

imprisonment" under Pennsylvania law meant life without the possibility of parole.[3]

II.

Because the District Court did not conduct an evidentiary hearing, our review of that Court's decision is plenary. *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir.), *cert. denied*, 534 U.S. 919, 122 S.Ct. 269, 151 L.Ed.2d 197 (2001). However, our review of the decision of the Pennsylvania Supreme Court is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Hartey v. Vaughn*, 186 F.3d 367, 371 (3d Cir.1999). Under AEDPA, a federal court may not grant habeas relief on any claim adjudicated on the merits in state court unless the adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under the "contrary to" clause of § 2254(d)(1), relief may be ordered if the state court arrived at "a conclusion opposite to that reached by [the

[3] A certificate of appealability was not required for the Commonwealth's appeal of the ineffective assistance of counsel claim. Fed. R.App. P. 22(b)(3). The District Court granted a certificate of appealability as to the parole ineligibility claim, *Rompilla*, 2000 WL 964750, at *21, and we granted a certificate of appealability as to the accomplice liability instruction claim. 28 U.S.C. § 2253(c).

Supreme] Court on a question of law" or if the state court decided "a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the "unreasonable application" clause of § 2254(d)(1), relief may be awarded if the state court identified the correct governing legal principle from Supreme Court decisions but unreasonably applied that principle to the facts of the case, *id.,* or was "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone,* 530 U.S. 156, 166, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000). Relief may not be granted under the "unreasonable application" clause merely because the federal court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams,* 529 U.S. at 411, 120 S.Ct. 1495. *See also Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002) ("The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one."). Furthermore, a federal court "must presume that the factual findings of both state trial and appellate courts are correct." *Everett v. Beard,* 290 F.3d 500, 508 (3d Cir.2002) (citing 28 U.S.C. § 2254(e)(1)). This presumption may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.

Rompilla claims that his trial attorneys were ineffective at the penalty phase. First, Rompilla alleges that his

attorneys were derelict in failing to obtain school, hospital, court, and prison records that reveal a number of IQ test results in the mentally retarded range, low achievement scores, placement in special education classes, childhood neglect, problems with alcohol, and an alcoholic mother. Second, he faults his attorneys for failing to provide such records to the psychologist and the two psychiatrists whom they retained to examine him and for allegedly failing to communicate adequately with these experts. Third, he alleges that his attorneys were negligent in interviewing members of his family. He criticizes trial counsel because they did not interview two sisters who did not testify at the penalty phase, and because they did not ask sufficiently specific questions when they interviewed other family members. Fourth, Rompilla charges that his attorneys were derelict in failing to investigate the possible effects on Rompilla of childhood trauma and alcoholism.

A.

Rompilla was represented by two public defenders, Frederick Charles, who was then the Chief Public Defender for Lehigh County, and Maria Dantos, a full-time assistant public defender. App. 1055-56, 1059. Both testified at length at the PCRA hearing. For present purposes, two aspects of these attorneys' preparation for the penalty phase are most pertinent: first, their efforts to obtain information about Rompilla's childhood and schooling and, second, their communications with the three mental health professionals whom they consulted.

Both Charles and Dantos explained that the defense had questioned Rompilla and numerous members of his

family about his childhood, schooling, and background and had asked for any information that might be helpful at sentencing. According to their testimony, however, neither Rompilla himself nor any family member even hinted at the problems on which Rompilla's ineffective assistance claim is based. Dantos testified that she had developed a good relationship of trust with Rompilla, that she felt that she had gotten to know him, and that she had a lot of discussions with Rompilla "about who he was and his life." App. 1073, 1163. When she asked Rompilla about school, Dantos recounted, he told her "[t]hat there was nothing unusual about it." *Id.* at 1197. Dantos also said that she specifically asked Rompilla about drinking and that he responded that he sometimes drank but "could handle it" and was not an alcoholic. *Id.* at 100-01. On the night of the killing, Rompilla told her, he had consumed three or four beers over the course of the entire evening. *Id.* at 1101.

Charles added that Rompilla had responded to questions about his background by saying that nothing was wrong:

> "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me." . . .
>
> There was no indicator from anything he told us that would send us searching for . . . any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. . . .
>
> . . . I remember [Dantos] specifically going one by one and talking to him. 'Is there anything you

> can tell me? Tell me about yourself. Tell by about your background.' She was, you know, meticulous to cover points.

App. 1303. Both Dantos and Charles said that nothing in their discussions with Rompilla ever suggested that he was mentally retarded, *id.* at 1181, 1393, and Charles elaborated that Rompilla did not have difficulty in understanding what was said to him or in expressing his feelings. *Id.* at 1393.

Dantos and Charles also testified that members of Rompilla's family provided no hint that Rompilla had mental problems, had suffered child abuse, or was an alcoholic. Dantos stated that she spoke with three of Rompilla's siblings, his sister-in-law Darlene Rompilla, and his ex-wife and that she had formed a "very close" relationship with the family. App. 1092, 1065. She said that they had discussed the importance of mitigation evidence but that no one had provided any useful information about Rompilla's background. She testified that she had "spent hours with these family members," that they had "discussed the family dynamics and what [Rompilla's] family relationship was with his parents," and that there was no indication "that there was any sort of abuse within the family." *Id.* at 1097 Likewise, she stated that "there was nothing exceptional presented to [her] about drinking within the family." *Id.* Charles added that although the family members said that they did not know Rompilla well because he had spent so many years behind bars, the family was a "constant source of information." *Id.* at 1303, 1384.

Charles was questioned repeatedly and extensively by Rompilla's attorneys about the failure of the defense to

look for school, prison, and medical records, and Charles explained his strategy as follows:

> I would investigate by asking my client, "how was your childhood? Were there any problems that you suffered? Any kind of abuse? . . . [I]s there anything that sticks out? Don't think whether it's important or not. You just tell us, and then we'll determine whether or not we can use it." Investigate it that way. Would I send somebody to the person's elementary school to talk to the teacher to see if they remember him from 25 years or 40 years before. No. I didn't have those resources in the office. . . . I had two investigators and 2,000 cases. . . . I will talk to the client, talk to the family, and see if anything developed from there.

Id. at 1293-94. If these inquiries provided any hint that records would be helpful, he added, he would go anywhere to get the records. *Id.* at 1307.

With respect to the development of mitigation evidence regarding Rompilla's mental condition, Charles said that he had sent Rompilla to "the best forensic psychiatrist around here, to [another] tremendous psychiatrist and a fabulous forensic psychologist" and that he relied on them to detect any mental problems that might be useful to the defense and to request that the defense provide them with any records that they might need. App. 1307-08. He elaborated that when he sent Rompilla to the psychologist, he expected the psychologist to administer "a Reitan battery test to determine if there was any brain damage,"[4]

[4] "The Reitan Battery measures organic impairment by means of a variety of exercises testing concentration, coordination, memory, motor

(Continued on following page)

a personality test such as "the Minnesota Multiphasic Personality Inventory ("MMPI")",[5] a Rorschach test,[6] and an IQ test. *Id.* at 1323. He stated that he also expected that the results of this testing would be available to the psychiatrists. *Id.* If the mental health professionals needed any records or other information, he said, he expected them to ask for them, and he would have tried to provide whatever they sought. *Id.* He said that he also thought that the mental health professionals would interview Rompilla and that they would detect whether Rompilla's denial of anything unusual in his background seemed suspicious. *Id.* at 1308-09.

All three of the mental health professionals to whom Rompilla had been sent by the defense testified at the PCRA hearing either in person or by deposition. All three stated that they had examined Rompilla and had found nothing useful to the defense, but as Rompilla now stresses, all three also testified that, if they had been provided with Rompilla's school and other records, they would have done additional testing.

Dr. Gerald Cooke, an experienced clinical and forensic psychologist, no longer possessed records regarding his

control, abstract abilities and other cognitive and physical functions." *Barker v. Secy. of Health and Human Services,* 882 F.2d 1474, 1476 (9th Cir.1989).

[5] The Minnesota Multiphasic Personality Inventory or "MMPI" is "one of the best known and widely used personality assessment tests." Richard Sloane, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY – 1992 SUPPLEMENT 522 (1992).

[6] The Rorschach test is "a projective psychological [test] in which the subject reveals his or her attitudes, emotions, and personality by reporting what is seen in each of 10 inkblot pictures." STEDMAN'S MEDICAL DICTIONARY 1808 (27th ed.2000).

examination of Rompilla other than the letter that he had sent to the public defender's office after completing the examination, but he was able to state with "99 percent" certainty what he would have done in a case of that type. App. at 1797. In a death penalty case, he testified that one of the questions in his mind would have been whether the defendant "showed any mental illness, emotional disturbance, or other sorts of problems that might be a psychological mitigating circumstance." App. at 1808. He would have administered an MMPI, "an Incomplete Sentence Blank,[7] the Rorschach inkblot technique, and two or three subtests of the verbal subscale of the Wexler Adult Intelligence WAIS Revised."[8] *Id.* at 1797. Dr. Cooke testified that he knew that the IQ test that he would have administered to Rompilla had not produced a score in the mentally retarded range because, in that event, he would have given further tests. *Id.* at 1810. He explained that he had not prepared a report regarding his examination because it was his practice to discuss the results of an examination orally with the referring attorney and to leave it to the attorney to decide whether he should prepare a report. *Id.* at 1816. He interpreted the letter that he wrote in this case to mean that he "didn't have anything that [he] felt could be helpful." *Id.*

Dr. Robert Sadoff, an experienced board-certified forensic psychiatrist, also had no records about Rompilla

[7] The Rotter Incomplete Sentences Blank Test tests maladjustment by providing the beginning of sentences (e.g., "I feel . . .", "My nerves . . .") that are completed by the subject. *See* www.cps.nova.edu/~cpphelp/ROTTER.hrml.

[8] The Wechsler Adult Intelligence WAIS Revised is a test that measures general intelligence in adults. STEDMAN'S MEDICAL DICTIONARY, *supra*, 1596.

but testified that in a case of that type he would have examined the defendant for competency to stand trial, criminal responsibility, and mitigating circumstances. App. 1841, 1859. He would have questioned and observed the defendant and would have requested psychological testing if he thought it was necessary. *Id.* From the letter that he sent to the Public Defender's Office, he said, it was fair to infer that he had found no mitigating evidence. *Id.* at 1859.

A second psychiatrist, Paul K. Gross, also testified that he had examined Rompilla prior to his trial at the request of the Public Defender's office to determine his mental status at the time but was not asked to look for mitigating factors. App. 1504, 1506, 1549. Dr. Gross stated that Rompilla "denied any abuse as a child, by either parent." *Id.* at 1517. According to Dr. Gross, Rompilla said that he had "a good relationship with his father" and a "fairly normal childhood except for the fact that he didn't like school, which he left in the ninth grade." *Id.* at 1517. Dr. Gross's conclusion at the time was that, although there was some evidence of antisocial behavior, "[t]here was no other evidence for underlying psychiatric or mental disorder." *Id.* at 1540. He added that he did not see anything in the materials shown to him by Rompilla's attorneys at the PCRA hearing that would have changed his opinion. *Id.* at 1539-40. Dr. Gross also reported that although Rompilla denied it, there was a possibility that he could become violent while under the influence of alcohol.

In the PCRA proceedings, Rompilla presented testimony of three family members: two sisters, Barbara Harris and Randi Rompilla, who testified that they were not interviewed before sentencing, and Nicholas Rompilla, who had testified at the sentencing hearing. These family

members stated, among other things, that their parents were alcoholics; that their mother drank while pregnant with Rompilla; that their father was physically abusive to the children and their mother; that Rompilla was locked in an outdoor dog pen; and that Rompilla was told he was stupid and would not amount to anything and was a very nervous child who kept everything inside. Nicholas testified that during the pre-sentencing interview he was asked only about the three months prior to the offense and was not asked about Rompilla's childhood. App. 1462-63, 1467-71, 1477-78.

Rompilla also presented evidence from two psychologists, Carol L. Armstrong and Barry Crown, both of whom had evaluated and tested Rompilla after he was convicted and sentenced. These psychologists' evaluations included neuropsychological testing, review of Rompilla's school, medical, and prison records, and review of post-sentencing declarations by Barbara Harris, Darlene Rompilla, and Nicholas Rompilla. The psychologists stated that the low IQ and achievement test results documented in Rompilla's school records, his medical history, and his abusive background were all "red flags" indicating that further objective evaluation was necessary. App. at 1692, 1739, 1743.

Drs. Armstrong and Crown opined that Rompilla suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions. They expressed the view that Rompilla's problems relate back to his childhood and were likely caused by fetal alcohol syndrome, and they concluded that Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. *See* Rompilla Br. at 58-61.

B.

In evaluating Rompilla's ineffective assistance of counsel claim, the PCRA court noted that *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requires proof of deficient performance and prejudice. App. 2027. The court then observed that Pennsylvania cases employ a three-pronged test:

> First, a defendant must demonstrate that his claim is of arguable merit. In the event this threshold requirement is satisfied, a defendant must show that counsel had no reasonable basis for the act or omission in question. Finally a defendant must establish that but for counsel's act or omission, the outcome of the proceedings would have been different.

App. 2028 (quoting *Commonwealth v. Buehl,* 540 Pa. 493, 658 A.2d 771 (1995)).

Applying this standard, the PCRA court concluded that Rompilla satisfied the first prong because he was "entitled to have relevant information of mental infirmity" presented to the jury, but the court held that the second prong was not met because "counsel had a reasonable basis for proceeding as they did during the penalty phase." App. 2028. The court made the following findings:

> . Drs. Cooke and Sadoff, are "recognized experts in the field of psychiatry and psychology."
>
> . "These experts administered tests, evaluated Mr. Rompilla, and reported back to defense counsel."
>
> . They found "no organic brain damage" and "nothing that could be used in mitigation."

. They diagnosed Rompilla as a "sociopath," and this evidence "would not have been of benefit to Mr. Rompilla's case."

. The defense attorneys provided Drs. Cooke and Sadoff "with whatever they asked for," and Drs. Cooke and Sadoff did not request the records later unearthed by PCRA counsel.

. Trial counsel "also obtained an evaluation by Dr. Paul Gross, a well respected Lehigh Valley psychiatrist," and Dr. Gross "found nothing that would have been beneficial in the penalty phase."

. Rompilla did not provide trial counsel with "any indication of mental problems or alcoholic blackouts" or anything else that was "particularly useful."

. Trial counsel "spoke with members of the family in a detailed manner," and the family did not reveal the family background information adduced in the PCRA proceeding.

. The family members' testimony at the PCRA hearing was not credible insofar as it "attempted to contradict what defense counsel indicated was asked of them during numerous communications prior to trial."

App. 2028-2029.

Based on these findings, the PCRA concluded:

. "Given the fact that [the] three health care professionals [retained by trial counsel], all of whom were experienced forensic experts, had provided opinions . . . , and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions."

. Trial counsel was not ineffective in questioning family members because family members were questioned "in a detailed manner," and contrary testimony at the PCRA hearing was rejected.

. "Defense counsel was reasonable in believing that the only avenue available to them was to ask the jury to show mercy upon Mr. Rompilla." "Under the circumstances of this case, this strategy was not only an appropriate one, but the only one reasonably available to counsel."

On appeal, the Pennsylvania Supreme Court also held that Rompilla's ineffective assistance claim lacked merit. The Court agreed with the PCRA court "that trial counsel was effective with respect to their investigation and presentation of mitigating evidence." *Rompilla-2,* 721 A.2d at 790. Noting that "trial counsel employed three experts to evaluate Appellant" and that "the experts found nothing helpful to Appellant's case," the Court added: "[W]e agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussion with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances." *Id.*

In the habeas proceeding, the District Court not only disagreed with the decisions of the PCRA court and the state supreme court on the ineffective assistance issue, but the District Court found that those decisions were unreasonable. *Rompilla,* 2000 WL 964750, at *14. However, the Court stated that its decision was "a very close call . . . because trial counsel performed so admirably according to my review of the record" and further commented that its review of the record revealed that "trial counsel were

intelligent, diligent and devoted to their task of representing [Rompilla]." *Id.* at *8, *12.

The District Court found two omissions in the opinions of the PCRA court and the state supreme court. First, the District Court stated, the prior opinions lacked "an in depth analysis of what the duty to investigate consists of in a case of this nature." *Id.* at *8. In particular, the District Court faulted the state courts for failing to "include a reference to the ABA Standards for Criminal Justice." *Id.* Second, the District Court found the state court opinions deficient for failing to discuss alcoholism. *Id.* at *8. Observing that it appeared that trial counsel "thought they could rely on the experts to determine [Rompilla's] general mental ability or capacity," the Court opined: "[I]t seems to me on balance that [trial counsel] were obliged to go a bit farther to fulfill their duty to investigate." *Id.* at *9, *12. Concluding that trial counsel's performance at the penalty phase had been inadequate and that Rompilla had been prejudiced, the Court held that Rompilla was entitled to habeas relief with respect to his sentence. *Id.* at *14.

IV.

Strickland is the Supreme Court precedent governing ineffective assistance of counsel claims, *Williams,* 529 U.S. at 391, 120 S.Ct. 1495, and in order to show ineffective assistance under *Strickland,* a defendant must demonstrate (1) that counsel's "representation fell below an objective standard of reasonableness," *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052; and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id.* at 694, 104 S.Ct. 2052. "Judicial scrutiny of a counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. "There is a 'strong presumption' that counsel's performance was reasonable." *Jermyn v. Horn,* 266 F.3d 257, 282 (3d Cir.2001). Thus, "a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Bell,* 122 S.Ct. at 1852 (quotations omitted).

"The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is . . . whether what [counsel] did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir.1995) (en banc) (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052). Ultimately, the issue is not what conduct is "prudent or appropriate, but only what is constitutionally compelled," *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (quoting *United States v. Cronic,* 466 U.S. 648, 665 n. 38, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)), and the Sixth Amendment "simply . . . ensure[s] that criminal defendants receive a fair trial," *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. *See also Kokoraleis v. Gilmore,* 131 F.3d 692, 696 (7th Cir.1997) ("The sixth amendment does not guarantee success or entitle defendants to the best available counsel or the most prudent strategies. . . . [T]he Constitution is satisfied when the lawyer chooses a professionally competent

strategy that secures for the accused the benefit of an adversarial trial.")

V.

In this appeal, the Commonwealth contends that the state courts reasonably applied the *Strickland* ineffective assistance standard to the facts of this case. According to the Commonwealth, the District Court erred by essentially considering the ineffective assistance issue as if it were conducting a de novo review – that is, by making its own independent application of the *Strickland* test to the facts rather than considering only whether the state supreme court's application of that test was reasonable. Rompilla of course disagrees, but he also goes further and argues that we need not reach the unreasonable application issue at all for two reasons: first, because the Pennsylvania Supreme Court did not render a "decision" within the meaning of 28 U.S.C. § 2254(d)(1), and, second, because the state supreme court's decision is "contrary to" *Strickland*. We discuss each of these arguments below.

A.

Rompilla argues that the Pennsylvania Supreme Court did not render a "decision" on his Sixth Amendment claim because "[t]he Pennsylvania Court's opinion lacks any real Sixth Amendment analysis." Rompilla Br. at 98. Rompilla criticizes the state supreme court for applying the three-pronged test set out in its own cases rather than the two-pronged *Strickland* test. *Id.* He contends that the relationship between the three-part Pennsylvania formulation and the *Strickland* test is "not clear," and he faults that state supreme court for supposedly failing to address

either prong of the *Strickland* test. *Id.* at 98-99. He asserts that the state supreme court mistakenly thought that his federal claim was that trial counsel did not conduct any investigation at all, whereas his actual claim was that trial counsel did not conduct a sufficiently "thorough" investigation. *Id.* at 100. Finally, he criticizes the state supreme court for failing "to render a 'decision' at all on critical aspects of this claim," *viz.*, the prejudice prong of *Strickland* and his arguments regarding alcoholism and intoxication. *Id.*

In order to address these arguments, we must first explain the critical difference under the habeas statute between, on the one hand, the failure of a state court to adjudicate a federal claim on the merits (something that may occur if the state court misconstrues the federal claim) and, on the other, the failure of a state court to hand down an opinion that discusses every argument, subargument, and legal authority offered by the habeas petitioner. For purposes of the habeas statute, a failure to decide affects the standard of review; a failure to discuss (either at all or to the satisfaction of the habeas petitioner or the federal court) is irrelevant.

Under the habeas statute, as previously noted, if a claim was *"adjudicated on the merits"* in a state court proceeding, relief may not be granted "unless *the adjudication* of the claim . . . *resulted in a decision* that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1) (emphasis added). An "adjudication on the merits" "has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d

303, 311 (2d Cir.2001). *See also Neal v. Puckett,* 286 F.3d 230, 235 (5th Cir.2002) ("adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural"), *cert. denied,* 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772 (2003).

In *Chadwick v. Janecka,* 312 F.3d 597, 605-07 (3d Cir.2002), *cert. denied,* 538 U.S. 1000, 123 S.Ct. 1914, 155 L.Ed.2d 828 (2003), we discussed this issue in detail and reviewed both pertinent Supreme Court precedent and our own prior decisions in *Everett v. Beard,* 290 F.3d 500, 507-08 (3d Cir.2002), *cert. denied,* 537 U.S. 1107, 123 S.Ct. 877, 154 L.Ed.2d 777 (2003); *Appel v. Horn,* 250 F.3d 203, 210 (3d Cir.2001); and *Hameen v. Delaware,* 212 F.3d 226, 248 (3d Cir.2000). We noted that under *Weeks v. Angelone,* 528 U.S. 225, 237, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), a state court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever. *Chadwick,* 312 F.3d at 606. We explained that if an examination of a state court opinion reveals that the state court did not decide a federal claim on the merits, the deferential standards of review set out in § 2254(d)(1) do not apply. *Id.* at 605-07. But if the state court decided the claim, the § 2254(d)(1) standards govern – regardless of the length, comprehensiveness, or quality of the state court's discussion. *Id. See also Sellan,* 261 F.3d at 312 (a state court adjudicates a claim on the merits when it "(1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment. . . . [e]ven if the state court does not explicitly refer to . . . relevant federal case law."); *Bell v. Jarvis,* 236 F.3d 149, 160 (4th Cir.2000) (en banc) (section 2254(d) "does not require that a state court cite to federal law in order for a federal court to determine

whether the state court decision is an objectively reasonable one."), *cert. denied sub nom., Bell v. Beck,* 534 U.S. 830, 122 S.Ct. 74, 151 L.Ed.2d 39 (2001); *Aycox v. Lytle,* 196 F.3d 1174, 1177 (10th Cir.1999) ("The focus is on the state court's *decision or resolution* of the case."); *Wright v. Secretary for Dep't of Corrections,* 278 F.3d 1245, 1255 (11th Cir.2002) (section 2254(d)(1) "focuses on the result, not on the reasoning that led to the result") *cert. denied,* 538 U.S. 906, 123 S.Ct. 1511, 155 L.Ed.2d 225 (2003).

Here, it is abundantly clear that the state supreme court adjudicated Rompilla's Sixth Amendment claim on the merits. Although the state supreme court referred to its own three-pronged ineffective assistance test rather than the two-pronged *Strickland* test, the Pennsylvania Supreme Court has explicitly held that the state standard is "the same" as *Strickland's* and that Pennsylvania law does not provide "any greater or lesser protection" than the Sixth Amendment. *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 976-77 (1987). As we put it in *Werts v. Vaughn,* 228 F.3d 178, 203 (3d Cir.2000) *cert. denied,* 532 U.S. 980, 121 S.Ct. 1621, 149 L.Ed.2d 483 (2001), the Pennsylvania Supreme Court has "opined that the Pennsylvania standard judging ineffectiveness claims [is] identical to the ineffectiveness standard enunciated by the United States Supreme Court in *Strickland.*" Since the brief filed in the state supreme court on Rompilla's behalf in the PCRA appeal left no doubt that the ineffectiveness claim asserted was based on federal law, it is perfectly clear that the state supreme court adjudicated that federal claim on the merits but simply chose to address the claim within the framework of its own, familiar three-part test, which it regards as "the same" as *Strickland.*

Moreover, it is apparent that this essentially stylistic choice on the part of the state supreme court had no effect on its decision. The state supreme court held that the second prong of the state formulation – requiring a showing that "counsel had no reasonable basis for the act or omission in question," *Rompilla-2,* 721 A.2d at 789 – had not been met because Rompilla's trial "counsel acted reasonably" "with respect to their investigation and presentation of mitigation evidence." *Id.* at 790. The second prong of the state formulation is substantively indistinguishable from the first prong of *Strickland* – which requires a showing that counsel's "representation fell below an objective standard of reasonableness". *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. Rompilla argues that the significance of the first Pennsylvania prong is unclear[9] and that the third Pennsylvania prong differs from *Strickland'* s prejudice prong,[10] Rompilla Br. at 98-99, but because the state supreme court held that Rompilla failed *the second* state prong, which is indistinguishable

[9] Rompilla takes exception with the first prong of the Pennsylvania formulations – whether the underlying claim has arguable merit. Although the question of the merit of an underlying claim is not an explicit step under *Strickland,* we have held that it is a determinative factor in the "deficient performance" prong of the *Strickland* analysis in at least some contexts. *See Parrish v. Fulcomer,* 150 F.3d 326, 328 (3d Cir.1998) (counsel not ineffective for failing to raise meritless claims).

[10] Rompilla notes that the third Pennsylvania prong, as stated by the Pennsylvania Supreme Court's opinion, asks whether counsel's act or omission "would have" produced a different outcome, not whether, as stated in *Strickland,* there is a reasonable probability of a different outcome. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Since neither the decision of the state supreme court nor our decision in this appeal turns on the issue of prejudice, we have no occasion to explore the question whether in practice prejudice is analyzed differently under these two standards.

from the first *Strickland* prong, these arguments are entirely beside the point.

Rompilla's remaining arguments on the question whether the state supreme rendered an "adjudication" or "decision" on the merits of his federal ineffectiveness claim require little additional discussion. There is plainly no merit to Rompilla's argument that the state supreme court mistakenly thought that his Sixth Amendment claim was that counsel failed to conduct any investigation at all regarding the matters at issue and did not appreciate that his claim was that counsel did not conduct a sufficiently thorough investigation. Although the state supreme court did use the phrase "failed to investigate," 721 A.2d at 790, it seems clear that this was simply a shorthand way of referring to the claim. The court's discussion of the various steps that counsel took and its conclusion that counsel acted "reasonably" make it clear that the court did not think that any investigation at all would suffice but instead understood that the extent of the investigation had to be "reasonabl[e]."

What we have said about the relationship between the Pennsylvania formulation of the test for ineffective assistance and the *Strickland* formulation is sufficient to dispose of Rompilla's criticism of the state supreme court for failing to discuss *Strickland* in so many words. Rompilla's criticism of the state supreme court for failing to decide whether the prejudice prong of *Strickland* was satisfied is further flawed because, in light of the state supreme court's holding that counsel's performance was reasonable, the court had no need to address the issue of prejudice. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the

inquiry if the defendant makes an insufficient showing on one."); *Sistrunk v. Vaughn,* 96 F.3d 666, 673 n. 8 (3d Cir.1996) (if counsel's performance is objectively reasonable, there is no need to decide prejudice).

Finally, Rompilla's complaint that the state supreme court "failed to discuss any aspect" of his arguments regarding evidence of alcoholism and intoxication goes to the style of the state court's opinion, not the question whether the state court rendered an adjudication on the merits. There are many different theories about how judicial opinions should be written. While some opinions make a point of specifically addressing every argument and every significant legal authority offered by counsel, others favor brevity and comment on only those points that the court finds most important. Because the state supreme court in this case rendered an "adjudication on the merits" of Rompilla's Sixth Amendment claim, Rompilla's criticisms of the state court's opinion cannot free him from the restrictive standards of review set out in 28 U.S.C. § 2254(d)(1).

B.

There is similarly no merit in Rompilla's contention that the decision of the state supreme court was "contrary to" *Strickland* because it did not "identify and apply actual Sixth Amendment standards." Rompilla Br. at 101. A decision is "contrary to" a Supreme Court holding if the state court "contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a [different] result." *Williams,* 529 U.S. at 405-06, 120 S.Ct. 1495.

In this case, the critical standard applied by the state supreme court – whether trial counsel had a "reasonable basis for the act[s] or omission[s] in question" – did not contradict *Strickland* but rather, as we have explained, was entirely consistent with *Strickland.* In *Werts v. Vaughn,* 228 F.3d at 202-04, as noted, we compared Pennsylvania's ineffective-assistance test with the test enunciated in *Strickland,* and we found that a state court decision that applied the Pennsylvania test did not apply a rule of law that contradicted *Strickland* and was thus not "contrary to" established Supreme Court precedent. *Id.* at 204. In the instant case, the state court applied the same state test. Accordingly, here, as in *Werts,* the state court's application of that test does not mean that its decision is "contrary to" established Supreme Court precedent.

Rompilla also argues that the state court decision is contrary to *Strickland* because counsel's failure to obtain records, without knowing the contents of the records, "*cannot* be deemed a reasonable strategy/tactic, *as a matter of Sixth Amendment law,*" and because "Sixth Amendment law does *not* condition [the] obligation [to obtain records] in any way on counsel's duties with regard to expert evaluations." Rompilla Br. at 106, 108 (emphasis in original). Rompilla is essentially challenging the manner in which the state court applied the law to the facts, and thus this argument must be analyzed under the "unreasonable application" clause of § 2254(d)(1). *See Williams,* 529 U.S. at 406, 120 S.Ct. 1495 (a "run-of-the-mill state court decision" that is "in accord with . . . *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim . . . may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case" but is not contrary to

Strickland itself). For these reasons, we reject Rompilla's arguments under the "contrary to" clause of § 2254(d)(1).

VI.

We now turn to the 'unreasonable application' clause of § 2254(d)(1). To obtain relief under this clause, Rompilla

> must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Bell, 122 S.Ct. at 1852 (citation omitted). In other words, Rompilla must demonstrate that "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under *Strickland*." *Werts,* 228 F.3d at 204.

We hold that the Pennsylvania Supreme Court's conclusion that trial counsel acted reasonably and rendered effective assistance was not an unreasonable application of *Strickland.* The findings of the PCRA court and uncontradicted testimony at the PCRA hearing establish that trial counsel conducted an extensive investigation for mitigating evidence. According to their testimony, trial counsel got to know Rompilla well during the course of their representation and established a good relationship with him. Rompilla was questioned about his background but provided no useful information or leads. Trial counsel also spoke to three of Rompilla's siblings, as well as a

sister-in-law and Rompilla's ex-wife. Family members were questioned "in a detailed manner," but they did not allude to any of the new evidence adduced at the PCRA proceeding.

Trial counsel retained three well-qualified mental health experts to examine Rompilla. Dr. Cooke, a psychologist, testified that in a case of this type he would have looked for mitigating evidence and would have performed a battery of tests, including an IQ test. Based on his letter to the Public Defender's office, he concluded that Rompilla's IQ test must not have shown mental retardation and that his evaluation must not have revealed any abnormalities that would have been useful in showing mitigation. Dr. Sadoff, a psychiatrist, interviewed Rompilla and evaluated him for the presence of mitigating factors, but Dr. Sadoff inferred that he also found nothing useful. A second psychiatrist, Dr. Gross, was also retained but similarly found nothing useful. In view of this record, we cannot say that the Pennsylvania Supreme Court unreasonably applied *Strickland* in concluding that trial counsel's investigation regarding mitigating evidence relating to Rompilla's family background and mental condition did not fall below the Sixth Amendment floor.

Rompilla criticizes many aspects of trial counsel's performance at the penalty phase, but we see no ground for relief under the habeas statute. Rompilla faults his trial attorneys for failing to interview two sisters who testified at the PCRA hearing – Barbara Harris, the oldest of Rompilla's siblings, and Randi Rompilla, the second youngest. But trial counsel did interview three other siblings, including two who were a few years older than Rompilla (Nicholas Rompilla and Sandra Whitby) and one Robert Rompilla, who was younger. At least some of the

siblings who were interviewed must have been aware of the lurid conditions in the family home that were portrayed at the PCRA hearing, but they never mentioned anything about these matters to trial counsel despite being interviewed "in a detailed manner." It was thus not constitutionally ineffective for trial counsel to fail to anticipate that interviewing Barbara Harris or Randi Rompilla would have yielded important new information about the family home.

Rompilla also criticizes his trial attorneys for allegedly failing to ask sufficiently specific questions when interviewing family members and for allegedly failing to ask Nicholas Rompilla about any time period other than the three and one-half months just before the murder. This argument is defeated by findings of fact made by the state courts. The PCRA found that trial counsel "spoke with members of the family in a detailed manner." App. 2028. The PCRA court also rejected Nicholas Rompilla's testimony insofar as it contradicted "what defense counsel indicated was asked . . . during numerous conversations prior to trial." *Id.* at 2030. Testimony at the PCRA hearing supports these findings. *See, e.g., id.* at 1303 ("I remember [Dantos] specifically going one by one and talking to him. 'Is there anything you can tell me? Tell me about yourself. Tell by about your background.' She was, you know, meticulous to cover points."). The state courts' findings must be presumed to be correct, and Rompilla has not rebutted that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). We accordingly reject Rompilla's argument regarding the interviewing of family members.

Rompilla contends that trial counsel should have sought out school, medical, police, and prison records, but this argument also falls short of meeting the AEDPA

standard. With the benefit of hindsight, we know that these records contain useful information about Rompilla's childhood home environment, his mental problems, and his problems with alcohol, but trial counsel had grounds for believing that if there was any mitigating evidence of this sort to be found, at least a hint of its availability would be disclosed in the interviews with Rompilla and his family members or in the testing and evaluations performed by the three mental health experts whom they retained.

Charles, the lead trial attorney who had the final say on every issue in the case, App. 1258, explained why these records were not sought out. He testified that he would have done whatever was needed to get records if there had been any indication from the interviews or from the information provided by the mental health experts that such records would be helpful. *Id.* at 1307. But since these interviews and evaluations suggested that Rompilla's home environment, schooling, and mental condition were not promising avenues of investigation in the search for mitigating evidence, he did not think that obtaining those records would have represented a sound allocation of his office's resources. *Id.* at 1293-94.

This explanation provides a reasonable basis for counsel's decision not to seek the records. Defense counsel was permitted to rely on statements made by their client in deciding on the extent of the investigation that should be conducted in particular areas. *See Strickland,* 466 U.S. at 691, 104 S.Ct. 2052 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); *id.* ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even

harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). As noted counsel's interviews with Rompilla himself and with family members provided no indication of Rompilla's abusive childhood or mental problems. *See Thomas,* 144 F.3d at 515 ("if the client and his family and friends throw the lawyer off the scent . . . by denying the existence of psychological problems that might have provided an alternative theory of mitigation, the lawyer cannot be faulted for failing to go down the path thus closed off"). "The right to counsel does not require that a criminal defense attorney leave no stone unturned and no witness unpursued. [Although] it does require a reasoned judgment as to the amount of investigation the particular circumstances of a given case require[,] [a]n attorney need not fully investigate every potential avenue if he or she has reasonable grounds for not doing so." *Berryman v. Morton,* 100 F.3d 1089, 1101 (3d Cir.1996). *See also Thomas v. Gilmore,* 144 F.3d 513, 515 (7th Cir.1998) ("A reasonable investigation is not . . . the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would conduct.") *cert. denied,* 525 U.S. 1123, 119 S.Ct. 907, 142 L.Ed.2d 905 (1999).

It was likewise not unreasonable for trial counsel to rely on its mental health experts to detect whether there was any basis for further pursuit of mitigating evidence relating to their client's mental condition. Trial counsel retained no fewer than three highly qualified experts. Dr. Cooke and Dr. Sadoff looked for any evidence that could be used as mitigation but found none. A battery of tests was performed but yielded no indication of mental retardation

or anything else that would have been useful for mitigation. Although all three of the experts testified that the records that PCRA counsel subsequently obtained would have caused them to do further investigation, none of the experts asked for records or suggested that any further testing be done.

In view of these circumstances, it was not unreasonable for the state courts to conclude that trial counsel did not fall below the constitutionally mandated level of representation by failing to search out the records at issue and by failing to provide those records to their mental health experts. This was not a case where counsel knew of the defendant's mental health or other problems and failed to inform or provide the experts with the information. *See Caro v. Calderon,* 165 F.3d 1223, 1228 (9th Cir.1999) ("A lawyer who knows of but does not inform his expert witnesses about . . . essential pieces of information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment.") *cert. denied, sub nom, Woodford v. Caro,* 527 U.S. 1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). Despite counsel's attempts to find out otherwise, counsel had no knowledge of Rompilla's problems and/or childhood abuse.[11]

---

[11] For this reason, the authority cited by Rompilla is inapposite. *See Jermyn,* 266 F.3d at 275 (counsel knew that expert was willing to testify regarding defendant's abusive childhood and its mitigating effects on the defendant's adult life); *Profitt v. Waldron,* 831 F.2d 1245, 1246-49 (5th Cir.1987) (counsel knew defendant escaped from mental hospital shortly before the crime); *Beavers v. Balkcom,* 636 F.2d 114, 115-16 (5th Cir.1981) (counsel knew of defendant's prior hospitalization in mental institution); *Glenn v. Tate,* 71 F.3d 1204, 1208 (6th Cir.1995) (counsel knew defendant had received mental health counseling) *cert. denied,* 519 U.S. 910, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996); *Antwine v. Delo,* 54 F.3d 1357, 1365-66 (8th Cir.1995) (counsel knew that defendant

(Continued on following page)

In *Card v. Dugger,* 911 F.2d 1494 (11th Cir.1990), the court addressed an argument very similar to Rompilla's argument regarding trial counsel's failure to provide records to their mental health experts. In *Card,* a capital case, the mental health expert spoke to members of the defendant's family and was provided copies of pre-trial reports indicating that the defendant was competent to stand trial. *Id.* at 1512. The expert testified at the sentencing hearing that the defendant suffered from a sociopathic personality disorder and that his abusive childhood was consistent with the development of the disorder. *Id.* at 1508. The defendant claimed that counsel was ineffective in failing to provide the expert with various school, incarceration, army, and medical records and information from family members. *Id.* at 1512. This information, the defendant argued, would have enabled the expert to diagnose the defendant as suffering from organic brain damage and schizophrenia, rather than merely a sociopathic personality. *Id.* at 1512-13. The Eleventh Circuit rejected this argument observing that

> [t]here is no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examinations. Nor is there any reason that, after receiving the experts' reports, counsel was obligated to track down every record that might possibly relate to [the defendant's] mental health and could affect a diagnosis.

was acting "odd" prior to the offense) *cert. denied sub nom, Bowersox v. Antwine,* 516 U.S. 1067, 116 S.Ct. 753, 133 L.Ed.2d 700 (1996); *Hill v. Lockhart,* 28 F.3d 832, 838-40, 845 (8th Cir.1994) (counsel knew of defendant's prior hospitalization); *Kenley,* 937 F.2d at 1300, 1304-06 (counsel knew of but failed to contact a doctor who had previously treated the defendant); *Clabourne v. Lewis,* 64 F.3d 1373, 1377, 1388 (9th Cir.1995) (counsel knew defendant was mentally impaired at the time of the offense, and had "display[ed] a broad spectrum of psychiatric and emotional disorders"); *Wallace v. Stewart,* 184 F.3d 1112, 1114, 1116 (9th Cir.1999) (counsel knew from first sentencing hearing of defendant's "chaotic upbringing," substance abuse, and mother's mental illness) *cert. denied,* 528 U.S. 1105, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000).

Id. at 1512.

We find this reasoning persuasive. As in *Card,* there was no indication in the present case that Drs. Cooke, Sadoff, and Gross "felt incapable of basing their conclusions on the information they obtained through their own testing and examinations." *Card,* 911 F.2d at 1512. Thus, it was not unreasonable for counsel to rely on the expertise and experience of the mental health professionals in determining the need for any records. Such deference to the legitimate role of experts is well within the wide range of reasonable professional assistance.

Furthermore, it was permissible for Charles to consider his office's limited investigative resources in determining the extent of the investigation that should be conducted with respect to Rompilla's childhood, family, and mental condition. *See McWee v. Weldon,* 283 F.3d 179, 188 (4th Cir.2002) ("the reasonableness of an investigation . . . must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing"), *cert. denied,* 537 U.S. 893, 123 S.Ct. 162, 154 L.Ed.2d 158 (2002); *Mahaffey v. Page,* 151 F.3d 671, 685 (7th Cir.) ("A 'reasonable investigation' does not mandate a 'scorch-the-earth strategy,' a requirement that would fail to consider the limited time and resources that defense lawyers have in preparing for a sentencing hearing.") (citations omitted), *vacated in part on other grounds,* 162 F.3d 481 (7th Cir.1998); *Rogers v. Zant,* 13 F.3d 384, 387

(11th Cir.1994) (the focus on whether a decision not to conduct a particular investigation was reasonable "reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources").

Rompilla argues that his trial attorneys were deficient because they did not provide adequate information or instructions to Drs. Cooke, Sadoff, and Gross. Rompilla maintains that his attorneys should have instructed Dr. Cooke to test for brain damage, but Charles testified that he relied on the experts to do whatever testing was appropriate. App. 1307-08. Dr. Cooke was aware of the need for mitigating evidence. He testified that in a capital case he would have looked for indications of "any mental illness, emotional disturbance, or other sorts of problems that might be a psychological mitigating circumstance," and he performed the battery of tests that he felt was called for. *Id.* at 1808-09. He stated that if the results of some of those tests had provided a reason to do a "neuropsyche test," he would have done so. *Id.* at 1809. Thus, Rompilla is in effect faulting his trial attorneys for failing to instruct an expert to do a test that the expert apparently did not think was warranted under the circumstances. This argument demands much more than the Sixth Amendment requires.

Rompilla criticizes his trial attorneys for allegedly failing to educate Dr. Sadoff about the meaning of mitigating evidence. Based on a snippet of Dr. Sadoff's testimony, Rompilla suggests that Dr. Sadoff thought that "mitigating evidence was *limited* to evidence *about the offense* itself," Rompilla Br. at 87 (citing App. 1874), whereas under the law, "mitigation is anything that 'might serve as a basis for a sentence less than death' and need 'not relate specifically to [the defendant's] culpability for the crime he

committed.'" Rompilla Br. at 88 (quoting *Skipper v. South Carolina,* 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)) (emphasis and brackets in original). There are at least three weaknesses in this argument.

First, in light of Dr. Sadoff's background – which included extensive experience relating to the criminal justice system (*see* App. 1876-1892) – it is far from clear that trial counsel had a constitutional obligation to brief him on the meaning of exculpatory evidence.[12] Second, it also is not clear that Rompilla's argument accurately represents what Dr. Sadoff said. Asked by Rompilla's PCRA attorney whether he thought that evidence was mitigating only "if it relates to the defendant's state of mind at the time of the commission of the offense," Dr. Sadoff answered: "It relates to that *and the kind of person he is. . . .*" App. 1874. (emphasis added). He continued that in the past he had not "used irrelevant material that had nothing to do with the crime itself as a mitigating factor. It had to be something that would have impacted on [the defendant's] state of mind at the time." *Id.* Thus, Dr. Sadoff did not say that he thought that mitigating evidence *had to*

[12] Both Drs. Sadoff and Cooke had previously testified in criminal proceedings. *See, e.g., United States v. Green,* 544 F.2d 138, 144 (3d Cir.1976) (Sadoff and Cooke); *New Jersey v. Zola,* 112 N.J. 384, 548 A.2d 1022, 1030 (1988) (Sadoff and Cooke); *Commonwealth v. Comitz,* 365 Pa.Super. 599, 530 A.2d 473, 474-75 (1987) (Sadoff); *Commonwealth v. Stark,* 363 Pa.Super. 356, 526 A.2d 383 (1987) (Sadoff). They had also previously testified in capital cases. *See, e.g., New Jersey v. Pitts,* 116 N.J. 580, 562 A.2d 1320, 1325-27 (N.J.1989) (Sadoff and Cooke); *Commonwealth v. Aulisio,* 514 Pa. 84, 522 A.2d 1075, 1087 (1987) (Cooke); *Commonwealth v. Terry,* 513 Pa. 381, 521 A.2d 398, 405, 409 (1987) (Cooke); *Commonwealth v. Whitney,* 511 Pa. 232, 512 A.2d 1152, 1157 (1986) (Cooke); *Commonwealth v. Terry,* 501 Pa. 626, 462 A.2d 676 (1983) (Sadoff and Cooke).

be evidence "about the offense." Rompilla Br. at 87 (emphasis in original removed). Rather, he said that the mitigating evidence that he had used in the past was evidence of something that had an impact on the defendant's mind at the time. App. at 1874. It is not apparent that mental health evidence is likely to be persuasive for mitigation purposes if it cannot have had any impact on a murderer's mind at the time of offense.

Third and most important, even assuming for the sake of argument that Dr. Sadoff's understanding of the range of mental health evidence that can be mitigating was unduly narrow, we see absolutely no reason to believe that Dr. Sadoff's understanding contributed in any way to his failure to detect the conditions that Rompilla now claims. Rompilla argues that he "suffers from organic brain damage, including damage to the frontal lobes and parietal area" and that these impairments, among other things, prevent him from "adequately control[ling] and guid[ing] his behavior," "emotions," and "impulses." Rompilla Br. at 58. He argues that these conditions "substantially impair [] his capacity to appreciate criminality of conduct or conform conduct to the requirements of law." *Id.* at 96. Accordingly, these impairments surely would have "impacted" his mind at the time of the Scanlon murder and thus fall squarely within the scope of the sort of mitigating evidence to which Dr. Sadoff referred.

Rompilla argues that his trial attorneys were ineffective because they did not ask Dr. Gross to look for mitigating evidence. Rompilla Br. at 65 (citing App. 1535-36, 1545). However, Drs. Cooke and Sadoff did look specifically for mitigating evidence, and the scope of Dr. Gross's evaluation encompassed at least some mitigating evidence. He stated: "I was looking to see if he knew what he was

doing, whether he was suffering from any kind of psychiatric disorder, whether he may have been intoxicated, exactly what his emotions and cognitive processes were." App. 1506. In light of what Drs. Cooke and Sadoff were asked to do and in fact did, trial counsel's instructions to Dr. Gross do not show that trial counsel were ineffective.

Finally, Rompilla argues that trial counsel were ineffective in failing to do further investigation relating to Rompilla's alcohol use. Rompilla never explains exactly what alcohol-related mitigation argument he believes his trial attorneys should have made, but he refers to information suggesting that there is a history of alcohol-abuse in the Rompilla family, that he is an alcoholic, that his alcoholism was caused by his traumatic childhood, that he suffers from alcohol-induced blackouts, and that he was intoxicated on the night of the murder. While these elements can be woven into an attractive mitigation argument, most of the elements are based on information in the records that trial counsel was not, for the reasons we have explained, constitutionally obligated to obtain. This includes evidence of drinking in the Rompilla family, Rompilla's abusive childhood home, blackouts, and Rompilla's alcoholism.

The only alcohol-related mitigation argument that trial counsel could have made without obtaining the previously discussed records – namely, that Rompilla was so intoxicated at the time of the Scanlon murder that his judgment was impaired – would not have been particularly compelling. Moreover, while evidence to support this

argument was available,[13] the argument would have to have been made without the support of testimony from Rompilla, who did not take the stand at either phase of the trial and denied intoxication or alcohol problems. We cannot say that it was objectively unreasonable for trial counsel not to put on such a defense.

Finally, Rompilla argues that the Supreme Court's recent decision in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), shows that his trial attorneys conducted an unreasonably abbreviated investigation of potential mitigating factors, but there is a sharp contrast between the conduct of the attorneys in *Wiggins* and those in this case. In *Wiggins*, the trial attorneys claimed that they made a tactical decision not to present mitigating evidence but instead to pursue the alternative strategy of attempting to prove that someone other than the defendant actually killed the victim. *Id.* at 2533. Accordingly, they made little effort to investigate the defendant's background although they had reason to believe that such an investigation would have been fruitful.

The Supreme Court found that defense counsel's investigation of their client's background was based entirely on the presentence investigation report (PSI) and documents from the Baltimore City Department of Social Services (DSS). *Id.* at 2540. Although funds were available for the preparation of a social history of the defendant, counsel did not commission such a report. *Id.* at 2536. But

[13] As Rompilla points out, police reports on the Scanlon case indicated that "Rompilla was drinking heavily and was intoxicated and incoherent around the time of the offense." Rompilla Br. at 92.

even the limited documents that counsel reviewed contained information that should have alerted counsel that an expanded investigation into their client's background was likely to yield mitigation evidence. The PSI reported that the defendant had spent most of his childhood in foster care and quoted the defendant as describing his background as "disgusting." *Id.* at 2536. The DSS records disclosed that the defendant's "mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food." *Id.* at 2537.

Wiggins's trial counsel nevertheless failed to follow these leads. Counsel moved for bifurcation of the penalty phase trial so that they could first attempt to show that their client did not kill the victim by his own hand and then, if that defense was rejected, offer evidence in mitigation. *Id.* at 2532. When bifurcation was denied, defense counsel made a brief reference in her penalty phase opening to the defendant's "difficult life" but "introduced no evidence of [his] life history." *Id.* And although counsel proffered some evidence that would have been introduced if the bifurcation had been allowed, no evidence of the defendant's life history or family background was included. *Id.* After the defendant was sentenced to death, new counsel commissioned the preparation of a social history. *Id.* at 2532. A social worker interviewed Wiggins and family members, obtained additional documents, and compiled evidence of severe physical and sexual abuse by Wiggins's mother. *Id.* at 2532, 2542.

Faced with these facts, the Supreme Court held that it was objectively unreasonable for counsel not to conduct a

further investigation for mitigating evidence regarding Wiggins's background. *Id.* at 2541. The Court stated that "any reasonably competent attorney" would have realized that it was necessary to follow the leads in the PSI and DSS documents before making a choice among potential defenses. *Id.* at 2537. The Court stressed that "counsel uncovered no evidence in their investigation to suggest that . . . further investigation would have been fruitless." *Id.* The Court also emphasized that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Id.* Instead, the Court reiterated that "[a] decision not to investigate . . . 'must be directly assessed for reasonableness in all the circumstances.'" *Id.* (quoting *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052).

There are critical differences between the conduct of Wiggins's and Rompilla's trial attorneys. Wiggins's attorneys were presented with leads that "any reasonably competent attorney" would have realized were promising. Rompilla's attorneys had no comparable leads. Wiggins described his childhood as "disgusting"; Rompilla insisted that his was "normal." In *Wiggins,* postconviction interviews with Wiggins himself and with members of his family produced evidence of severe abuse. 123 S.Ct. at 2542. In the present case, Rompilla's attorneys interviewed their client and numerous family members in detail before the penalty proceeding but discovered no mitigating evidence. Wiggins's attorneys "uncovered no evidence in their investigation to suggest that . . . further investigation would have been fruitless." *Id.* at 2537. Rompilla's trial attorneys had a body of evidence that suggested that a further investigation into Rompilla's family background would not have been productive. Not only did Rompilla's attorneys probe their client for mitigating evidence, but they interviewed numerous members of his family, including siblings who bracketed him in age. At least one of these siblings, Nicholas Rompilla, later revealed that he knew about the conditions in the home on which Rompilla now relies, but he never provided that information to trial counsel, and although he now claims that trial counsel never asked him about any period of time other than the months immediately preceding the murder, the PCRA court found that this testimony was not believable.

In short, the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so. Rompilla's attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources. In our view, *Wiggins* is critically different from the present case.

Rompilla asserts that Dr. Gross's report "explicitly recommend[ed] that counsel investigate alcoholism," Rompilla Br. at 66, but this is not exactly what Dr. Gross wrote. Dr. Gross said that "[t]he possibility does remain . . . that Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior although he himself strongly denies this." Dr. Gross added: "My recommendation is that this area should be further evaluated *before any definitive conclusions are drawn.*" (emphasis added). Thus, Dr. Gross did not say that further evaluation was likely to produce evidence that Rompilla becomes violent when drunk, only that this was a "possibility." Nor did he

recommend further evaluation as a promising strategy for the defense. Instead, he merely said that "no definitive conclusions" should be drawn about this possibility unless there was a further evaluation. And finally, it should be noted that he referred to a further "evaluation" (a term that suggests a psychiatric examination), not an "investigation." Rompilla's brief repeatedly uses the term "investigate" in an apparent attempt to suggest that Dr. Gross recommended that trial counsel search for evidence such as the records discussed above. The use of this term obscures the fact that trial counsel did precisely what Dr. Gross recommended: they had Rompilla "evaluated" further, i.e., examined by another psychiatrist, Dr. Sadoff.

In conclusion, it appears to us that Rompilla is now arguing that his trial counsel were constitutionally derelict in failing to take all the steps that might have been pursued by the most resourceful defense attorneys with bountiful investigative support. But while we may hope for the day when every criminal defendant receives that level of representation, that is more than the Sixth Amendment demands. *See Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 ("the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system"); *Burger,* 483 U.S. at 794, 107 S.Ct. 3114 ("The record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'") (quoting *Cronic,* 466 U.S. at 665 n. 38, 104 S.Ct. 2039) (alteration in original). The Sixth Amendment is satisfied when "counsel's conduct

falls within the wide range of reasonable professional assistance," thereby "ensur[ing] that criminal defendants receive a fair trial." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.[14] *See also Waters,* 46 F.3d at 1512 ("The test has

---

[14] In finding the state courts' analysis unreasonable, the District Court relied in part on the absence of any "in depth analysis" of the duty to investigate, including the lack of any reference to the ABA Standards for Criminal Justice. *Rompilla,* 2000 WL 964750, at *9. Three important observations must be made about the District Court's treatment of this point. First, the state court's failure to *discuss* these standards does not mean that the standards themselves or the principles they embody were not considered. Second, we see nothing in the quoted portions of the ABA standards that dictates that records of the sort at issue here must always be sought. Third, although the ABA standards are important guides, they cannot be viewed as a codification of the requirements of the Sixth Amendment. In *Strickland,* the Supreme Court recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are *guides* to determining what is reasonable." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052 (emphasis added). *See also Williams,* 529 U.S. at 396, 120 S.Ct. 1495. However, the Supreme Court has made it clear that the ABA standards

> are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . [T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland, 466 U.S. at 688-89, 104 S.Ct. 2052 (citation omitted). *See also Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (the Court has "consistently declined to impose mechanical rules on counsel – even when those rules might lead to better representation").

nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.") (quoting *White v. Singletary,* 972 F.2d 1218, 1220-21 (11th Cir.1992)). Here, the state court's determination that counsel acted reasonably was not "contrary to" or an "unreasonable application" of *Strickland.*

VII.

Rompilla advances three claims related to the trial court's response to the jury's questions about accomplice liability. First, Rompilla argues that his federal constitutional right to due process was violated because the court instructed the jury on accomplice liability without providing "notice or fair warning that he might be subjected to liability as an accomplice." Rompilla Br. at 14. Second, he contends that his federal constitutional right to due process was abridged because the accomplice-liability comments did not state that "accomplice liability must be proven beyond a reasonable doubt and that conviction for murder, even based on accomplice liability, required proof of a specific intent to kill." *Id.* at 20. Third, he maintains that his rights under the Sixth, Eighth, and Fourteenth Amendments were violated because the trial judge's remarks prevented the jury "from considering and giving exculpatory and mitigating effect to evidence that someone other than Rompilla was the killer." *Id.* at 22 (emphasis in original removed).

A.

Under 28 U.S.C. § 2254(b)(1), a state prisoner's application for a writ of habeas corpus "shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State" or the case falls within one of two exceptions to the exhaustion requirement, i.e., "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." Moreover, under 28 U.S.C. § 2254(b)(3), a state may not be deemed to have waived exhaustion or be estopped from relying on exhaustion "unless the State, through counsel, expressly waives the requirement." In order to exhaust state remedies, a habeas petitioner must present the petitioner's federal claim in the state courts. *See Keller v. Larkins,* 251 F.3d 408, 413 (3d Cir.2001). It is not enough for a petitioner to advance a similar state-law claim. *Duncan v. Henry,* 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Rather, a petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir.1999).

Three sections of Rompilla's brief on direct appeal to the state supreme court raised claims concerning the accomplice liability instruction. First, Rompilla argued that the judge erred in giving the instruction because the defense had no prior notice that this theory of liability was in the case and because the judge refused a defense request that "the jury be specifically instructed that under an accomplice theory every element must be proven beyond a reasonable doubt." Appellant's Br. at 11, *Commonwealth v. Rompilla,* Supreme Court of Pennsylvania,

Philadelphia District, No. 53 Capital Appeal Docket (hereinafter "Rompilla Direct Appeal Br."). Although this section of Rompilla's brief did refer to the requirement of proof beyond a reasonable doubt – something demanded by both the federal Constitution and Pennsylvania law[15] – the brief made no reference to the federal Constitution and did not cite any federal authorities. Second, Rompilla argued that the judge erred in refusing to poll the jury as to whether the guilty verdict was based on the theory of accomplice liability. Rompilla Direct Appeal Br. at 15-17. This contention was based exclusively on state law. Third, Rompilla repeated the argument that the trial judge erred in refusing to give the requested defense instruction to the effect that conviction as an accomplice required proof beyond a reasonable doubt. *Id.* at 17-18. Only state authorities grounded on state law were cited.

Based on our examination of Rompilla's brief to the Pennsylvania Supreme Court, it is not clear that Rompilla properly presented any federal constitutional claim to that court.[16] Moreover, even if Rompilla's brief to the state supreme court is read as having raised the federal claim that the trial judge erred in refusing to give the requested instruction on the requirement of proof beyond a reasonable doubt, it seems clear that the remaining federal constitutional claims advanced by Rompilla in this appeal

[15] *See Commonwealth v. Bonomo,* 396 Pa. 222, 151 A.2d 441, 446 (1959).

[16] On direct appeal, the state supreme court described Rompilla's argument as follows:

> by being instructed on an accomplice theory and then being told to disregard it, the jury might have been confused and convicted [Rompilla] as an accomplice.

Rompilla-1, 653 A.2d at 631.

were not presented to the state supreme court. Rompilla's argument in the state supreme court concerning the lack of prior notice was based solely on state authorities, and the argument that Rompilla has made to us that the trial judge's instruction effectively prevented the jury from considering exculpatory and mitigating evidence was never made, either as a state- or federal-law claim, in Rompilla's direct appeal brief.

In view of these deficiencies, if Rompilla could still return to the state courts and present the federal constitutional claims that he has made here, we would probably be obligated to regard those claims as unexhausted. It is clear, however, that Rompilla can no longer raise those claims in state court, 42 Pa. Cons.Stat. Ann. § 9545(b), and therefore it appears that those claims are exhausted but are probably procedurally defaulted. *See Fahy v. Horn,* 240 F.3d 239, 245 (3d Cir.2001). The Commonwealth has not raised the defense of procedural default, but we have the discretion to do so in appropriate circumstances. *See Sweger v. Chesney,* 294 F.3d 506, 520 (3d Cir.2002) *cert. denied,* 538 U.S. 1002, 123 S.Ct. 1902, 155 L.Ed.2d 830 (2003). Nevertheless, we do not rely on the doctrine of procedural default in deciding this appeal. Assuming for the sake of argument that our consideration of those claims on the merits is not barred, we find that the claims do not provide a basis for habeas relief.

B.

When language in jury instructions is challenged, the language in question "must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385

(1991). We then consider "'whether there is a *reasonable likelihood* that the jury has applied the challenged instructions in a way' that violates the Constitution." *Smith v. Horn,* 120 F.3d 400, 411 (3d Cir.1997) (quoting *McGuire,* 502 U.S. at 72, 112 S.Ct. 475.) Under these standards, the trial judge's comments about accomplice liability did not violate Rompilla's constitutional rights.

1.

Since there were no eyewitnesses to the killing, the Commonwealth's case was based almost entirely on the previously noted circumstantial evidence. *See Rompilla-1,* 653 A.2d at 629. The defense argued that someone other than Rompilla was the actual assailant.

During jury deliberations in the guilt phase, the jury asked:

> If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?

App. at 585. In response, the trial judge began by informing the jury that the Commonwealth had not proceeded on the theory that Rompilla was liable for the murder as an accomplice and that no instruction on accomplice liability had been given. The judge stated:

> Well, preliminarily, let me say this. If you recall, *the Court, in [its] Charge, at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice.* I'm not quite sure what prompted the question. If it arose because of something that was argued by Counsel in the closing speeches, if you recall, I indicated that

> you are to give – and you should be guided by each Lawyer's arguments to the extent they're supported by the evidence and in so far as they aid you in applying your own reason and common sense. However, you are not required to accept the arguments of either Lawyer. It is for you alone – you and you alone to decide this case based on the evidence as it was presented from this witness stand and in accordance with the instruction which the Court gave you. Now, again, as I say, I'm not quite sure what prompted the question, but you did ask the question, and I assume you want an answer, is that correct?

Id. at 585-86 (emphasis added). The jury foreman nodded in the affirmative, and the trial court then attempted to explain when an accomplice could be held liable for a crime committed by another. *Id.* at 586-87. The court concluded, however, with the following comments:

> I can only say this to you, that *you should determine this case based on the Charge of the Court as it had given you originally.* There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but *it requires other proof or findings on your part that were not a part of this case nor were they made a part of this case, all right.*

Id. at 587-88 (emphasis added).

On direct appeal, the state supreme court did not decide whether the trial judge's comments about accomplice liability were flawed but instead held that any error was cured by the judge's admonition to the jury that it

should not consider that theory of liability. *Id.*[17] The District Court – presented with arguments notably different from those advanced in the state supreme court – went beyond the state supreme court in holding that the judge's explanation of accomplice liability was incomplete, but the District Court agreed with the state supreme court that any flaw was cured by the trial court's admonition that the theory of accomplice liability was not before the jury in this case. *Rompilla,* 2000 WL 964750, at *14. Similarly, we conclude that, even assuming *arguendo* that the challenged comments were constitutionally flawed, there is no basis for habeas relief. The state supreme court's decision that any defect in the challenged comments was cured by the judge's admonition that the jury was not to consider the theory of accomplice liability did not "involve an unreasonable application of Federal law," 28 U.S.C. § 2254(d)(1), namely, the rule that jury instructions do not violate the Constitution unless there is a reasonable probability that they were applied in a way that abridged constitutional rights. Moreover, even under a standard of plenary review, we would find no constitutional violation.

Here, the clear thrust of the trial court's response to the jury's question was that the Commonwealth was not relying on the theory that Rompilla was liable as an

[17] In the PCRA appeal, Rompilla again attempted to challenge the trial judge's instruction on accomplice liability, but the state supreme court held that relief was unavailable because the claim had already been litigated on direct appeal. *Commonwealth v. Rompilla,* 554 Pa. 378, 721 A.2d 786, 793 (1999).

In the federal habeas proceeding, the District Court also found that the instruction did not prevent consideration of exculpatory and mitigating evidence and that Rompilla's claim that there was evidence of an accomplice was not supported by the record. *Id.*

accomplice and that the jury should not consider that theory as a possible basis for conviction. As noted, when the judge first responded to the jury's question, the judge began by reminding the jury that the court's instructions "at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice." App. 585-86. In addition, the judge told that jury that they were required to decide the case "in accordance with the instruction which the Court gave you." *Id.* Since "the instruction which the Court gave [the jury]" "at no time referred to any theory of accomplice in this case," *id.* at 585-86, the judge's comments meant that the jury was to decide the case without relying on the theory of accomplice liability. The judge's final statements regarding accomplice liability made exactly the same point. The judge stated: "I can only say this to you, that you should determine this case based on the Charge of the Court as it had given you originally." *Id.* at 587. Jurors are presumed to follow the court's instructions. *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In view of the instructions given here, it is not reasonably likely that the jury interpreted the judge's comments to mean anything other than that they were not to consider accomplice liability as a possible ground for conviction.

Once the meaning of the judge's comments is understood, it is apparent that there is no merit in Rompilla's argument that his right to due process was violated because he did receive prior notice that he might be subjected to liability as an accomplice or in his argument that the judge's explanation of accomplice liability was constitutionally flawed. Since the trial judge told the jury

that it was to decide the case without relying on the theory of accomplice liability, these arguments fail.

Rompilla contends that the trial court told the jury that it should not consider accomplice liability because no evidence was presented during the trial to support such a finding. Rompilla Br. at 16. Rompilla then maintains that the trial judge gave contradictory instructions in that, on the one hand, he told the jury not to consider accomplice liability because there was no evidence to support such a finding and, on the other hand, he told the jury that it was the sole factfinder and its recollection of the evidence should therefore control. According to Rompilla, the jury was left with two irreconcilable options – either to disregard the theory of accomplice liability because the trial court believed there was no evidence to support the theory or to consider the theory if the jury, as sole factfinder, believed, as suggested by its question, that there was evidence of an accomplice.

This elaborate argument rests on the faulty premise that the trial judge instructed the jury that the reason why the theory of accomplice liability was not in the case was because there was no supporting evidence. In fact, however, the judge never made such a statement. The trial judge did state that "[t]here was no evidence in this case with regard to the question as posed," but he did not state that this was why the theory was not in the case. Rather, as noted, the judge twice told the jury that they were not to consider accomplice liability *because it was not in the original charge,* and the judge also noted that "[i]t [was] not the Commonwealth's theory in this case that the Defendant was an accomplice."

Rompilla's remaining argument (that the trial judge's statements prevented the jury from considering exculpatory and mitigating evidence) entirely misconstrues the judge's words. The judge did not, as Rompilla contends, say that there was no evidence that another person was involved. Rather, the judge stated that "[t]here was no evidence in this case *with regard to the question as posed.*" The "question as posed" was: "If Defendant was an accomplice to the Charge of Criminal Homicide, can he be charged with Murder in the First Degree?" Thus, the judge essentially said that there was no evidence to support a conviction under an accomplice liability theory; the judge did not say that there was no evidence that might justify reasonable doubt, or residual doubt for purposes of sentencing mitigation, as to whether Rompilla committed the killing with the requisite intent. Accordingly, nothing that the judge said foreclosed consideration of exculpatory or mitigating evidence.

In sum, after considering all of Rompilla's arguments regarding accomplice liability, we see no ground for habeas relief.

VIII.

Rompilla contends, finally, that his future dangerousness was put at issue during the sentencing phase of his trial and that therefore, under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the trial court was required to inform the jury that "life" imprisonment under Pennsylvania law means "life without parole." We agree with the District Court, however, that the Pennsylvania Supreme Court's rejection of this

claim cannot be disturbed under the narrow standard of review prescribed by AEDPA.

A.

Rompilla maintains that the state supreme court's decision was "contrary to" and represented "an unreasonable application" of *Simmons.*[18] The actual holding in *Simmons,* however, as set out in Justice O'Connor's controlling opinion, is narrower than Rompilla acknowledges.

In *Simmons,* the defendant was convicted of capital murder for the killing of an elderly woman. *Simmons,* 512 U.S. at 156, 114 S.Ct. 2187. The defendant had a history of assaulting elderly women, and both defense and state witnesses agreed that the defendant posed a continuing danger to elderly women. *Id.* at 157, 114 S.Ct. 2187. During the penalty phase, the state argued that the question for the jury was "what to do with [the defendant] now that he is in our midst." *Id.* The state also urged that a death sentence would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* The defendant sought to rebut the state's argument by presenting evidence that his dangerousness was limited to elderly women and that there was no reason to expect acts of violence once he was in a prison setting. *Id.* The trial court denied defense counsel's request for a parole ineligibility instruction. *Id.* at 158-60,

[18] *Simmons* applies here because it was decided before Rompilla's conviction became final upon conclusion of his direct appeal in 1995. *Cf. O'Dell v. Netherland,* 521 U.S. 151, 156-57, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

114 S.Ct. 2187. During deliberations, the jury asked if a life sentence included the possibility of parole. *Id.* at 160, 114 S.Ct. 2187. The trial court instructed the jury not to consider parole or parole eligibility and told the jury that life imprisonment and death were to be understood in their plain and ordinary meaning. *Id.* Shortly thereafter, the jury returned with a sentence of death. *Id.*

The United States Supreme Court held that, under these circumstances, due process required the trial judge to inform the jury that the defendant would not have been eligible for parole if sentenced to imprisonment for life. The plurality opinion endorsed by four Justices reasoned that

> the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and *by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed.*

Id. at 161-62, 114 S.Ct. 2187 (plurality) (emphasis added). The plurality found that the jury was then "left to speculate about . . . parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer . . . even when it was requested." *Id.* at 165-66, 114 S.Ct. 2187. Consequently, the plurality stated that "where the defendant's future dangerousness *is at issue,* and state law prohibits the defendant's release on parole, due

process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156, 114 S.Ct. 2187 (plurality) (emphasis added). *Id.* at 161-62, 114 S.Ct. 2187.[19]

The controlling opinion in *Simmons* – Justice O'Connor's concurrence in the judgment, in which the Chief Justice and Justice Kennedy joined – seemed to phrase the holding more narrowly. Justice O'Connor stated that a "defendant should be allowed to bring his parole ineligibility to the jury's attention . . . in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and *the prosecution argues* that the defendant will pose a threat to society in the future." *Id.* at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgement) (emphasis added). Other passages in Justice O'Connor's opinion pointed in the same direction. She referred to cases "'[w]here *the prosecution specifically relies on a prediction of future dangerousness* in asking for the death penalty,'" *id.* at 175, 114 S.Ct. 2187 (emphasis added) (citation omitted) (brackets in original) and cases where "the State seeks to show the defendant's future dangerousness." *Id.* at 177, 114 S.Ct. 2187. *See also id.* at 176, 114 S.Ct. 2187 ("the State sought to show that petitioner is a vicious predator who would pose a continuing threat to the community"); *id.* at 177,

[19] Justice Souter's concurring opinion, in which Justice Stevens joined, was phrased in seemingly broader terms. *See* 512 U.S. at 172, 114 S.Ct. 2187 (Souter, J., concurring) ("at least when future dangerousness is an issue. . . ."). The *Simmons* dissenters interpreted the plurality opinion as apparently requiring admission of parole ineligibility even when the prosecution does not argue future dangerousness. *Id.* at 183, 114 S.Ct 2187 (Scalia, J., joined by Thomas, J., dissenting).

114 S.Ct. 2187 ("The prosecutor in this case put petitioner's future dangerousness in issue").

In short, whereas the *Simmons* plurality opinion may be read to state that the *Simmons* rule applies whenever a defendant's future dangerousness is "at issue" (whether or not the prosecution makes that argument), Justice O'Connor's controlling opinion may be read more narrowly to hold that the rule governs only where the prosecution actually "argue[s]" that a defendant poses a future threat. Neither position, of course, has perfectly clear boundaries. There is a sense in which future dangerousness is "at issue" at the penalty phase of virtually all capital cases. The possibility that a first-degree murderer will kill again is likely to be present in the jurors' mind in all cases except those where the defendant committed the murder for which he or she was convicted only because of unusual circumstances that are very unlikely to occur again even if the defendant is released from prison. As the Chief Justice has put it, "[i]t is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make [an inference of future dangerousness to society]." *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 735, 151 L.Ed.2d 670 (2002) (Rehnquist, C.J., dissenting). Thus, read liberally, the plurality's position in *Simmons* would mandate that the jury be informed about parole ineligibility in almost all capital cases in which the only possible sentences are death or life without parole.

On the other hand, the fine line that Justice O'Connor's opinion seemed to draw – between cases in which the prosecution "argue[s]" future dangerousness and cases in which future dangerousness is inferred by the jury from the evidence that is brought to its attention – is difficult to police and arguably superficial. A prosecutor may encourage a jury

to think about future dangerousness without expressly referring to that concept.

Last year, in *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002),[20] the Court arguably broadened the holding in *Simmons.* In *Kelly,* the state told the jurors in its opening at the penalty phase: "I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." *Kelly,* 122 S.Ct. at 729. The state then presented evidence that while in prison, Kelly had made a knife, had attempted to escape from prison, and had planned to hold a female guard as a hostage. *Id.* The state also brought out evidence of "Kelly's sadism at an early age, and his inclination to kill anyone who rubbed him the wrong way." *Id.* (citation omitted). During closing arguments, the state referred to Kelly as "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid." *Id.* The state also told the jurors that "Kelly doesn't have any mental illness. He's intelligent . . . He's quick-witted. Doesn't that make somebody a little more dangerous . . . for this lady . . . doesn't that make him more unpredictable for [the victim] . . . murderers will be murderers. And he is the cold-blooded one right over there." *Id.* at 729-30. The trial court did not give a parole ineligibility instruction. *Id.* at 730.

The Supreme Court held that Kelly's future dangerousness was sufficiently put at issue that he was entitled

[20] *Kelly* was decided after briefing was completed and before oral argument in this case. Rompilla submitted a Notice of Supplemental Authority, pursuant to Fed. R.App. P. 28(j). After oral argument both parties submitted supplemental memoranda addressing the issue of whether *Kelly* was applicable to the instant matter.

to a parole ineligibility instruction. *Id.* at 731, 733-34. In the body of its opinion, the Court stated that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." *Id.* at 732. The Court recognized that "it may well be that the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to be dangerous in the future," but the Court declined to address the issue of whether a defendant is entitled to a parole ineligibility instruction when the state's evidence shows future dangerousness but the prosecutor does not argue it. *Id.* at 732 n. 4. The Court concluded that "[t]he prosecutor accentuated the clear inference of future dangerousness raised by the evidence and placed the case within the four corners of *Simmons*." *Id.* at 732.

The *Kelly* dissenters, including two of the Justices who had joined Justice O'Connor's opinion in *Simmons,* argued that the Court had improperly extended *Simmons*'s reach. *See id.* at 735 (Rehnquist, C.J., joined by Kennedy, J., dissenting) ("the test is no longer whether the State argues future dangerousness to society[,] [as the Court found in *Simmons*]; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society") and *id.* at 737 (Thomas, J., joined by Scalia, J., dissenting) ("the Court dilutes the *Simmons* test, now requiring that a parole ineligibility instruction be given where the prosecution makes arguments that have a '*tendency* to prove dangerousness in the future.'").

Even if *Kelly* broadened *Simmons,* however, *Kelly* cannot aid Rompilla here. Under 28 U.S.C. § 2254(d)(1),

our review is limited to deciding whether a state court decision is "contrary to" or an "unreasonable application" of Supreme Court precedent *"as of the time of the relevant state-court decision."* *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (emphasis added). The state court decisions in this case preceded *Kelly*. Accordingly, regardless of whether *Kelly* expands the circumstances when future dangerousness is at issue for purposes of requiring a parole ineligibility instruction, the case is not applicable to the instant matter. We are limited to deciding whether the state court decisions in this case were contrary to or an unreasonable application of the holding in *Simmons* itself – which is to say Justice O'Connor's controlling concurrence. We must thus determine whether the Pennsylvania Supreme Court was reasonable in concluding that the prosecutor in the present case did not "argue[]" that Rompilla would present a future danger if not sentenced to death. We therefore turn to the relevant events at the penalty phase of Rompilla's trial.

B.

During the penalty phase, the Commonwealth attempted to establish the aggravating factor that Rompilla had a "significant history of felony convictions" as specified in 423 Pa.C.S. § 9711(d)(9). In doing this, the Commonwealth read into the record the testimony of J.M., a female bar owner whom Rompilla had previously robbed, slashed with a knife, and raped. During closing arguments, the Commonwealth argued:

> [T]he woman that was raped, was raped pretty brutally. She was raped at knife point. . . . [I]sn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding.

> Both take place around the bar. The Defendant gets in after closing or right before closing. . . . On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from [J.M.'s] Bar, takes a taxi the night of this crime. He slashes [J.M.] in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. But there is one difference, one major difference, [J.M.] lived through her experience. Jimmy Scanlon didn't. . . . I keep wondering, why did the Defendant wait till Jimmy Scanlon left the Bar? He knew he was closing up. Why didn't he just wait until he had left to break in and steal the money, no problem, nobody gets hurt? You have to ask yourselves, why didn't he wait for Jimmy Scanlon to leave? Was it his intent to kill right from the start? Was it his intent to do serious bodily injury right from the start? Because if he had waited maybe a half hour, an hour later, Jimmy Scanlon would have been gone. This wouldn't be a homicide case. Jimmy Scanlon would still be living. I think the Defendant learned a lesson from [J.M.] in that case, that Rape case. That lesson was, don't leave any witnesses. Don't leave anybody behind that can testify against you.

App. at 779-80.

During deliberations the jury asked:

> If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?

Id. at 802. The trial judge answered:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter

> that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right.

Id. at 802-03.

Several hours later, the jury asked to see the docket entries for Rompilla's prior convictions for the purpose of ascertaining Rompilla's prior sentence. The judge denied the request, and the following exchange took place:

> Juror No. 3: . . . we want to know if it was – the sentence was – if he got released on behavioral –
>
> Foreman: It was commuted in any way, the original sentence.
>
> Court: Well, that we can't give you.
>
> Prosecutor: You can't tell them.

Id. at 823-24.

The next day, after two more hours of deliberation, the jury asked:

> Was the Defendant offered any type of rehabilitation either while in prison or after his release from prison?

Id. at 842. The following colloquy then occurred:

> Court: Well, I'm sorry to say, I can't answer that. I can only tell you that you're going to have to make your decision based upon the evidence that was presented and in accordance with the

> Law with respect to Sentencing Hearing. First of all, I couldn't even answer it if I wanted to or if I could, I don't know.
>
> Foreman: Could I change the question to the point that is – isn't rehabilitation available in prison?
>
> Court: Well, again, I would like to even answer that, and I can't. You're going to have to rely upon your own knowledge of that aspect if, indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be quite frank with you, is not an issue before – before you with respect to the Law that it's a decision that you must make. I can understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find. All right.

Id. at 842-43. Three hours later the jury returned a sentence of death.

The PCRA court found that *Simmons* did not apply because the prosecutor did not argue future dangerousness. App. at 2025. The District Court similarly found that a "fair reading of [the prosecutor's summation] leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness," but rather upon Rompilla's "despicable, savage and cowardly beating" of the victim. *Rompilla*, 2000 WL 964750, at *15. The District Court concluded that although a "close issue," the state supreme court's decision was not an unreasonable application of federal law. *Id.*

C.

As noted, Rompilla relies on both the "contrary to" and "unreasonable application" prongs of 28 U.S.C. § 2254(d)(1). We will discuss each prong separately.

1.

A result is "contrary to" a Supreme Court holding if the state court "contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result." *Id.* at 405-06, 120 S.Ct. 1495. *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). This prong is not met here because the Pennsylvania Supreme Court applied the holding of *Simmons* and because the facts of *Simmons* and the present case are materially distinguishable.

Rompilla argues that the state supreme court's decision is "contrary to" *Simmons* because the state supreme court did not inquire whether there was "a 'reasonable likelihood' that parole and future dangerousness affected the sentencing decision." Rompilla Br. at 42 (citing *Simmons,* 512 U.S. at 170, 114 S.Ct. 2187). We reject this argument. Neither the *Simmons* plurality nor Justice O'Connor's concurrence stated that the test for entitlement to an instruction on parole ineligibility hinges on whether there is a reasonable likelihood that future dangerous [sic] might figure in the jury's verdict. Rather, the *Simmons* plurality opinion referred to the concept of "reasonable likelihood" in considering a different question – whether, once future dangerousness was put at issue, there was a "reasonable likelihood" that a jury instruction

"directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning" dispelled any misunderstanding that the jurors might have had as to the meaning of life imprisonment. *Simmons,* 512 U.S. at 169-70, 114 S.Ct. 2187 (citing *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

Rompilla contends that the prosecution necessarily put his future dangerousness at issue by presenting evidence of his prior criminal conduct to establish the aggravating factor that he had a significant history of felony convictions. According to Rompilla, the state supreme court rendered a decision that was "contrary to" *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) and *Ramdass v. Angelone,* 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000), when it rejected this argument on the "formalistic" ground that this aggravator concerns past conduct rather than future behavior. Rompilla Br. at 42. This argument is also meritless. It overlooks the scope of Justice O'Connor's *Simmons* concurrence, which, as noted, can reasonably be read as focusing on the prosecution's arguments, not the inferences that arise from the facts that are proven. On this view, proving past crimes that may cause jurors to worry about future dangerousness is quite different from arguing that a defendant presents a future threat.

In addition, *Skipper* does not hold or even state that proving prior felony convictions is tantamount to arguing that a defendant presents a future threat for *Simmons* purposes. In *Skipper,* the Court held that the capital defendant's right to present all relevant mitigating evidence at the sentencing stage of the trial was violated by the state court's refusal to admit evidence that the defendant had made a good adjustment to jail during the time

between his arrest and the trial. Thus, *Skipper* had nothing to do with an instruction on parole ineligibility.[21]

Rompilla's reliance on *Ramdass* is also misplaced. Not only does *Ramdass* post-date the decision of the Pennsylvania Supreme Court, but *Ramdass* does not address the question of when future dangerousness is sufficiently put in issue to require an instruction on parole ineligibility. In *Ramdass,* the prosecution expressly argued future dangerousness as an aggravating circumstance, and thus that point was not disputed. *Ramdass,* 530 U.S. at 161, 120 S.Ct. 2113. Instead, the issue in *Ramdass* was whether the defendant was eligible for parole at the time that was relevant for *Simmons* purposes. *See id.* at 166-68, 114 S.Ct. 2187.

Third, Rompilla argues that his case is "materially indistinguishable" from *Simmons,* but we disagree. In *Simmons,* as noted, the prosecution expressly argued that the defendant posed a future threat, stating that "a verdict for death would be 'a response of society to someone who is a threat. Your verdict will be an act of self-defense.'" *Simmons,* 512 U.S. at 157, 114 S.Ct. 2187. In this case, by contrast, the Commonwealth made no specific references

[21] Rompilla refers to the *Skipper* Court's statement that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." 476 U.S. at 5, 106 S.Ct. 1669. If this dictum is true – that people will inevitably draw inferences of probable future behavior from evidence of past conduct – it may argue against drawing the line suggested in Justice O'Connor's *Simmons* concurrence between cases in which the prosecution argues that a defendant presents a future danger and cases in which the facts give rise to an inference of future dangerousness. But that plainly does not make the decision of the Pennsylvania Supreme Court in this case "contrary to" *Skipper,* which was not even a *Simmons* case.

to any possible future conduct by the defendant. We thus hold that the decision of the Pennsylvania Supreme Court was not "contrary to" *Simmons.*

2.

Rompilla next contends that the state supreme court's decision represents an "unreasonable application" of *Simmons,* but while we agree with the District Court that the application of *Simmons* to the present case would be "close" if we were exercising plenary review, we are convinced that the state supreme court's decision was reasonable.

Rompilla maintains that the state supreme court's decision was unreasonable because its opinion did not discuss all of evidence on which he relies in arguing that his future dangerousness was sufficiently put at issue during the penalty phase of his trial. Rompilla Br. at 45. As we have already explained, however, 28 U.S.C. § 2254(d)(1) calls upon us to decide whether the adjudication of a claim on the merits in state court "resulted in a decision" that "involved an unreasonable application of . . . clearly established Federal law." This standard applies even when a claim is adjudicated on the merits without any discussion at all. *See Weeks,* 528 U.S. at 237, 120 S.Ct. 727; *Chadwick v. Janecka,* 312 F.3d at 606. Accordingly, we must look to the reasonableness of what the state supreme court decided, not the detail included in its opinion.

Rompilla argues that the prosecution raised the issue of future dangerousness in its closing by stating that Rompilla had "learned a lesson" from the prior rape, namely, that he should not leave any witnesses and by

repeatedly asking the jury whether the similarities between the rape and his murder of Scanlon were not "frightening." Rompilla contends that these comments painted a picture of him as a "hardened, frightening, violent recidivist who, if ever released, would commit additional violent crimes and would not 'leave any witnesses.'" Rompilla Br. at 34-35.

We have given this argument careful consideration, but in the end it does not persuade us that the difficult standard of § 2254(d)(1) is met. Reading the Commonwealth's remarks in the context of the entire sentencing proceedings, it appears to us that the Commonwealth did not argue future dangerousness. In her emotional closing argument at the penalty phase, defense counsel argued over and over that, although the jury had found the defendant guilty, they must have had some doubts about his guilt in view of the evidence and that they should therefore not impose a sentence of death. She stated:

> You, as a Jury, convicted him of First Degree Murder. You convicted him, in your minds, beyond a reasonable doubt, but you must have some doubt. There has got to be some doubt there with no eye witness, with circumstantial evidence. . . .
>
> So I know that you have to have some doubt as to what actually happened that night. We may never know what actually happened that night. . . .
>
> Don't you want to be sure before you condemn that man to die because don't fool yourselves. A death sentence is death. . . . No more questions after that. . . .

> I saw you all struggling with this. I saw it Monday night at 10:00 o'clock when we let you go for the evening. You looked tired, you looked nervous, and you looked like you've been struggling. . . . [I]f you're struggling with it, the fact that you had some doubt should also stay in your mind, now. If there was any doubt, and I submit to you that there has to be some doubt. There has to be. You don't know what happened. You'll never know exactly what happened. There's got to be some doubt here. . . .
>
> What if you're wrong? Can you live with that?. . . .
>
> You've rendered what you felt was a just verdict. I have no quarrel with you, that was your job, you came back with a verdict but none of you can tell me that you have no doubts and if you have a doubt, then you better think very, very, carefully about what you're going to do here. . . .
>
> Don't take a chance that you may be making a wrong decision that you can't live with. Please, spare his life, thanks.

App. 767-774.

The prosecutor's remarks upon which Rompilla now relies came in response to these defense comments suggesting that the jury should still have doubts about the defendant's guilt. Seeking to dispel any such doubts, the prosecutor's obvious point in stressing the similarities between the circumstances of the rape for which Rompilla had previously been convicted and the Scanlon murder was to convince the jury that the same man had committed both crimes. Although the prosecutor at times termed the similarities between the two crimes "frightening," it

seems clear that he did not use this term to suggest that Rompilla was "frightening" in the sense that he posed a future threat, but simply that the similarities were, as he more aptly put it at another point, "astounding." That his argument did not go to future dangerousness is illustrated by the fact that many of the features of the two crimes that he highlighted – both occurred at a bar, both took place at around closing time, and in both instances the perpetrator used a taxi – are not features that naturally suggest future dangerousness. The prosecutor's further comment that Rompilla had learned a lesson from the rape, i.e., that he should not leave any witnesses, came immediately after this litany of similarities, and the comment seems to have had two likely purposes: to explain why there was no eyewitness to the most recent crime and to explain why the two crimes differed in the important respect that one involved a killing and the other did not.

In any event, even if this interpretation of the prosecutor's comments is incorrect and even if they were meant to *imply* that Rompilla would present a future danger if he was ever released from prison, the fact remains that the prosecutor never actually argued that Rompilla presented a future threat. Concluding that these facts did not bring the case within the holding of *Simmons,* as set out in the controlling concurrence, is by no means "unreasonable." Particularly in view of the fact that the Justices who endorsed the controlling concurrence in *Simmons* apparently felt that it was important to draw the line where they did, rather than approving the arguably broader reach of the plurality, the state court's failure to extend *Simmons* to situations in which the prosecution does not

argue future dangerousness was not an "unreasonable application" of *Simmons.*[22]

Rompilla also argues that the state supreme court's decision is an unreasonable application of Supreme Court law because it "flies in the face of" the state court's prior decisions regarding future dangerousness and prior criminal history and thus violates the Eighth and Fourteenth Amendment requirements that capital sentencing be applied consistently and with an even hand (citing *Eddings v. Oklahoma,* 455 U.S. 104, 126, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Gardner v. Florida,* 430 U.S. at 349, 361, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)). Rompilla Br. at 44. In making this argument, Rompilla points to the passage in the state supreme court opinion addressing his argument that his future dangerousness was put at issue for *Simmons* purposes by the prosecution's effort to prove as an aggravating circumstance that he had a significant history of violent felony convictions. *Rompilla-2,* 721 A.2d at 795. Rejecting this contention, the state supreme court stated that "this aggravating circumstance only addresses Appellant's *past* conduct, not his *future* dangerousness." *Id.* Rompilla attacks this reasoning on the ground that the underlying rationale for this aggravating circumstance is

[22] Rompilla points to the testimony regarding his parole status and the lack of rehabilitative services as indicating that his future dangerousness was an issue for the jury. This evidence was brought out by defense counsel on direct examination of Rompilla's witnesses and was not argued by the Commonwealth. Rompilla also points to the jury's questions regarding parole and future dangerousness. Although the questions may demonstrate that the jury did not know the meaning of "life" imprisonment, *see Simmons,* 512 U.S. at 170 n. 10, 114 S.Ct. 2187; *id.* at 178, 114 S.Ct. 2187 (O'Connor, J., concurring); *Rompilla-2,* 721 A.2d at 795 (Flaherty, C.J., dissenting), a jury's uncertainty as to parole ineligibility is insufficient to require an instruction under *Simmons.*

that a history of violent felony convictions is a "barometer of future danger." Rompilla Br. at 44. He therefore contends that the state supreme court's holding in the present case violates the principle that a state must administer its death penalty statute evenhandedly. There is no merit in this argument.

The constitutional principle on which Rompilla relies demands consistency in a state's treatment of its capital cases, and we have not been presented with any evidence that Pennsylvania does not apply the *Simmons* standard evenhandedly. On the contrary, it appears to us that Pennsylvania has uniformly required a *Simmons* instruction when the prosecutor specifically raised the issue of future dangerousness, *see, e.g., Commonwealth v. Trivigno,* 561 Pa. 232, 750 A.2d 243, 252-54 (2000) (prosecutor asked jury to use prior convictions as a "weather vane looking into the future" and a "determinant of where [the defendant] is going, not just where he's been"); *Commonwealth v. Chandler,* 554 Pa. 401, 721 A.2d 1040, 1046-47 (1998) (prosecutor asked jury to "stop [the defendant] from ever killing another woman again"), and has not required the instruction when the prosecutor only presented evidence of prior convictions. *E.g., Commonwealth v. Robinson,* 554 Pa. 293, 721 A.2d 344, 355 (1999) (prosecutor only made references to defendant's past dangerousness); *Commonwealth v. King,* 554 Pa. 331, 721 A.2d 763, 779 (1998) (prosecutor only made reference to defendant's past violent acts); *May,* 710 A.2d at 47 (prosecutor did not argue future dangerousness). *See also Robinson,* 721 A.2d at 355 (recognizing that the court requires a *Simmons* instruction only when future dangerousness is "expressly implicated").

Rompilla does not dispute the fact that Pennsylvania applies the *Simmons* rule evenhandedly. Instead, his

complaint is that there is, in his view, a logical inconsistency between the rationale for the aggravator in question and the Pennsylvania Supreme Court's interpretation of *Simmons.* This argument, however, is invalid for numerous reasons. First, the constitutional principle on which Rompilla relies concerns consistency in the treatment of cases, not logical consistency in all aspects of a state's death penalty jurisprudence. Second, Rompilla has not identified a logical inconsistency. The Legislature may have adopted the aggravating circumstance in question wholly or partially for the purpose of retribution, not to protect the public from those defendants who are likely to pose a threat. Moreover, even if this aggravating circumstance was intended solely to serve as a "barometer of future danger," there is nothing illogical about taking the position that, while proof of a defendant's past history of violence may tend to suggest that the defendant may pose a future danger if released, the jury should be instructed about parole only in those cases in which there is a particularly strong reason to think that concern about future danger will decisively influence the jury's sentence. Informing a jury about the correctional consequences of a verdict is an exception from usual practice, and it is not illogical to confine this exception to narrow circumstances. Third, if there is a logical inconsistency, it flows from the fine line drawn by the controlling opinion in *Simmons,* not from the Pennsylvania Supreme Court. For all these reasons, Rompilla's argument is rejected.

IX.

For the reasons set out above, the decision of the District Court is reversed with respect to the ineffective

assistance of counsel claim and affirmed as to the accomplice liability instruction and parole ineligibility claims.

SLOVITER, Circuit Judge, dissenting.

I respectfully dissent from the well-crafted (albeit, in my view, flawed) decision of the Majority that, in effect, reinstates the death penalty for appellant Ronald Rompilla. There are two claims that I believe warrant the grant of a writ of habeas corpus. One, which was the basis for the District Court's grant of the writ requiring a new sentencing hearing, is the shocking ineffective assistance of counsel at the sentencing phase. Rompilla's trial counsel failed to obtain Rompilla's school, medical, court and prison records as part of their investigation and, as a result, failed to present to the jury any mitigating evidence regarding Rompilla's "childhood, alcoholism, mental retardation, or possible organic brain damage." *Rompilla v. Horn,* 2000 WL 964750, at *9. Counsel also failed to communicate with two of Rompilla's siblings who lived nearby and would have advised counsel of evidence that Rompilla was raised by alcoholic parents in a cold, violent, frightening and abusive home.

The standard for establishing ineffective assistance of counsel was set forth in the Supreme Court's seminal decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* was applied in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), to the issue of the investigation required of counsel at the penalty phase. Holding, in "a straightforward application of *Strickland*," that trial counsel was ineffective because he "failed to discover or failed to offer" certain mitigating evidence, *id.* at 393, 120 S.Ct. 1495, the Court held that the Virginia Supreme

Court decision denying the requested writ of habeas corpus was both contrary to and involved an unreasonable application of *Strickland. Id.* at 391, 120 S.Ct. 1495.

As I will discuss, the Pennsylvania Supreme Court's failure to grant relief to Rompilla because of trial counsel's grossly inadequate investigation also was both contrary to and involved an unreasonable application of *Strickland* and *Williams.* The Majority's decision overturning the District Court's grant of a writ of habeas corpus and rejecting Rompilla's claim of ineffective assistance of counsel is inexplicable in light of the Supreme Court's most recent application of *Strickland* in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), under circumstances remarkably similar to those presented here.

The second ground on which I would grant a writ of habeas corpus is the refusal of the trial judge to advise the jury as to the meaning of a life sentence in Pennsylvania, notwithstanding the jury's questions on that issue on three different occasions during its sentencing deliberations. As a result, the jury imposed a death sentence, rather than a life sentence, without ever being told by the trial court in response to the jury's question that a life sentence in Pennsylvania means life without parole. The Pennsylvania courts' rule in this respect is, in my judgment, an unreasonable application of the Supreme Court's decisions in *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002). Because this appeal is literally, not figuratively, a matter of life or death, I elaborate on each of these grounds.

I.

Ineffective Assistance of Counsel

There is no need to restate the facts of this case and its procedural history, both of which are fully and accurately set forth in the majority opinion. The ineffective assistance of counsel claim is before us on the Commonwealth's appeal.

The applicable legal principles are not in dispute. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), the federal court may grant a petition for habeas corpus only if the state's adjudication resulted in a decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or § 2254(d)(2), the state decision was based on an unreasonable determination of the facts. Both parties agree that it is section 2254(d)(1) that is at issue here. *Strickland* supplies the standard for addressing a claim of ineffective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. 2052.

In *Williams*, the Supreme Court held that "the rule set forth in *Strickland* qualifies as clearly established federal law, as determined by the Supreme Court." 529 U.S. at 391, 120 S.Ct. 1495 (internal quotation marks omitted). The Court further held that a state decision is "contrary to . . . clearly established" federal law if, *inter alia*, "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406, 120 S.Ct. 1495. As the decision in *Williams* made clear, relief should be granted under the "unreasonable application" clause "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1495. *Williams* instructs that "clearly established Federal law" refers "to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." 529 U.S. at 412, 120 S.Ct. 1495. The Court in *Wiggins* decided the ineffectiveness of counsel claim before it using the standards articulated in *Strickland*, noting that *Williams* did not create new law, but illustrated "the proper application" of these standards. 123 S.Ct. at 2535. Because *Williams* fell squarely within *Strickland*, *Williams*, 529 U.S. at 390, 120 S.Ct. 1495, and *Wiggins* was decided pursuant to the same standards of *Strickland*, these two later cases demonstrate how *Strickland* should be applied.

Under *Strickland*, a petitioner seeking to prove ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. To make the requisite showing of deficiency, the petitioner

must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. Among counsel's responsibilities with regard to the sentencing phase is the "obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396, 120 S.Ct. 1495. Coincidentally, in both *Williams* and *Wiggins*, two of the principal Supreme Court cases dealing with ineffective assistance of counsel, the Court found that a writ of habeas corpus was appropriate because the failure of counsel to conduct the requisite thorough investigation was objectively unreasonable and prejudicial.

In *Williams*, the Court noted that counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395, 120 S.Ct. 1495. The Court continued,

> Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abuse foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. (footnotes omitted). The Court, noting that mitigating evidence "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," *id.* at 398, 120 S.Ct. 1495, concluded that

"the Virginia Supreme Court rendered a 'decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,' thereby violating Williams' constitutional right to the effective assistance of counsel as defined in *Strickland*." *Id.* at 399, 120 S.Ct. 1495.

Our court in *Jermyn v. Horn*, 266 F.3d 257 (3rd Cir.2001), a decision following *Williams*, concluded that Jermyn's trial counsel was ineffective "because he failed to conduct an investigation, failed to prepare adequately for the penalty phase of Jermyn's trial, and consequently, failed to present substantial mitigating evidence that would have directly undercut the state's penalty-phase case." *Id.* at 306. We explained,

> Counsel failed to investigate the circumstances surrounding Jermyn's childhood, even though counsel admitted at the PCRA hearing that he was aware that Jermyn had claimed that he was abused as a child. Dr. Phillips told counsel before the original trial that Jermyn had been abused as a child, and told counsel that the abuse was a critical component to understanding Jermyn's mental illness. Nonetheless, counsel did not attempt to locate any fact witness who witnessed the abuse and could testify about it specifically.

Id. at 306 (internal citation omitted).

We stated that if counsel had investigated further "he would have obtained powerful and, as the PCRA court noted, 'credible,' testimony" from witnesses who presented testimony at the PCRA hearing that

> was replete with first-hand accounts of instances of mental and physical abuse that Jermyn suffered at the hands of his father. . . . Counsel

> could have used that testimony to provide the jury with critical insight into the root of Jermyn's mental illness. The [witnesses'] testimony also offered valuable insight into Jermyn's mother's role in the household, and how she failed to intervene on Jermyn's behalf.

Id. at 306-07. Counsel in *Jermyn* "also did not seek to obtain records from the school which corroborate the fact that Jermyn was abused as a child, and that his mother did not intervene on his behalf." *Id.* at 307. Based on the ineffective assistance of counsel for this and other reasons set forth in that opinion, we affirmed the District Court's grant of a writ of habeas corpus.

With these cases as a background, we turn to the conduct of Rompilla's trial counsel, informed by the Supreme Court's recent decision in *Wiggins*.

Counsel in this case were two public defenders. Frederick Charles, the senior of the two, was a veteran attorney with significant criminal trial experience as a defense lawyer, who never before tried a capital case. His role here was as the principal counsel for Rompilla at the guilt phase. His colleague, Maria Dantos, who was two and a half years out of law school at the time of the trial, App. at 1060-61, 1065-67, was given the responsibility of handling the penalty phase. She had the role of making the arguments and presenting witnesses at the penalty phase, under Charles' supervision. This was her first capital case and first homicide trial. Counsel's devotion to Rompilla's cause has not been challenged. They impressed the District Court as "intelligent, diligent and devoted to their task of representing [Rompilla]." 2000 WL 964750, at *9. It is their competence and effectiveness that are at issue.

The PCRA court determined that "counsel had a reasonable basis for proceeding as they did during the penalty phase," Maj. Op. at 244 (quoting App. at 2028), because counsel retained three health professionals, two of whom, Drs. Cooke and Sadoff, are "recognized experts in the fields of psychiatry and psychology," *id.*, who administered tests, evaluated Rompilla and reported back to defense counsel that they found that nothing could be used in mitigation. Counsel also obtained an evaluation by a local psychiatrist, Dr. Paul Gross, who found nothing that would have been beneficial in the penalty phase.

In affirming the PCRA court's determination rejecting, *inter alia,* Rompilla's claim of ineffective assistance of counsel, the Supreme Court of Pennsylvania concluded that counsel "reasonably relied upon their discussions with [Rompilla] and upon their experts to determine the records needed to evaluate mental health and other potential mitigating circumstances." *Commonwealth v. Rompilla,* 554 Pa. 378, 721 A.2d 786, 790 (1998).

In accepting the Pennsylvania courts' conclusions, the Majority also concludes that "trial counsel conducted an extensive investigation for mitigation evidence," Maj. Op. at 250-251, because trial counsel retained three well-qualified mental health experts to examine Rompilla. The Majority recognizes that counsel failed to seek out school, medical, police, and prison records, which they recognize "contain useful information about Rompilla's childhood home environment, his mental problems, and his problems with alcohol," Maj. Op. at 252. Nevertheless, the Majority characterizes counsel's decision as "reasonable" because Charles, who "had the final say on every issue in the case," Maj. Op. at 252, "did not think that obtaining those records would have represented a sound allocation of his

office's resources." Maj. Op. at 252. The question before us is not whether we believe counsel's explanation for his failure to obtain the relevant records, ~~some of~~ which were available across the street from the trial and others in the same building as the trial, was "reasonable" but whether his failure to take such action to save money was objectively reasonable and consistent with his obligation to conduct a thorough investigation.

A comparison of counsel's actions in this case with those of counsel in *Wiggins,* where the Supreme Court concluded that counsel was ineffective, is instructive.

Wiggins, who was represented by two public defenders, was convicted of capital murder in 1989 by a Maryland judge, and the jury sentenced him to death the same afternoon. A divided Maryland Court of Appeals affirmed. He filed a motion for post-conviction relief in which he challenged the adequacy of his representation at sentencing, "arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background." *Wiggins,* 123 S.Ct. at 2532. At the PCRA hearing, a licensed social worker testified regarding an elaborate social history in which he chronicled Wiggins' "bleak life history" based on state social services, medical and school records and interviews with Wiggins and numerous family members. *Id.* at 2533. His mother, a chronic alcoholic, frequently left him and his siblings alone for days, forcing them to beg for food and to eat paint chips and garbage. Her abusive behavior included beating the children and having the children present while she engaged in her active sexual life. Wiggins suffered severe physical and sexual abuse at the hands of his mother and father and while in the care of a series of foster parents. The father in

his second foster home repeatedly molested and raped him. In one foster home, he was gang raped on more than one occasion and was sexually abused by his supervisor on a job corps program. *Id.*

Wiggins' counsel decided to focus their request for post-conviction relief on retrying the factual case and disputing Wiggins' direct responsibility for the murder. Notwithstanding that counsel, as a practical matter, did not compile a social history of Wiggins, the state post-conviction court concluded that when the decision not to investigate is a matter of trial tactics, there is no ineffective assistance of counsel. *Wiggins,* 123 S.Ct. at 2533. The Maryland Court of Appeals affirmed the denial of relief on the ground that trial counsel, although they knew of Wiggins' unfortunate childhood and had available both the presentence investigation report and the more detailed social service records, "made a reasoned choice to proceed with what they thought was their best defense." *Id.* at 2533-34.

In holding that Wiggins' trial counsel provided constitutionally ineffective assistance of counsel and that the Maryland Court of Appeals unreasonably applied *Strickland* in failing to so conclude, the Supreme Court specified why counsel's conduct was defective. The Court noted that trial counsel had limited their investigation to two sources. One was the presentence investigation report (PSI) prepared by the Division of Parole and Probation, "which included a one-page account of Wiggins' 'personal history' noting his 'misery as a youth,' quoting his description of his own background as 'disgusting,' and observing that he spent most of his life in foster care." 123 S.Ct. at 2536 (quoting PSI). The other source counsel examined was the records kept by the Baltimore City Department of

Social Services (DSS) documenting Wiggins' various placements in the state foster care system. The Supreme Court noted that counsel chose not to expand their investigation beyond those records even though the Public Defender's Office made funds available for the retention of a forensic social worker. *Id.* The Supreme Court thus concluded that, "counsel abandoned their investigation of [Wiggins'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 2537.

The Supreme Court characterized the Maryland Court of Appeals' application of *Strickland*'s governing legal principles as "objectively unreasonable." *Id.* at 2538. That court merely assumed that counsel's investigation was adequate and failed to focus on counsel's failure to engage in further investigation, despite the information in the DSS records with respect to Wiggins' mother's alcoholism, his shuttling from foster home to foster home, and his lengthy absences from school. Further investigation would have discovered the sexual abuse that was later revealed during state post-conviction proceedings. *Id.*

The investigation by Rompilla's lawyers, albeit different from that conducted by Wiggins' lawyers, was similarly defective. They did not present at the penalty phase evidence that was available, had they investigated thoroughly, and which was presented for the first time at Rompilla's PCRA hearing. Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought

violently, and on at least one occasion his mother stabbed his father. App. at 1408, 1416-17, 1450, 1460, 1487, 1492, 1495-96. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags. These facts were not presented at the sentencing hearing because counsel did not know them and, more important for our purposes, failed to make the reasonable investigation that would have uncovered them.

Rompilla's counsel presented the testimony of three of Rompilla's siblings at the sentencing hearing but did not interview two of Rompilla's sisters, Barbara Harris and Randi Rompilla, both of whom lived nearby, prior to sentencing, App. at 1422, 1436-37, 1489-90, and did not present their testimony. Further, Rompilla's brother, Nicholas Rompilla, Jr., who had briefly testified at the sentencing hearing, claimed at the post-conviction hearing that Rompilla's counsel only asked him about the three months prior to the offense and did not ask him about Rompilla's childhood. App. at 1462-63. We must then ask whether it was unreasonable for counsel not to have interviewed all of Rompilla's siblings. It was these family members who testified at the PCRA hearing that, among other things, their parents were alcoholics and their

mother drank while pregnant with Rompilla. They detailed the physical abuse referred to above. Rompilla was told he was stupid and would not amount to anything; they also testified that Rompilla was a "very nervous child," who kept everything inside. App. at 1407-13, 1424, 1451, 1480-84, 1487-88.

It was Rompilla's PCRA counsel, not trial counsel, who presented evidence from two mental health experts, Drs. Armstrong and Crown, both of whom evaluated and tested Rompilla post-conviction. Their evaluations included neuropsychological testing, review of Rompilla's school, medical, and prison records (none of which had been examined by trial counsel), and review of declarations by Barbara Harris, Darlene Rompilla, and Nicholas Rompilla, Jr., App. at 1562-64, 1567, 1704, 1736, 1741, 1743, 1745; Commonwealth Response to Habeas Pet., Exh. B, C, & Pet., Exh. B, C, & D. The doctors stated that Rompilla's low IQ and achievement test results documented in his school records, his medical history, and his abusive background were all "red flags" indicating that further objective evaluation was necessary. App. at 1614, 1686, 1692-93, 1739, 1743, 1745-46.

These doctors determined that Rompilla suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions: impulsivity, reasoning and judgment, ability to make sense out of experience, ability to draw conclusions, ability to accept long-term consequences of immediate behavior, emotional liability [sic], concentration, mental flexibility, recalling and integrating information, controlling behavior, and controlling motor movements (hands). App. at 1572-74, 1577-79, 1581-84, 1617-18, 1707, 1717-18, 1721-22, 1726, 1728-33. The doctors believe Rompilla's problems

relate back to his childhood, and were likely caused by fetal alcohol syndrome. App. at 1601-02, 1606, 1615. They concluded that Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. App. at 1616, 1687-88, 1735-36.

The PCRA court, applying Pennsylvania's three-prong standard for ineffective assistance of counsel claims, stated that although Rompilla's claim arguably had merit because he was "entitled to have relevant information of mental infirmity" presented to the jury, App. at 2028, "[g]iven the fact that three health care professionals, all of whom were experienced forensic experts, had provided opinions to defense counsel, and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions." App. at 2030.

The PCRA court accepted Rompilla's trial counsel's testimony that they had spoken to family members in detail and that the family had not revealed the information that was claimed in the PCRA hearing. App. at 2029-30. The court also noted that Rompilla "made contradictory statements" to counsel during their representation, and that he had not indicated he had any mental problems or alcoholic blackouts. App. at 2029. The PCRA court concluded that counsel was reasonable in believing that seeking mercy was the only available strategy, and found that there was a reasonable basis for counsel's actions. App. at 2029-30.

The Pennsylvania Supreme Court, also citing the state's three-prong test for ineffective assistance of counsel claims, agreed with the PCRA court's conclusion that

counsel was effective, concluding without discussion that counsel acted reasonably. *Rompilla,* 721 A.2d at 789-90. The Court, relying on the conclusions of the PCRA court, noted that counsel had investigated Rompilla's mental health by retaining three experts and reasonably relied on the experts and on their own discussions with Rompilla to determine the records needed to evaluate Rompilla, and it effectively adopted the PCRA court's credibility determination of trial counsel's conversations with family members, leading it to conclude that counsel had not failed to investigate. The Court rejected Rompilla's argument that the experts received inadequate information because of counsel's failure to investigate his background. *Id.*

An examination of the record shows that Rompilla's lawyers did less investigation into mitigating evidence than did counsel for Wiggins. The Pennsylvania Supreme Court, in affirming the decision of the PCRA court denying post-conviction relief, stated that there was no "arguable merit" in Rompilla's claim that trial counsel failed to investigate Rompilla's family background, *Rompilla,* 721 A.2d at 790. The Court never referred to counsel's failure to speak to two of Rompilla's siblings, Randi Rompilla and Barbara Harris, who lived nearby and who attended the trial. Dantos, when questioned at the post-conviction hearing, said that she didn't remember whether she spoke to those sisters or not, App. at 1099-1100, but those sisters testified at the PCRA hearing that they would have testified at the penalty phase, if asked, and would have told counsel about Rompilla's dysfunctional background, if they had been asked.

Counsel certainly had reason to inquire further as to the availability of other family members. Counsel was aware that the family members whom she interviewed did

not know a great deal about Rompilla. Charles testified that the family said "they hardly know him." One said, "He was in a reformatory. He's been away the whole time. We didn't know him well." Even Dantos testified that "[T]he overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody . . . ," App. at 1094, and that the family had "limited knowledge of their brother." App. at 1098. Dantos stated that "it seemed pretty clear that [the family members she interviewed] didn't feel as though they knew Ron very well," App. at 1166. It is thus apparent that trial counsel had sufficient leads, as in *Wiggins,* to investigate further to find family members who did know more about Rompilla's youth. Counsel never explained why she did not interview the other sisters.

The Pennsylvania Supreme Court, in rejecting Rompilla's PCRA claim that counsel did not obtain records that would have aided the mental health experts who evaluated him, agreed with the PCRA court that counsel reasonably relied on their experts to determine the record needed to evaluate his mental health. *Rompilla,* 721 A.2d at 790. Counsel cannot so easily shed their constitutional obligations. Moreover, it appears that counsel directed the experts to the guilt phase, giving no or little attention to the penalty phase.

Rompilla's lawyers sought opinions from the mental health experts they hired primarily about Rompilla's "mental infirmity or mental insanity for the guilt phase." App. at 1069-71. Although Dantos stated that she also instructed the experts to see if there was any issue "to possibly use in mitigation any mental infirmity," *id.* at

1067, Dr. Gross' report says that counsel's instruction as to the evaluation was "to determine Mr. Rompilla's mental state during the time of the alleged charges." *Id.* at 1069. That is supported by Dantos' own testimony that the mental health professionals employed by the defense were asked to look into Rompilla's "mental state at the time of the commission of the offense." App. at 1071. Counsel did not themselves investigate Rompilla's medical history, drug use, birth trauma or developmental delays, did not request or instruct the medical experts they retained to investigate those issues, and the medical experts did not make any such investigation. Counsel did not provide Drs. Sadoff and Cooke, who saw Rompilla, with any of the records that would have shown Rompilla's long history of alcoholism and never themselves investigated the records that would have shown that history.

Rompilla's counsel did not seek or obtain any of Rompilla's school records and therefore did not learn that Rompilla was in special education, left school in the ninth grade, and that his abilities had not advanced beyond the third grade, suggesting mental retardation because of a possible organic brain disorder. *Rompilla,* 2000 WL 964750, at *4-*7. Because they did not obtain these records, they did not provide them to the health experts they retained.

The PCRA court, on which the Pennsylvania Supreme Court relied, did not explain its finding that the school records were "not entirely helpful" beyond noting that Rompilla's IQ can "simply be part of the Bell Curve and a learning disability is not necessarily caused by an organic defect," a statement made by Dr. Cooke, one of the experts retained by Rompilla's trial counsel. App. at 2029. Trial counsel failed to investigate further into Rompilla's retarded

level IQ scores. Indeed, Dr. Cooke further testified at the PCRA hearing that had he been provided with Rompilla's IQ scores at trial he would have done testing for brain damage, looked for evidence of prenatal damage to Rompilla's brain, and looked at the family situation, whether it was an abusive situation, or dysfunctional situation. App. at 1800-01.

Counsel did not investigate records from the Pennsylvania Department of Corrections where Rompilla was incarcerated for 14 years and therefore did not learn that his adult scores on achievement tests were very low, his spelling and arithmetic achievement scores were below 96% of the population, App. at 1009, and that psychological tests performed showed serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales. *See* App. at 1595-99. The court records, which counsel did not investigate, were used by the Commonwealth as an aggravating circumstance and were in the same courthouse where Rompilla's case was tried. Because counsel failed to investigate into Rompilla's prior correctional experience, they did not provide that information to the health experts they retained.

In *Wiggins,* the Supreme Court quoted from the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989), which provide that investigations into mitigating evidence "'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" 123 S.Ct. at 2537 (emphasis in original). Because Wiggins' counsel abandoned the investigation of his background by failing to pursue

evidentiary leads provided in the DSS records, they fell short of these "well-defined norms." *Id.*

As shown by the above, the investigations by Rompilla's counsel were no more thorough, perhaps less, than those found inadequate by the Supreme Court in *Wiggins*. The Majority's attempt to reconcile its conclusion that Rompilla's counsel provided effective assistance of counsel with the conclusion in *Wiggins* that defendant's counsel were ineffective is nothing short of astonishing. The Majority states that "[t]here are critical differences between the conduct of Wiggins's and Rompilla's trial attorneys." Maj. Op. at 257-258. It continues, "Wiggins's attorneys were presented with leads that 'any reasonably competent attorney' would have realized were promising. Rompilla's attorneys had no comparable leads." *Id.*

With due respect to my colleagues on the Majority, the distinction entirely misses the point. If it was ineffective for Wiggins' counsel to fail to follow up the leads they had, was it not even more ineffective, indeed inexcusable, for Rompilla's attorneys to fail to investigate to find the leads that could have been used by the experts they retained or to retain experts to testify at the penalty phase and present a viable case for mitigation? At the brief sentencing hearing, trial counsel called only five witnesses, Rompilla's sister Darlene, older brother Nicholas, Jr., younger brother Robert, sister Sandy Whitby and Aaron, Rompilla's fourteen-year old son. The total examination covered about 26 pages of notes of testimony. The witnesses testified in general that Rompilla was a good family member and never had a problem. As described by the District Court, the "testimony was apparently presented to engender sympathy for [Rompilla]." 2000 WL 964750, at *4. "It seemed to be designed primarily as an emotional

appeal to the jury to show mercy to [Rompilla] – he wasn't as bad as he seemed and his family loved him." *Id.* In lieu of the case trial counsel presented in mitigation, a case that the District Court described as "unreasonably brief and lacking in real substance," 2000 WL 964750, at *4, had they investigated they could have presented a case such as that presented by the PCRA counsel. Rompilla's counsel shifted the responsibility for finding leads to the medical experts, and never even told their experts that they had the responsibility for uncovering that information.

In *Wiggins,* trial counsel made the tactical decision to forego mitigating evidence of Wiggins' dysfunctional background and mental health problems because they believed that Wiggins' "best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency." *Wiggins v. State,* 352 Md. 580, 724 A.2d 1, 15 (1999), a decision the Maryland Supreme Court termed a "deliberate, tactical decision" which, under *Strickland,* should not be second guessed. *Id.* at 15, 17-18. When the United States Supreme Court reviewed that decision under § 2254(d), it held that because counsel's investigation was inadequate, the state court's "subsequent deference to counsel's strategic decision . . . despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable." *Wiggins,* 123 S.Ct. at 2538.

The PCRA court found that Rompilla's counsel "had a reasonable basis for proceeding as they did," App. at 2028, because they employed two experts and obtained an evaluation by another psychiatrist, who also advised counsel that he found nothing that would be beneficial in

the penalty phase. The Pennsylvania Supreme Court agreed that "trial counsel was effective with respect to their investigation and presentation of mitigation evidence." *Rompilla*, 721 A.2d at 790. Notwithstanding the decision in *Wiggins*, the Majority, applying § 2254(d)(1), holds that "the state court's determination that counsel acted reasonably was not 'contrary to' or an 'unreasonable application' of *Strickland*." Maj. Op. at 259.

As noted above, I believe the Majority seriously errs. It is clearly established by both *Williams* and *Wiggins* that counsel or counsel's experts cannot make a reasonable decision at the penalty phase if they do not investigate the relevant facts that could be used in mitigation. In holding that the Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable, Justice O'Connor, in *Wiggins*, stated that counsel's failure to thoroughly investigate made "a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 123 S. Ct[.] at 2538. Therefore the state Supreme Court's holding "reflected an unreasonable application of *Strickland*." *Id.* What was true in *Wiggins* and before that in *Williams* is equally applicable here. It follows that the District Court properly determined that Rompilla's trial counsel did not meet the performance standards required under *Strickland*.

I believe that unde. the circumstances in which counsel presented an inadequate case for mitigation at the penalty phase of a capital sentencing hearing, the prejudice prong of constitutionally ineffective assistance of counsel is clearly met. The Pennsylvania Supreme Court did not reach this issue and therefore we may consider it *de novo*. A reasonable attorney, if aware of the evidence presented at the PCRA hearing following a thorough

investigation, would have done more at sentencing than plead for mercy. As the Court stated in *Wiggins*, "had the jury been confronted with [the] considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." 123 S.Ct. at 2543. Quoting from *Williams*, the Court stated, "we must evaluate the totality of the evidence, both that adduced at trial, and the evidence adduced in the habeas proceeding." *Wiggins*, 123 S.Ct. at 2543, citing *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495. In *Williams*, the Court recognized that the graphic description of the defendant's childhood "filled with abuse and privation, or the reality that he was 'borderline mentally retarded' might well have influenced the jury's appraisal of his morale [sic] culpability." 529 U.S. at 398, 120 S.Ct. 1495 (citation omitted). The Court further stated that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.*

In considering prejudice to Rompilla from his trial counsel's performance, we should look at the totality of evidence adduced at trial as well as that adduced at the state post-conviction hearing where counsel, after a thorough investigation, found the evidence of Rompilla's abusive background, his disfunctional family situation, his low IQ, his meager reading and understanding ability found in the prison records, and the medical evidence of brain disfunction. The jury could certainly have considered this matter as sufficiently mitigating to warrant a different sentence. Therefore, I believe that the Supreme Court of Pennsylvania failed to reasonably apply the *Strickland* standard when it held that Rompilla had not shown ineffective assistance of counsel.

I therefore disagree with the Majority and would affirm the District Court's grant of a writ of habeas corpus because of trial counsel's ineffective assistance of counsel.

II.
Failure to Give a Simmons *Instruction*

Rompilla has cross-appealed from the District Court's denial of a writ of habeas corpus on Rompilla's claim that his right to due process was violated by the state trial court's refusal to inform the jury in response to the jury's inquiries that Rompilla was parole ineligible if sentenced to life imprisonment.

While the jury was deliberating Rompilla's penalty, life imprisonment or death, the jury asked in succession, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" App. at 802. The trial court responded:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I-if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

App. at 802-03.

The jury later requested to examine information with respect to Rompilla's prior sentence. The trial court refused because it was not entered into evidence. The jury foreman clarified that the jury wanted to know the sentence from

Rompilla's prior conviction. The trial court stated that he cannot give that. A juror then asked "if he got released on behavioral . . ." and the foreman added, "It was commuted in any way, the original sentence." App. at 823. As before, the trial court refused to give the requested information. App. at 824.

Finally, the next day, after more deliberation the jury asked, "Was the Defendant offered any type of rehabilitation either while in prison or after his release from prison?" App. at 842. Once again the trial court declined to answer, even after the foreman changed the question to ask "isn't rehabilitation available in prison?" App. at 842. The trial court again refused to provide the information sought by the jury. It was only after the trial court declined to provide the information requested by the jury time after time that the jury returned a sentence of death.

On Rompilla's appeal from the denial of his PCRA petition, the Supreme Court of Pennsylvania rejected Rompilla's contention that due process required that the jury be instructed that in Pennsylvania "life imprisonment means life," ruling as follows:

> Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendant's future dangerousness is at issue. *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998). Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The Court rejected this argument in *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44, 47 (Pa.1998). As stated in that case, this aggravating circumstance only addresses

Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due.[10]

Commonwealth v. Rompilla, 554 Pa. 378, 721 A.2d 786, 795 (1998). In his dissent, Chief Justice Flaherty wrote:

> I believe the majority is in error in its treatment of the issue pertaining to the jury's question about the defendant's parole eligibility. Under *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31, 35-36 (Pa.1998), the court must tell a jury that a life sentence means life without parole, if the defendant requests the instruction and his future dangerousness is at issue. Here, during deliberations in the penalty phase, the jury asked, "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" I view this question as a clear expression of the jury's concern about the defendant's future dangerousness. I would therefore hold that the trial court's refusal to explain the meaning of life without parole constituted error under *Commonwealth v. Clark, supra.* I would therefore reverse the order of the court of common pleas and remand for proceedings consistent with this opinion.

[10] This author [Justice Nigro] agrees with the dissent's position that a *Simmons* instruction should be given in all cases and has previously so stated. *See Clark,* 710 A.2d at 43-44 (Nigro, J., concurring, joined by Flaherty, J. and joined in relevant part by Zappala, J.); *May,* 710 A.2d at 49 (Nigro, J., concurring, joined by Zappala, J.). Under the current state of the law, however, Appellant's argument that he was entitled to the instruction because the Commonwealth argued the aggravating circumstance identified above, is without merit. *See May,* 710 A.2d at 47.

> I would go further and require an explanation of the meaning of a life sentence in all capital cases. There can be no harm in instructing juries that in Pennsylvania appellant would be statutorily ineligible for parole if sentenced to life in prison, but that a life sentence might nonetheless be commuted by the governor. On the other hand, if we do not so instruct, a jury, erroneously believing that a prisoner sentenced to life may be paroled within a period of years, may impose the death penalty for reasons which are not based in law.

Id. at 795-96 (Flaherty, C.J., dissenting).[1]

I believe that the Pennsylvania Supreme Court's analysis of Rompilla's *Simmons* claim was an "unreasonable application" of Supreme Court precedent, specifically *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and *Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), and therefore that it must be reversed under the standards of AEDPA.

[1] I find it difficult to glean much enlightenment from the two cases cited by the Pennsylvania Supreme Court. In *Commonwealth v. Clark,* 551 Pa. 258, 710 A.2d 31 (1998), the Court did not define what it meant to put future dangerousness "at issue" because the question did not arise. (In *Clark* it was not the Commonwealth that argued future dangerousness; rather, the defense argued the opposite, noting that chances of a commuted sentence in Pennsylvania were close to zero; the court gave an instruction defining life imprisonment.) As for *Commonwealth v. May,* 551 Pa. 286, 710 A.2d 44 (1998), its proposition that "[t]he aggravating circumstance of appellant's prior record for violent felonies addressed only appellant's past conduct, not his future dangerousness," is a mere unsupported assertion. *Id.* at 47.

In *Simmons,* the Supreme Court held that the defendant's due process right to answer an allegation against him requires the trial court to instruct the jury that the alternative to the death penalty is life without parole (in states where that is the alternative) if the prosecutor argues that the defendant will pose a danger to others. As Justice Blackmun, who authored the plurality opinion, wrote: "The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Simmons,* 512 U.S. at 171, 114 S.Ct. 2187. In *Shafer v. South Carolina,* 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001), the Supreme Court described *Simmons* as holding that when "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'" *Id.* at 39, 121 S.Ct. 1263 (quoting *Ramdass v. Angelone,* 530 U.S. 156, 165, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (plurality opinion)).

The *Simmons* plurality and Justice O'Connor, concurring, believed there was no question that the prosecutor had made an issue of Simmons's future dangerousness. As a result, the Court had no occasion to define what constitutes making an issue of future dangerousness. That issue was directly addressed eight years later in *Kelly,* an opinion of the Court authored by Justice Souter.

In *Kelly,* the prosecutor stated that he would not argue future dangerousness and "that takes it out of *Simmons* anyhow." *Kelly,* 534 U.S. at 249, 122 S.Ct. 726.

The trial court then denied Kelly's counsel's request for a *Simmons* instruction, saying that the State's evidence went to Kelly's character and characteristics, not to future dangerousness. The South Carolina Supreme Court affirmed the conviction and death sentence, holding that the *Simmons* instruction was not required because future dangerousness was not at issue.

In reversing, Justice Souter stated that the South Carolina Supreme Court's statement that Kelly's future dangerousness was not at issue "is unsupportable on the record before us." *Id.* at 252, 122 S.Ct. 726. He continued, "It is not that the state court failed to pose the legal issue accurately, for in considering the applicability of *Simmons* it asked whether Kelly's future dangerousness was 'a logical inference from the evidence,' or was 'injected into the case through the State's closing argument.'" *Id.* at 252, 122 S.Ct. 726 (internal citations omitted). In support of the appropriateness of this statement of the legal issue, Justice Souter included the following citations and explanatory parentheses: "*Shafer,* [532 U.S.] at 54-55 [121 S.Ct. 1263] (whether prosecutor's evidence or argument placed future dangerousness in issue) [and] *Simmons,* 512 U.S. at 165, 171 [114 S.Ct. 2187], (plurality opinion) (future dangerousness in issue because 'State raised the specter of . . . future dangerousness generally' and 'advanc[ed] generalized arguments regarding the [same]')." *Kelly,* 534 U.S. at 252, 122 S.Ct. 726.

In addressing the trial court's interpretation of the evidence, the *Kelly* Court explained why the trial court erred:

> To the extent that it thought that "[e]vidence that Kelly took part in escape attempts and carried a shank . . . is not the type of future dangerousness evidence contemplated by *Simmons,*" . . .

> it overlooked that evidence of violent behavior in prison can raise a strong implication of "generalized . . . future dangerousness." *Simmons,* [512 U.S.] at 171 [114 S.Ct. 2187]. (And, of course, the state court's reasoning says nothing about the evidence of the crime, or of Kelly's sadism generally, and his mercurial thirst for vengeance.) *A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior,* whether locked up or free, and whether free as a fugitive or as a parolee.

Id. at 253-54, 122 S.Ct. 726 (emphasis added).

In language particularly relevant to this case, the *Kelly* Court stated, "The fallacy of the State Supreme Court's attempt to portray the thrust of the evidence as so unrealistically limited harks back to a comparable mistake by the trial judge, who spoke of the evidence as going, not to future dangerousness, but 'to [Kelly's] character and characteristics.'" *Id.* at 254, 122 S.Ct. 726. The Court continued,

> The error in trying to distinguish *Simmons* this way lies in failing to recognize that evidence of dangerous "character" may show "characteristic" future dangerousness, as it did here. This, indeed, is the fault of the State's more general argument before us, that evidence of future dangerousness counts under *Simmons* only when the State "introduc[es] evidence for which there is *no other possible inference* but future dangerousness to society." . . . Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear

> merely because it might support other inferences or be described in other terms.

Id. (emphasis in original).

The *Kelly* Court thus made explicit what was implicit in *Simmons:* the prosecutor need not expressly and separately argue future dangerousness; rather, future dangerousness can be made an issue through implication by or inference from arguments addressing such independent matters as the defendant's character.

At Rompilla's sentencing hearing, the prosecutor, who was seeking the death penalty, focused on Rompilla's "significant history of felony convictions," as that is one of the statutory factors that can serve as "aggravators" in the balancing between mitigating factors and aggravating factors required under Pennsylvania's death penalty law. 42 Pa. Cons.Stat. Ann. § 9711(d)(9). During his closing argument the prosecutor referred to Rompilla's prior offense, which involved the robbery, rape and slashing with a knife of a female bar owner, in the following terms:

> Joe Macrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point. . . . [I]sn't it *frightening,* the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. . . . On both occasions, a knife was used. Steals money both times. Isn't it *frightening* the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely *frightening* to think of the similarities in those two crimes. But there is one difference, one

> major difference, Joe Macrenna lived through her experience. Jimmy Scanlon didn't. . . . I think the Defendant learned a lesson from Joe Macrenna in that case, that Rape case. *That lesson was, don't leave any witnesses.* Don't leave anybody behind that can testify against you.

App. at 779-80 (emphasis added).

At sentencing the jury also learned via testimony elicited by both parties that the instant crime occurred shortly after Rompilla had been released from prison, that there is a lack of rehabilitation services for prisoners, that Rompilla's children were initially frightened of him when he was released on parole, and that he had been paroled from his previous sentence only three weeks before the instant crime.

Rompilla argues that because the prosecutor placed Rompilla's future dangerousness at issue, the trial court was required under *Simmons* to inform the jury that Rompilla is parole ineligible. The PCRA court disagreed, reasoning that *Simmons* does not apply because the prosecutor did not argue future dangerousness. The court stated, "The prosecution merely argued that Mr. Rompilla had a significant history of felony convictions which was proper argument as an aggravating factor under Pennsylvania law." App. at 2025. The court did not find the jury's question concerning whether he had received rehabilitation supportive of Rompilla's argument: "This question . . . relates more to the issues raised by the defense witnesses during the penalty phase who complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole after his 1974 rape and burglary convictions. In fact, that was a mitigating factor found by the jury rather than an aggravating factor." App. at 2026. The

court did not address, perhaps did not recognize, the relevance of the jury's question concerning whether rehabilitation is available in prison to Rompilla's request for a *Simmons* instruction.

On appeal, the Pennsylvania Supreme Court summarized the facts and issue, and analyzed Rompilla's *Simmons* claim in one paragraph which I quoted in full near the beginning of this dissent. The Pennsylvania Supreme Court interpreted Pennsylvania law as requiring a *Simmons* instruction "only when the defendant's future dangerousness is at issue," and expressly rejected Rompilla's argument that in presenting Rompilla's extensive criminal history the prosecutor *ipso facto* made future dangerousness an issue. The Pennsylvania Supreme Court thus appears to have determined that future dangerousness must be argued expressly and separately and may not be implied by or inferred from other arguments; consequently, the prosecutor's recitation of defendant's past criminal conduct cannot, without more, also amount to making an issue of future dangerousness. It is unclear whether the Pennsylvania Supreme Court believes this principle to be consistent with or required by *Simmons*.

When the *Simmons* issue was before the District Court on Rompilla's habeas petition, that court also gave the issue only brief analysis and concluded:

> The prosecutor's summation in this case covers 16 pages of the notes of testimony[2] and a fair reading of it leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable,

[2] That is not accurate: it covers eight pages. *See* App. at 774-782.

> savage and cowardly beating the Petitioner inflicted upon his victim. This is a close issue, however, but the Supreme Court of Pennsylvania's decision in the PCRA case was not an unreasonable application of federal law.

Rompilla v. Horn, 2000 WL 964750, at *15 (E.D.Pa. July 11, 2000). The District Court appears to have agreed with the Pennsylvania Supreme Court that if the prosecutor "based his argument on" the despicable nature of the defendant's actions, he could not at the same time have made an issue of Rompilla's future dangerousness for *Simmons* purposes without providing a separate, express argument to that effect. The Majority appears to agree, as its opinion states: "even if [the prosecutor's comments] were meant to imply that Rompilla would present a future danger if he was ever released from prison, the fact remains that the prosecutor never expressly argued that Rompilla presented a future threat." Maj. Op. at 271-272.

I do not read *Simmons* as requiring an express argument of future dangerousness. In *Simmons,* the prosecutor put future dangerousness "at issue" in a few brief comments in his closing argument. As the *Simmons* plurality opinion describes it:

> In its closing argument the prosecution argued that petitioner's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. The question for the jury, said the prosecution, was "what to do with [petitioner] now that he is in our midst." . . . The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 114 S.Ct. 2187.

In his dissent, Justice Scalia takes issue with the conclusion of those Justices who formed the majority that the above statements constituted an argument for future dangerousness.[3] The language used in the various opinions

[3] The dissent states:

> Both Justice Blackmun and Justice O'Connor focus on two portions of the prosecutor's final argument to the jury in the sentencing phase. First, they stress that the prosecutor asked the jury to answer the question of "what to do with [petitioner] now that he is in our midst." That statement, however, was not made (as they imply) in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence. Read in context, the statement is not even relevant to the issue in this case:
>
> "The defense in this case as to sentence . . . [is] a diversion. It's putting the blame on society, on his father, on his grandmother, on whoever else he can, spreading it out to avoid that personal responsibility. That he came from a deprived background. That he didn't have all of the breaks in life and certainly that helps shape someone. But we are not concerned about how he got shaped. We are concerned about what to do with him now that he is in our midst.". . . .
>
> Both opinions also seize upon the prosecutor's comment that the jury's verdict would be "an act of self-defense." That statement came at the end of admonition of the jury to avoid emotional responses and enter a rational verdict:
>
> "Your verdict shouldn't be returned in anger. Your verdict shouldn't be an emotional catharsis. Your verdict shouldn't be . . . a response to that eight-year-old kid [testifying in mitigation] and really shouldn't be a response to the gruesome grotesque handiwork of [petitioner]. Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." . . . .
>
> This reference to "self-defense" obviously alluded, neither to defense of the jurors' own persons, nor specifically to defense of persons outside the prison walls, but to defense of all members of society against this individual, wherever he or they might be. Thus, as I read the record (and bear in mind that the trial judge was on the lookout with respect to this point), the prosecutor did not *invite* the jury to believe that

(Continued on following page)

of the Justices who formed the *Simmons* majority does not suggest that the prosecutor must expressly argue that defendant will be a serious threat if not sentenced to death before the Court will hold that future dangerousness has been placed before the jury. For example, Justice Blackmun's opinion uses the following phrases (emphases added, *passim*): "where the defendant's future dangerousness *is at issue*," *id.* at 156, 114 S.Ct. 2187; "[t]he Due Process Clause does not allow the execution of a person *'on the basis of information* which he had no opportunity to deny or explain.'" *Id.* at 161, 114 S.Ct. 2187; "the State's *repeated suggestion* that petitioner would pose a future danger to society if he were not executed," *id.* at 162, 114 S.Ct. 2187; "[t]he State *raised the specter* of petitioner's future dangerousness generally . . . ," *id.* at 165, 114 S.Ct. 2187; "if the State *rests its case for imposing the death penalty at least in part* on the premise that the defendant will be dangerous in the future . . . ," *id.* at 168-69, 114 S.Ct. 2187; "[t]he State may not create a false dilemma *by advancing generalized arguments* regarding the defendant's future dangerousness . . . ," *id.* at 171, 114 S.Ct. 2187.

In his concurring opinion, Justice Souter writes, "when future dangerousness *is an issue* in a capital sentencing determination. . . ." *Id.* at 172, 114 S.Ct. 2187 (emphasis added). Similarly, Justice O'Connor states, "When the State *seeks to show* the defendant's future dangerousness," and "a means of responding to the State's

---

petitioner would be eligible for parole – he did not *mislead* the jury.

Simmons, 512 U.S. at 181-182, 114 S.Ct. 2187 (Scalia, J., dissenting) (emphasis in original).

showing of future dangerousness." *Id.* at 177, 114 S.Ct. 2187. "Moreover, the prosecutor, by referring to a verdict of death as an act of 'self-defense,' *strongly implied* that petitioner *would* be let out eventually if the jury did not recommend a death sentence." *Id.* at 178, 114 S.Ct. 2187 (emphasis added).

There are indeed some statements that can be read to refer to arguments expressly made by the State as to Simmons's future dangerousness, particularly in the concurring opinion of Justice O'Connor, but even she uses the phrase "strongly implied." I therefore repeat my observation that neither Justice O'Connor nor the other Justices forming the majority suggest that the instruction must be given only if the prosecutor makes express, explicit, exclusive arguments for future dangerousness. Rather, the Court was willing to infer a future dangerousness argument from what was, on Justice Scalia's account, an argument about a different topic entirely (the merit of one of Simmons's mitigating factors). Nothing in the Justices' language supports the premise on which the Pennsylvania Supreme Court's decision turns. Any doubts on the matter were dispelled by the Supreme Court's subsequent decision in *Kelly* where the prosecutor did not expressly argue future dangerousness.

The Majority concedes that *Kelly* "arguably broadened the holding in *Simmons*," Maj. Op. at 265-266, and notes that two of the Justices who joined Justice O'Connor's concurring opinion in *Simmons* dissented in *Kelly* because "the test is no longer whether the State argues future dangerousness to society . . . [but] whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." *Kelly*, 534 U.S. at 261, 122 S.Ct. 726 (Rehnquist, C.J., joined by Kennedy, J., dissenting).

The Majority declines to apply *Kelly* in Rompilla's favor, stating, "Even if *Kelly* broadened *Simmons* . . . *Kelly* cannot aid Rompilla here" because *Kelly* was decided after the Pennsylvania Supreme Court's decision in Rompilla's case. Maj. Op. at 267. The Majority notes that under *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), federal review pursuant to section 2254(d)(1) is limited to the state court's application of federal law "as of the time of the relevant state-court decision." *Id.* at 412, 120 S.Ct. 1495.

The Supreme Court does not interpret the unreasonable application of Supreme Court precedent prong of § 2254(d)(1) as narrowly as does the Majority. In *Wiggins,* the Court viewed its opinion in *Williams* as "illustrative of the proper application" of the *Strickland* standard, notwithstanding that "*Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case." *Wiggins,* 123 S.Ct. at 2535. Just as the *Williams* opinion noted that "the merits of [Williams's] claim are squarely governed by our holding in *Strickland v. Washington*," *Williams,* 529 U.S. at 390, 120 S.Ct. 1495, so also the Court's opinion in *Kelly* represented an application of *Simmons* and did not make new law. There is no indication anywhere in the opinion that the *Kelly* majority thought that they were doing anything other than applying *Simmons.* Rather, at every step of the way the *Kelly* majority cites *Simmons.* At one point, the *Kelly* majority states that the prosecutor "accentuated the clear implication of future dangerousness raised by the evidence and [thereby] placed the case within the four corners of *Simmons*." *Kelly,* 534 U.S. at 255, 122 S.Ct. 726. Therefore, even if *Kelly* "arguably" broadened *Simmons,* it

is dispositive for present purposes that the majority of the Supreme Court believed otherwise.

To recapitulate, the Pennsylvania Supreme Court applied an unjustifiedly narrow test for determining whether the prosecutor made an issue of Rompilla's future dangerousness. That test represented an unreasonable application of *Simmons,* especially as *Simmons* was applied in *Kelly.*

In any event, I believe that the record shows that the prosecutor did make an issue of Rompilla's future dangerousness. It is noteworthy that the prosecutor referred to the similarities between this crime and Rompilla's previous crime as "frightening" no less than three times. The similarities can be "frightening" only if the prosecutor was sending the message that there is a possibility that Rompilla will repeat the crime. Similarly, the prosecutor's emphasis on the one major difference between this crime and his previous crime – the murder of the victim – and his statement to the jury that Rompilla had learned not to leave any witnesses were tantamount to a warning about what would happen if Rompilla were allowed to commit another crime, i.e., that Rompilla would be dangerous. Moreover, as the Supreme Court has recognized, evidence of past criminal conduct may be indicative of future dangerousness. *See Skipper v. South Carolina,* 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

The Majority urges us to consider the prosecutor's comments in context, claiming he was merely responding to counsel's argument that the jury must have some doubt concerning Rompilla's guilt and that his comments were a rebuttal of that argument, not an argument for future dangerousness. The Majority states, "Seeking to dispel any

such doubts, the prosecutor's obvious point in stressing the similarities between the circumstances of the rape for which Rompilla had previously been convicted and the Scanlon murder was to convince the jury that the same man had committed both crimes." Maj. Op. at 271.

The Majority's attempt to explain the remark is sheer conjecture. The prosecutor made his remarks in the course of outlining why three aggravating factors apply against Rompilla. After addressing the first two – torture and murder while committing other crimes – the prosecutor said:

> Commonwealth has more. Commonwealth submits to you that the Defendant has a significant history of felony convictions involving violence to the . . . person or the threat of violence to the person.

App. at 779. The prosecutor then described the previous rape with his above-quoted use of "frightening" and gave the State's explanation that Rompilla did not wait at the bar until Scanlon closed up before breaking in to steal because Rompilla did not want to leave any witnesses. App. at 780. This suggests dangerousness, not rebuttal.

It is plain from *Simmons* and *Kelly* that the reasons for the prosecutor's statements are not dispositive of whether they put future dangerousness at issue for the jury. They could have done so even if their principal thrust were to dispel doubt raised by the defense. After all, in *Simmons* the prosecutor's remarks were made in response to defense counsel's mitigating evidence (*see* Justice Scalia's dissenting opinion, quoted above). Thus, even if the prosecutor in Rompilla's case did not make an express

argument, *Simmons* is still applicable because, as explained above, *Simmons* does not require "express arguments."

The Majority also asserts that the prosecutor merely used the word "frightening" as a synonym for "astounding," a word that the prosecutor also used ("more aptly," as the Majority puts it). Maj. Op. at 271. Accepting *arguendo* the Majority's hypothesis, it does not negate the implication of future dangerousness. The meaning of a word or phrase depends in part on the reasonable understanding of the listener, not merely the intent of the speaker.

The Majority also attempts to discount any future dangerousness implications in the prosecutor's statement that by the time of this crime Rompilla had learned to kill any eyewitnesses by explaining that "the comment seems to have had two likely purposes: to explain why there was no eyewitness to the most recent crime and to explain why the two crimes differed in the important respect that one involved a killing and the other did not." Maj. Op. at 271. Again, even if those were the prosecutor's purposes, it does not follow that he did not also thereby inject future dangerousness into the proceedings. The more immediate message learned by the jury was surely that if they put Rompilla in a position from which he could commit another crime, the jurors had better not be among the witnesses. Their repeated questions to the judge concerning parole and rehabilitation suggests that they had learned that lesson.[4]

---

[4] This court is limited to reviewing the Pennsylvania Supreme Court's opinion for its consistency with federal law, and has no role in its application of state law. It is of interest, however, that there is

(Continued on following page)

Justice Souter, in his concurring opinion in *Simmons,* joined by Justice Stevens, wrote:

> The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. The Court has explained that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina,* 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (1976) (plurality

---

disagreement among the Pennsylvania Supreme Court justices themselves as to whether the jury need be instructed that in Pennsylvania the jury may not be informed that life imprisonment means life without parole. Pennsylvania is one of only two states out of the 50 United States where life imprisonment means life without parole that hold that the jury may not be so informed. South Carolina, the state that was the subject of the Supreme Court decisions in *Simmons, Kelly,* and *Skipper,* is the other such state.

The Pennsylvania rule was enunciated in *Commonwealth v. Mills,* 350 Pa. 478, 39 A.2d 572 (1944), where the Pennsylvania Supreme Court stated that in a capital case the jury's only function was to decide whether the penalty should be life imprisonment or the death penalty. More recently, the Pennsylvania Supreme Court, in addressing the effect of *Simmons* on the rule announced in *Mills,* stated that "the per se rule announced in *Mills* [that any reference to the possibility of parole was an improper consideration for the jury in their deliberation of the defendant's guilt] has been superseded [by *Simmons*]." *Clark,* 710 A.2d at 36. The Pennsylvania Court then stated "that due process requires the court to instruct the jury on the law as it relates to the possibility of parole where that issue [the defendant's future dangerousness] clearly arises from the arguments of either counsel in the penalty phase." *Id.* Justice Nigro concurred, suggesting "that the better practice and policy is to require trial courts to give a *Simmons* instruction in all death penalty proceedings, regardless of whether counsel raises the issue of a defendant's potential future dangerousness during the penalty phase." *Id.* at 43. Justice Zappala concurred separately, agreeing with Justice Nigro that a *Simmons* charge should be mandated. *Id.*

> opinion of Stewart, Powell, and Stevens, JJ.); see also, *e.g., Godfrey v. Georgia,* 446 U.S. 420, 427-428 [100 S.Ct. 1759, 64 L.Ed.2d 398] (1980); *Mills v. Maryland,* 486 U.S. 367, 383-384 [108 S.Ct. 1860, 100 L.Ed.2d 384] (1988). Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia,* 428 U.S. 153, 190 [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination," *Beck v. Alabama,* 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392] (1980).
>
> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or discriminatorily" and "wantonly and . . . freakishly imposed." *Furman v. Georgia,* 408 U.S. 238, 249 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972) (Douglas, J., concurring) (internal quotation marks omitted); *id.,* at 310 [92 S.Ct. 2726] (Stewart, J., concurring).

Simmons, 512 U.S. at 172-73, 114 S.Ct. 2187 (Souter, J., concurring).

In this case, the repeated questions by the jury as to the effect of a sentence by them of life imprisonment demonstrate unequivocally that the jury did not understand that under Pennsylvania law a life prison term means life without parole. I believe the rationale for requiring that the jury be instructed about parole ineligibility when the prosecutor puts future dangerousness in issue – i.e., to ensure that the jurors have accurate information as to the effect of their sentence – is similarly applicable in a case, such as this one, where the jurors have requested accurate information. I do not understand the State to be arguing that the requested instruction was not legally accurate. The Majority has provided no rationale why the jury should not be informed of the applicable Pennsylvania law. Truth in advertising is now the byword of this generation. Truth in instructing the jury as to the effect of the sentence in a capital case is at least as important.

I would grant a writ of habeas corpus on this issue as well as on the ineffective assistance of counsel issue.

United States Court of Appeals,
Third Circuit.

Ronald ROMPILLA
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections Martin Horn,
Appellant/Cross-Appellee.

No. 00-9005, 00-9006.

Feb. 25, 2004.

Billy H. Nolas, David W. Wycoff, Defender Association of Philadelphia, Federal Capital Habeas Corpus Unit, Philadelphia, PA, for Appellee.

Amy Zapp, Office of Attorney General of Pennsylvania, Harrisburg, PA, for Appellant.

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, and CHERTOFF Circuit Judges, and STAPLETON, Senior Circuit Judge.*

SUR PETITION FOR REHEARING

ALITO, Circuit Judge.

The petition for rehearing filed by appellee/cross appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

---

* Voted as to panel rehearing only.

having voted for rehearing by the court en banc, the petition for rehearing is denied. Judges Sloviter and McKee would have granted rehearing en banc for the reasons set forth in the dissent. Judges Nygaard, Ambro and Smith would have granted rehearing en banc.

OPINION SUR DENIAL OF REHEARING

NYGAARD, Circuit Judge.

I share the concerns eloquently expressed by my colleague, Judge Sloviter, and agree fully with the analysis she offers in her dissenting opinion. Had I been on the panel, I would have joined her to form a majority. Now on petition for en banc review, however, I wish only to add my thoughts to hers why I firmly believe we should rehear this appeal en banc. The Rules provide that rehearing en banc is appropriate when a case "involves a question of exceptional importance." Fed. R.App. P. 35(a). To me, this case raises such a question.[1] The issue before us implicates the most fundamental and important of all rights – to be represented by effective counsel. All other rights will turn to ashes in the hands of a person who is without effective, professional, and zealous representation when accused of a crime. In my view, counsel here failed in all three areas.

Over seventy years ago, the United States Supreme Court reviewed a sensational criminal trial. Nine poor,

[1] Indeed, I suggest that every death case in which a divided panel of the court reverses a well-reasoned decision of the District Court that granted a writ of habeas corpus, should raise in our minds "a question of exceptional importance." As the Court has said, "death is different." *See, e.g., Wiggins v. Smith,* 539 U.S. 510, – –, 123 S.Ct. 2527, 2554, 156 L.Ed.2d 471 (2003).

young African American men were facing death sentences. They had been convicted of raping two white women in Alabama. The issue before the Supreme Court was simple: were the defendants entitled to the effective assistance of counsel as part of their constitutional right to due process? In a landmark ruling, Justice Sutherland famously declared that defendants in capital cases have the right to the "guiding hand of counsel at every step in the proceedings against [them]." *Powell v. Alabama,* 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *see also* Dan T. Carter, Scottsboro: A Tragedy of the American South, 5-6 (special ed., The Notable Trials Library 2000) (giving age range of Scottsboro defendants as 13-20). I am deeply concerned that Justice Sutherland's simple and eloquent idea of effective legal representation may not be the reality of our present-day jurisprudence. All too often, the "guiding hand" is either inexperienced, unmotivated or uncaring, and offers insufficient guidance to the indigent capital defendant.

The need for reform of the "delivery system" of counsel to indigent capital defendants is well-known, and its failures are, unfortunately, no longer either surprising or shocking. Reports continually surface highlighting the subpar performances of capital defense counsel. *See, e.g.,* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases,* 1973-1995, at ii (2000), *available at* http://www.justice.policy.net/jpreport/index.html (last visited Feb. 13, 2004). Too often appointed trial counsel lack the experience, training or financial resources necessary to adequately represent those defendants on trial for their life who face the powerful forces of the government. *See, e.g.,* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103

YALE L. J. 1835, 1862 (1994). In my view, any level of inadequate representation not only undermines the reliability that must be the foundation of our adversarial process, but also heightens the risk that defendants will be convicted and sentenced to death despite their actual or incremental innocence.[2]

Ideally, the standard set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), should act as a safety net to correct injustices caused by ineffective counsel. I view the results as less than ideal. I begin with the Supreme Court instruction to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. I submit, however, that where the sanction, once executed, is irreversible, the presumption must be defined narrowly – not widely. Unfortunately, in the twenty years since the standard was set out in *Strickland,* it has degraded. The range of what is deemed "effective" has widened to, in my view, an astonishing spectrum of shabby lawyering. Counsel has been deemed "effective" despite, for example, sleeping through a portion of the case. *See McFarland v. Texas,* 928 S.W.2d 482, 505 (Tex.Crim.App.1996) (recognizing that defense counsel slept through parts of defendant's capital trial, but deeming him "effective.").[3] Other shocking examples include

[2] What I refer to as "incremental innocence" represents the degree of guilt found in excess of one's actual culpability, resulting in a punishment imposed that exceeds that which is indicated by their participation in the crime.

[3] Mr. McFarland's counsel later justified his actions by testifying that he "customarily takes a short nap in the afternoon." Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row,* L.A. TIMES (Valley Ed.), July 15, 2000, at A1.

cases where counsel was intoxicated during the capital trial, *see Haney v. Alabama,* 603 So.2d 368, 377-78 (Ala.Crim.App.1991); and cases where counsel presented no evidence whatsoever during the sentencing phase, *see Mitchell v. Kemp,* 762 F.2d 886, 888 (11th Cir.1985). In my view, the majority opinion in this case infuses our jurisprudence with this degraded standard.

These disturbing examples of inept lawyering in capital cases have propelled professional organizations to act. The American Bar Association has promulgated "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." These Guidelines upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 31 HOFSTRA L.REV. 913, 939 (2003) (outlining the 2003 Revisions to the Guidelines). Included in those guidelines is the requirement that the capital defendant should "receive the assistance of all expert, investigative, and other ancillary professional services . . . appropriate . . . at all stages of the proceedings." *Id.* at 952. Here, in my view, counsel's failure to conduct even the most rudimentary investigation into Rompilla's background falls short of being "effective" representation. I believe this level of representation violates not only the standards set out by the American Bar Association, but by accepting it as adequately effective, we continue to degrade the standard set out in *Strickland,* and ignore the sentiments expressed by Justice Sutherland.

I believe that a policy of this importance should not be decided by a divided panel of the court. This court, which has traditionally been in the van, and a steadfast guardian

of constitutional rights, should have taken this opportunity to convene en banc to consider and carefully define the breadth of *Strickland's* presumption, and set forth a jurisprudentially sound and humanitarian threshold for what constitutes effective representation.

Sloviter, J., and McKee, J., join in this opinion.

15

2651

(19)

04-5462

Lodging submitted:

November 12, 2004

Material unavailable for filming

(13)

No. 04-5462

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION
OF PHILADELPHIA
Federal Court Division
The Curtis Center –
Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
Counsel for Petitioner,
Ronald Rompilla

(**Counsel of Record*)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED IN THIS CAPITAL CASE

Questions related to the *Simmons v. South Carolina*, 512 U.S. 154 (1994), issue:

1. Does *Simmons* require a life-without-parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from a lengthy prison term; and the prosecutor argues that the defendant is a frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him?

2. Is the state court decision denying the *Simmons* claim "contrary to" and/or an "unreasonable application" of clearly established Supreme Court law where the state court held that a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about parole eligibility and rehabilitation and the prosecution's actual evidence and argument?

Questions related to counsel's ineffective assistance at capital sentencing:

3. Has a defendant received effective representation at capital sentencing where counsel does not review prior conviction records counsel knows the prosecution will use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?

QUESTIONS PRESENTED IN THIS CAPITAL CASE – Continued

4. Has a defendant received effective representation at capital sentencing where counsel's background mitigation investigation is limited to conversations with a few family members; where the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation; where other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and where the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances?

5. Does counsel's ineffectiveness warrant habeas relief under the AEDPA where the state court sought to excuse counsel's failure to obtain any records about the defendant's history by saying the records contained some information that was "not entirely helpful," by saying counsel hired mental health experts (even though those experts did not do any background investigation and never saw the records), and by saying counsel spoke to some family members (even though those family members told counsel they knew little about the defendant and could not help with mitigation); and where the state court did not even try to address counsel's failure to interview other family members (who knew the defendant's mitigating history) or counsel's complete failure to investigate the aggravation that the prosecution told counsel it would use?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED IN THIS CAPITAL CASE	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Trial And Capital Sentencing Proceedings	2
B. Post-Conviction Proceedings	7
SUMMARY OF ARGUMENT	18
ARGUMENT	22
I. RELIEF SHOULD BE GRANTED UNDER *SIMMONS*	22
A. Petitioner's Death Sentence Violates *Simmons*	22
B. Habeas Relief Is Appropriate	26
II. RELIEF SHOULD BE GRANTED BECAUSE OF COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING	30
A. Counsel Failed To Reasonably Investigate	31
B. Petitioner Was Prejudiced	36
C. Habeas Relief Is Appropriate	37
CONCLUSION	41

TABLE OF AUTHORITIES

Page

CASES

Allen v. Illinois, 478 U.S. 364 (1986) 23

Atkins v. Virginia, 536 U.S. 304 (2002) 11

Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001) 35

Board of Cty. Com'rs v. Umbehr, 518 U.S. 668 (1996) 30

California v. Ramos, 463 U.S. 992 (1983) 25

Commonwealth v. Baker, 614 A.2d 663 (Pa. 1992) 23, 27, 36

Commonwealth v. Beasley, 479 A.2d 460 (Pa. 1984) 9

Commonwealth v. Billa, 555 A.2d 835 (Pa. 1989) 23, 28

Commonwealth v. Hodovanich, 251 A.2d 708 (Pa. Super. 1969) 34

Commonwealth v. Holcomb, 498 A.2d 833 (Pa. 1985) 10, 23, 27

Commonwealth v. Martin, 351 A.2d 650 (Pa. 1976) 33

Commonwealth v. Rompilla, 653 A.2d 626 (Pa. 1995) 1

Commonwealth v. Rompilla, 721 A.2d 786 (Pa. 1998) ..... *passim*

Commonwealth v. Rompilla, No. 682/1988 (Lehigh Cty. C.P. Aug. 21, 1996) 1

Commonwealth v. Roots, 393 A.2d 364 (Pa. 1978) 23

Commonwealth v. Stanley, 401 A.2d 1166 (Pa. Super. 1979), *aff'd*, 446 A.2d 583 (Pa. 1982) 24

TABLE OF AUTHORITIES – Continued

Page

Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1994) 36

Heller v. Doe, 509 U.S. 312 (1993) 23

Huddleston v. United States, 485 U.S. 681 (1988) 28

Johnson v. Texas, 509 U.S. 350 (1993) 23, 27

Jurek v. Texas, 428 U.S. 262 (1976) 23

Kelly v. South Carolina, 534 U.S. 246 (2002) 23, 28, 29

Kimmelman v. Morrison, 477 U.S. 365 (1986) 38

Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987) 35

Michelson v. United States, 335 U.S. 469 (1948) 23

Nichols v. United States, 511 U.S. 738 (1994) 23, 27

Penry v. Johnson, 532 U.S. 782 (2001) 37

Penry v. Lynaugh, 492 U.S. 302 (1989) 36

Rompilla v. Horn, 355 F.3d 233, *rehearing en banc denied*, 359 F.3d 310 (3d Cir. 2004) ..... *passim*

Rompilla v. Horn, 2000 WL 964750 (E.D. Pa.) 1

Simmons v. South Carolina, 512 U.S. 154 (1994) ..... *passim*

Skipper v. South Carolina, 476 U.S. 1 (1986) 23, 27, 35

Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994) 35

Strickland v. Washington, 466 U.S. 668 (1984) 18, 31, 38

Strickler v. Greene, 527 U.S. 263 (1999) 29

Tennard v. Dretke, 124 S. Ct. 2562 (2004) 39

Wiggins v. Smith, 123 S. Ct. 2527 (2003) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) ..... *passim*

Woodson v. North Carolina, 428 U.S. 280 (1976) 36

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

U.S. Const. Amend. VI 1, 30, 31
U.S. Const. Amend. XIV 1
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254(d) 2, 22, 26, 38, 39
42 Pa.C.S. § 9711(d) 3

MISCELLANEOUS

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 31, 35
American Bar Association Project on Minimum Standards of Justice, Standards Relating to Probation (Approved Draft, 1970) 33
Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983) 35
Kaplan & Sadock's Comprehensive Textbook of Psychiatry (B. Sadock & V. Sadock eds. 7th ed. 2000) 11
McCormick on Evidence (5th ed.) 28
Propper, *Juvenile Court Practice*, 30 Temple L.Q. 28 (1956) 34

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court on direct appeal is *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995), JA241. The opinion of the state post-conviction hearing court is *Commonwealth v. Rompilla*, No. 682/1988 (Lehigh Cty. C.C.P. Aug. 21, 1996), JA258. The opinion of the Pennsylvania Supreme Court on post-conviction appeal is *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998), JA269. The opinion of the United States District Court is *Rompilla v. Horn*, 2000 WL 964750 (E.D. Pa.), JA1280. The Third Circuit opinions are *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), JA1325, and *Rompilla v. Horn*, 359 F.3d 310 (3d Cir. 2004) (denying rehearing), JA1448.

JURISDICTION

This Court granted *certiorari* on September 28, 2004, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence."

The Fourteenth Amendment to the United States Constitution states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE[1]

A. Trial And Capital Sentencing Proceedings.

Petitioner was tried in the Lehigh County, Pennsylvania, Court of Common Pleas in 1988. He was represented by two public defenders, Maria Dantos and Fred Charles.[2]

[1] All emphasis herein is supplied unless otherwise indicated. The Joint Appendix and Lodging are cited as "JA" and "L," respectively, followed by the page number.

[2] Ms. Dantos was 2½ years out of law school. JA466. This was her first homicide case. JA471. She had "the majority of the client contact" and primary responsibility for preparing and presenting the capital

(Continued on following page)

The Commonwealth's guilt-phase case was that this was a "brutal murder" during a burglary in a bar, where the bar owner was assaulted with a knife, "stabbed repeatedly," severely beaten, "set on fire," and left "lying . . . in a pool of blood." JA241-244, JA255. The jury convicted Petitioner of first-degree murder and related offenses.

At capital sentencing, the prosecutor asserted three aggravating circumstances: Petitioner killed while committing other felonies, 42 Pa.C.S. § 9711(d)(6); the "offense was committed by means of torture," § 9711(d)(8); and Petitioner had "a significant history of felony convictions involving the use or threat of violence to the person," § 9711(d)(9). JA254-255.

The prosecutor introduced much evidence about Petitioner's prior convictions. JA44-89. They arose from a burglary in a bar, during which the bar owner was assaulted with a knife and raped. *Id.* The prosecutor had a member of his office read to the jury the transcript of the victim's testimony in the prior case – she described Petitioner as extremely violent. JA54-89.

From the custodian of the prior convictions records and on cross-examination of defense witnesses, the prosecutor elicited that Petitioner spent approximately thirteen years in prison for the prior convictions. JA46-47, JA127, JA131. The prosecutor elicited that Petitioner was released on parole from the prior convictions 3½ months

sentencing phase, including contacting and communicating with mental health experts. JA116, JA466, JA471, JA634, JA686-687. Mr. Charles, who was primarily responsible for the guilt-phase and "had the last say" on the case, had represented a few "potentially" capital clients, but had never prepared for or conducted a capital sentencing. JA634-635, JA655-656.

before this offense. JA126-127, JA131-132. The prosecutor elicited that when prisoners are paroled in Pennsylvania they are "just put . . . out on the street" without "help" or "rehabilitat[ion]." JA141-142. The prosecutor elicited that Petitioner was not able to rehabilitate himself. JA142. The jury also heard that Petitioner tried to get into a "Halfway House" when he was paroled, but "they couldn't give it to him, because . . . it was full." JA129. The jury heard that Petitioner "couldn't adjust" to life outside prison. JA130.

The prosecutor presented testimony from a pathologist, who was asked to discuss the decedent's injuries, which included abrasions, lacerations, blunt force injuries, a fractured nose, multiple stab wounds and burns; and who opined that Petitioner was "deliberately trying to cause pain." JA91-100, JA255.

Defense counsel's penalty-phase case was twenty transcript pages of testimony. Family members said they loved Petitioner; he was nice and helped around the house during the three months between his release on parole and this crime; they believed he was innocent; and they wanted mercy. JA123-149. Counsel argued for mercy based on this testimony. JA156-161.

The prosecutor's sentencing argument, JA161-167, detailed the multiple injuries to the decedent. He asserted that Petitioner is a cold-blooded killer without "one bit of mercy." JA162. He claimed Petitioner is "very violent" and "brutal," and "savagely, brutally, killed" while "torturing" the decedent with the "intent to cause substantial pain and suffering," leaving the decedent "lying in a pool of blood." JA162-164, JA166-167.

The prosecutor called Petitioner "a very strong individual, very violent individual." JA163. He said Petitioner's prior crimes were "brutal," JA165, and:

> [I]sn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes.

JA165. But, the prosecutor said, there was "one major difference" between the prior crimes and this one – the prior victim "lived through her experience," while this victim was killed. JA165.

The prosecutor emphasized that Petitioner "*learned a lesson* from Joe Macrenna in that case, that rape case. That lesson was *don't leave any witnesses. Don't leave anyone behind* that can testify against you. *Don't leave any eyewitnesses. . . .*" JA166.

The judge instructed that the jury's sentencing options were "death" or "life imprisonment." JA14, JA41, JA167. The judge did not instruct that life imprisonment in Pennsylvania is without parole.

The jury interrupted its deliberations three times with questions for the court. After 45 minutes of deliberations, the jury asked, "*If a life sentence is imposed, is there any possibility of the defendant ever being paroled*?" JA183.

Defense counsel noted, "Because of the misconceptions, a lot of people think that if you get a life sentence, you're out in five years or three years." JA181. The judge responded, "I can't stop that." JA182. The judge told the jury:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right.

JA183.

After 7½ hours, the jury asked about "the *length* of the sentence" on Petitioner's prior convictions; if the sentence "was *commuted* in any way"; and if he "got *released* on behavioral." JA200-201. In the jury's presence, the prosecutor said, "You can't tell them"; the judge told the jury, "Well, that we can't give you." JA201. The jury then deliberated for another hour before recessing for the night. JA209-210.

The following day, the jury deliberated for 55 minutes, then asked: "Was the defendant offered any type of rehabilitation either while in prison or after his release from prison?" JA216. The judge responded:

> Well, I'm sorry to say, I can't answer that. I can only tell you that you're going to have to make your decision based upon the evidence that was presented and in accordance with the Law with respect to Sentencing Hearing. First of all, I

> couldn't even answer it if I wanted to or if I could, I don't know.

JA216. The jury foreman then asked: "Could I change the question to the point that is – *isn't rehabilitation available in prison*?" JA216. In response, the judge instructed:

> Well, again, I would like to even answer that, and I can't. You're going to have to rely upon your own knowledge of that aspect if, indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be quite frank with you, is not an issue before – before you with respect to the Law that it's a decision that you must make. I can understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find.

JA216.

The jurors ultimately deliberated for approximately twelve hours. JA226. They "found all three of the aggravating circumstances alleged by the prosecution" and in mitigation found "'Rompilla's son being present and testifying' and the possibility of rehabilitation. The jury found that the aggravating circumstances outweighed the mitigating factors and sentenced Rompilla to death." JA1331. The Pennsylvania Supreme Court affirmed on direct appeal. JA241.

B. Post-Conviction Proceedings.

Trial counsel (Ms. Dantos and Mr. Charles) testified post-conviction that their investigation into Petitioner's

background consisted of conversations with Petitioner and some family members.[3] Counsel knew the people they spoke to were poor sources of information about Petitioner's history. The "overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody. . . . [T]here wasn't a lot that they knew." JA495; *see also* JA498 (family members to whom counsel spoke had "limited knowledge of" Petitioner). They were not "the type of family that would provide you information when asked," JA557; "it seemed pretty clear that they didn't feel as though they knew Ron very well, because there was a distance as a result of his being incarcerated and as a result of their own whatever was going on with them," JA557-558. Their "response [to questions] was they hardly know him. I mean one said, 'He was in a reformatory. He's been away the whole time. We didn't know him that well.' Things of that nature." JA669. Counsel testified that Petitioner, like the family members counsel spoke to, was not a good source of information. JA556-557, JA582-583, JA663, JA667.

The experts at the post-conviction hearing, including the Commonwealth's rebuttal expert, Dr. Dattilio, testified that Petitioner is a poor historian because of his brain damage, low intelligence, cognitive impairments, communication problems and memory deficits; moreover, he is the victim of childhood trauma, which is difficult even for an unimpaired person to discuss. JA1248-1249, JA1258-1261, JA1264 (Dr. Dattilio); JA1027 (Dr. Gross); JA889-890 (Dr.

[3] Trial counsel spoke to Petitioner's ex-wife; his "brother, Nick; his sister-in-law, Darlene; his brother, Bobby and his son Aaron." JA494.

Crown); JA960 (Dr. Armstrong). Similarly, the dysfunctional family history made it difficult for family members to discuss Petitioner's childhood. JA1259-1261, JA1264 (Dr. Dattilio); JA1027 (Dr. Gross). Trial counsel also believed the family was "coming from the position that Ronald was innocent. And, therefore, they weren't looking for reasons for why he might have done this." JA494. These problems were exacerbated because the lawyer who spoke to the family, Ms. Dantos, asked "general questions" – *e.g.*, was there "anything important or noteworthy about his family, upbringing?" – rather than specific questions about abuse, neglect, poverty, etc. JA478, JA497-498, JA549-551. The post-conviction expert testimony was that such general questions are inadequate when questioning people, like Petitioner and his family, who suffered childhood abuse and neglect. JA1260-1261 (Dr. Dattilio); JA1027 (Dr. Gross).

Although counsel knew the people they spoke to were not good sources of information, they *did not seek any records* about Petitioner's background. Records about Petitioner's prior convictions, prison records, juvenile records, school records and medical records were available, but not obtained by counsel. Counsel also made no effort to speak to two of Petitioner's sisters who were available locally, one of whom attended the trial.

The Commonwealth notified counsel pre-trial that it intended to introduce evidence about Petitioner's prior convictions in aggravation. Counsel knew pre-trial that the Commonwealth would use transcripts contained in the prior crimes court file. JA650. Pennsylvania law allowed the Commonwealth to introduce the "facts and circumstances" of the prior crimes at capital sentencing. *See Commonwealth v. Beasley*, 479 A.2d 460, 465 (Pa. 1984);

Commonwealth v. Holcomb, 498 A.2d 833, 851 n.18 (Pa. 1985).

Petitioner's prior convictions file was available in the clerk's office in the same courthouse where the capital trial was held. When the prosecutor used materials from that file at capital sentencing, counsel complained that they had not seen the file. The prosecutor replied, "[I]t's a public record, . . . you could have . . . looked at it just like I did." JA28; *see also* JA36 (prosecutor says to counsel that prior convictions file is "a public record, and you could have gotten the Transcript [from that file] at any time prior to this Trial.").

The court file from Petitioner's prior convictions contained prison records, L31-40, created in connection with those convictions. *See* JA631. It contained "achievement test" scores showing that Petitioner, as an adult, had not progressed beyond 3rd grade level in spelling and arithmetic, with abilities below 96% of the population. L35. It states that Petitioner left school after 9th grade. L33-34. It notes that he led a "nomadic existence" before his arrest. L40. These court/prison records also include results from the Minnesota Multi-Phasic Personality Inventory ("MMPI"), a psychological test, which was administered when Petitioner entered prison for the prior convictions. The test showed abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales. L35.[4] The records state that Petitioner is an alcoholic

[4] The Commonwealth's post-conviction expert, Dr. Dattilio, testified that these MMPI results demonstrate mental disturbances of a type associated with brain damage and childhood abuse and neglect. JA1225-1229. *See also* JA856-857, JA930 (Dr. Crown); JA1050-1051 (Dr. Gross).

and needed "counseling pertaining to his longstanding abuse of alcohol." L39. The records note that his criminal history is "related to his overindulgence in alcoholic beverages." L40. They note that he was the "6th of nine children raised in [a] slum environment." L40. Counsel did not read the court/prison records. The jury did not hear this mitigating evidence.

Petitioner's juvenile court records, L41-49, were referred to in the prior convictions court records, and contain information about Petitioner's mental deficiencies and dysfunctional childhood home. The juvenile records contain reports from the Allentown School District, dated November 20, 1964 and January 6, 1965 (when Petitioner was sixteen years old). L47-48. The school district reported that Petitioner's IQ is 69. L47.[5] He was "in a special education program." L48. He "is easily influenced by others into different events, no matter if it is bad or good," L47, and it "seems he lacked strong disciplined leadership outside of school and in the home to provide influences to lead to better accomplishment," L48. A juvenile court "summary" dated November 27, 1964, L43-46, also notes that Petitioner was in the "Special class" at his school. L44. The "summary" states that both of Petitioner's older brothers were incarcerated, L43, and that "Ronald comes from the Notorious Rompilla Family which has been known to the Lehigh County Courts on many occasions. The parents appeared to be cooperative but their past record indicates failure of handling there [sic] off-spring."

[5] IQ scores below 75 generally are considered to be in the mentally retarded range. *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002) (citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000)).

L45. The "summary" notes that Petitioner was born into a home that came to the attention of the City Health Department because of "neglected children" when "the mother was picked up by the police in a drunken condition at which time the Probation Office was obliged to enter into the home and . . . the children were placed in a hospital and the home of relatives." L44. Then,

> Over a period of years the mother was missing from home frequently for a period of one or several weeks at a time; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. Always upon return home the husband took her back into the house even though he complained about her absence; there was never any prosecution for her desertion of family nor her moral episodes. She has been reported over a period of years to be frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of her home at all times.

L44. Counsel did not obtain these records. The jury did not hear this mitigation.

Petitioner's juvenile records note that additional family history information is contained in the juvenile records of his brother, Nick Rompilla. These records, L49-110, also confirm that Petitioner's childhood home was dysfunctional. Several reports corroborate the entries in Petitioner's juvenile records regarding the mother's alcoholism, abandonment and neglect of the children, filthy home conditions, removal of the children from the home, etc. L93, L95, L104, L109. A 1951 report, when Petitioner was three years old, says the "family unit lives

in basement of cheap tenement house, filthy, upset, dirty beds, dirty clothing, worn out furniture." L107. A report dated April 6, 1957, when Petitioner was nine years old, states: "I regret to say that the home conditions in this family group have not changed. The mother still is neglecting her children with filth and lack of supervision existing at all times." L75. A 1960 report, when Petitioner was twelve years old, notes that the "father-son relationships were weak," L95; the mother was an "alcoholic" who was "often off with other men," L93, L95; there were "poor home conditions," L95; there was "an unstable home situation," L95; there was "[n]eglect of children," L95; and the "children were always dirty," L93. The records also note that Petitioner's brother, Nick, was rejected by the Army because he "could not pass the mental test," L80, and that he had a "retarded mental condition," L82. Counsel did not seek these records. The jury did not know this information.

Petitioner's school records, L11-30, show that his IQ was repeatedly found in the mentally retarded range (*see* note 5, *supra*). At age six, his IQ score was 60. L11. At age nine, his "verbal" IQ score was 75, and the tester noted "many replies very irrelevant." L11, L15. At age eleven, his "verbal," "performance" and "full-scale" IQ scores were 61, 75 and 64. L11, L13. At age thirteen, they were 69, 75 and 69. L12, L14. Achievement tests show that his abilities never advanced above 3rd grade level. L11. After receiving all "D" grades in third grade, he was placed in special education classes, where he remained until he left school in 9th grade. L11. Counsel testified that they understood Petitioner "had problems in school," JA677-678, but they did not try to get the records. The jury did not hear this mitigating evidence.

Petitioner's medical records, L1-10, show that he was hospitalized at age two for dehydration, diarrhea and a fever exceeding 105°F. Counsel did not obtain these records.[6]

The school records were available in the public school building, across the street from the capital case courthouse; the prior convictions court/prison records were available in the clerk's office in the capital case courthouse; the juvenile records were available from the local juvenile court and are referred to in the prior convictions records; the medical records were available in the same local hospital where the Commonwealth had Petitioner's blood tested for this case. Counsel, however, looked at no background records about Petitioner's history. JA479, JA481, JA489-490, JA506-507, JA584, JA665, JA692-693, JA705.

Three of Petitioner's siblings (Randi Rompilla, JA745-779, Barbara Harris, JA804-822, and Nick Rompilla, JA779-804) testified post-conviction, corroborating the information in the records:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his

[6] Post-conviction expert testimony explained that these records are relevant to assessment of brain damage. JA853-855 (Dr. Crown); JA976-978 (Dr. Armstrong); JA1114–1115 (Dr. Sadoff).

> father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

JA1415-1416, *Rompilla v. Horn*, 355 F.3d at 279 (Sloviter, J., dissenting) (describing family post-conviction testimony; citations omitted); *see also* JA300-310 (habeas petition, detailing family post-conviction testimony). Counsel did not try to speak to either of these sisters, even though both lived locally and Randi attended the trial. JA757-758, JA769-770, JA814-815. The jury did not hear this mitigation.[7]

Trial counsel had Petitioner seen by mental health experts (Drs. Sadoff, Gross and Cooke). Counsel did not provide any background information about Petitioner to the doctors. Counsel did not ask the doctors to report on mitigation arising from Petitioner's life history, instead requesting opinions only about Petitioner's "mental state

[7] Nick briefly testified at capital sentencing (that he had visited Petitioner in prison before Petitioner was paroled, Petitioner had a hard time adjusting to life out of prison, Petitioner helped around the house between his release on parole and this crime, and Nick believed Petitioner was innocent), but not about the dysfunctional family background. JA128-131.

during the time of the alleged charges" and competency to stand trial. JA474, JA476.[8] Counsel assumed one expert, Dr. Cooke, would test Petitioner for brain damage, but did not ask Dr. Cooke to do such neuropsychological testing and then did not ask if it had been done. JA504-505, JA684-687. Dr. Cooke did a "rough estimate of intellectual function," but did not conduct neuropsychological testing. JA1061.[9]

The post-conviction experts (Drs. Armstrong and Crown) were provided background information and asked to evaluate Petitioner for mitigation in light of his history. They testified that Petitioner's history is replete with "red flags" about childhood trauma, brain damage, mental retardation, learning disabilities, mental and emotional disturbances, and alcoholism, and showed that full neuropsychological testing for brain damage, which they performed, was necessary. Based on the background information and their testing, they found Petitioner suffers from organic brain damage, serious psychological impairments and alcoholism. His impairments are severe, date back to childhood, and were likely caused by fetal alcohol exposure, head injuries and childhood trauma. JA826-938 (Dr. Crown); JA941-1013 (Dr. Armstrong); *see also* JA318-333 (habeas petition, detailing testimony of Drs. Crown and Armstrong).

The trial doctors (Drs. Sadoff, Gross and Cooke) also testified post-conviction that the records about Petitioner's

[8] Dr. Gross did not even know that counsel wanted a *mitigation* evaluation; he understood that counsel was interested in *guilt*-phase mental defenses. JA1041-1042, JA1050.

[9] Dr. Cooke testified post-conviction that he did not have the specific results of his evaluation. JA1068.

history provide substantial mitigation. They testified that Petitioner's history contains "red flags" for childhood abuse, brain damage, mental retardation, alcoholism and psychological impairments. Had trial counsel provided the background information to the trial doctors, they would have pursued the same type of full neuropsychological testing that was done by the post-conviction doctors, rather than the brief screening one of them (Dr. Cooke) did at trial. JA1015-1051 (Dr. Gross); JA1057-1080 (Dr. Cooke); JA1102-1135 (Dr. Sadoff); *see also* JA333-345 (habeas petition, detailing testimony of Drs. Cooke, Sadoff and Gross).

Similarly, the Commonwealth's post-conviction rebuttal psychologist, Dr. Dattilio, testified that Petitioner's records and history have numerous "red flags" indicating brain damage, mental retardation and a traumatic childhood. Petitioner's history has mitigating significance; it would lead a mental health expert to seek the type of testing and evaluations done by the post-conviction doctors (Drs. Crown and Armstrong). JA1162-1278 (Dr. Dattilio); *see also* JA350-355 (habeas petition, detailing Dr. Dattilio's testimony).

Trial counsel testified at the post-conviction hearing that they did not withhold mitigation evidence from the jury for tactical or strategic reasons – they agreed they would have pursued the mitigating evidence about Petitioner if they had known about it. JA479, JA482-486, JA489-490, JA493, JA497, JA501, JA509-511, JA552-554.

The Court of Common Pleas denied post-conviction relief. JA257. The Pennsylvania Supreme Court affirmed. JA269. Pennsylvania Chief Justice Flaherty dissented. Relying on *Simmons v. South Carolina*, 512 U.S. 154

(1994), he explained that Petitioner's future dangerousness was at issue and the trial court should have instructed that life imprisonment is without parole in Pennsylvania. JA286.

Petitioner sought federal habeas relief. The District Court found counsel ineffective at capital sentencing because they failed to reasonably investigate. JA1280 (relying on *Williams v. Taylor*, 529 U.S. 362 (2000) and *Strickland v. Washington*, 466 U.S. 668 (1984)). The Third Circuit panel, in a 2-1 decision, reversed. JA1325. Rehearing *en banc* was denied by a closely divided (6-5) Circuit. JA1448. The Circuit dissenters would have upheld the District Court's grant of relief because of counsel's capital sentencing ineffectiveness, JA1405-1427, JA1448-1453, and, like Pennsylvania Chief Justice Flaherty, would have granted relief under *Simmons*, JA1427-1447.

SUMMARY OF ARGUMENT

I. Habeas relief is appropriate under *Simmons*. The prosecutor presented and elicited evidence that Petitioner is a recidivist who committed crimes of extreme violence, culminating in this murder; Petitioner spent thirteen years in prison for his prior convictions; Petitioner was released on parole from the prior prison term; Petitioner committed this murder just 3½ months after being released on parole; prisoners are paroled in Pennsylvania without rehabilitation or assistance; and Petitioner was unable to rehabilitate himself.

The prosecutor then argued that Petitioner "learned a lesson" from his prior convictions and that "lesson was don't leave any witnesses. Don't leave anyone behind that

can testify against you. Don't leave any eyewitnesses." The prosecutor emphasized the extreme violence of this and the prior offenses. The prosecutor argued that Petitioner is "absolutely frightening" because he repeatedly commits similar crimes of violence. The prosecutor argued that Petitioner is "a very strong individual, very violent individual," who is "brutal," cold-blooded, and merciless.

The jurors received the future dangerousness message the prosecutor sent. Three times, the jurors interrupted their sentencing deliberations with questions for the court. They asked about parole eligibility and rehabilitation. The jurors were not told that life imprisonment for first-degree murder in Pennsylvania is without parole. They were denied a straight answer and allowed to think that parole might be available.

The state court unreasonably considered *only* the bare fact that the prosecution presented an aggravating circumstance about Petitioner's criminal history, while the state court ignored most of the reasons why the prosecutor's evidence and argument actually put future dangerousness in issue in this case. Moreover, the state court unreasonably assumed a jury will ignore the common sense connection between a violent criminal history and future dangerousness.

II. An effective lawyer in a capital case conducts a thorough investigation for mitigating evidence. Counsel here wanted to present Petitioner's mitigating evidence – they had no tactical reason for withholding mitigation about Petitioner's life history from this jury.

Prior convictions court records, incarceration records, school records, juvenile records and medical records were readily available to counsel – some just a short walk from

the trial courtroom. Counsel knew that Petitioner and the family members they spoke to were very poor sources of information. But counsel did not get *any* records about Petitioner's life. Neither did counsel speak to two of Petitioner's sisters who could have discussed Petitioner's history, although both were available locally and one attended the trial.

Counsel's failure to obtain any life history records was especially unreasonable. Counsel knew the people they spoke to were not good sources of information about Petitioner's history, but pursued no other sources. Pennsylvania lawyers know that adult and juvenile criminal records typically contain much life history and mental health information, but counsel here did not get the records. Counsel knew Petitioner had problems in school, but did not get records about his educational history. Counsel knew Petitioner was drinking heavily around the time of the crime and that a condition of his parole was to abstain from alcohol, but counsel did not seek background records about Petitioner's alcohol problems. Counsel knew Petitioner spent much of his life in prison, but did not obtain Petitioner's incarceration records. Counsel knew the prosecutor would introduce evidence from Petitioner's prior convictions court file, but counsel did not review those prior convictions records, even as part of an investigation of the prosecution's aggravation.

The records chronicled Petitioner's mental impairments and traumatic history – serious learning problems, special education placement, mental retardation, psychological disturbances, alcoholism and a childhood spent in an impoverished and dysfunctional home. The family members counsel failed to interview also would have provided mitigating information about Petitioner's history.

And this life history information, provided to mental health experts, would have led to development of further mitigating evidence, including evidence about Petitioner's brain damage. The jury heard none of this mitigating evidence.

Habeas review of prejudice is *de novo* because the state court did not address it. As to counsel's deficient investigation, the state court tried to excuse counsel's failure to obtain records about Petitioner's life history by saying the low IQ and learning disability records were "not entirely helpful." This is contrary to and an unreasonable application of clearly established federal law because it uses the contents of the records to justify counsel's failure to get them, when counsel did not know what the records contained. It is also unreasonable because these records actually would have provided helpful mitigation.

The state court also suggested that hiring mental health experts relieved counsel of the responsibility to investigate Petitioner's social history. But counsel did not ask the trial doctors to collect life history mitigation, and counsel gave no life history information to the doctors, whose post-conviction testimony showed that the records would have led to the development of much in mitigation.

Finally, the state court suggested that counsel had no duty to get records because counsel spoke to Petitioner and some family members. This is unreasonable because counsel knew the people they spoke to were not useful sources of information. An effective lawyer does not rely on a narrow set of unhelpful sources when trying to develop mitigating evidence in capital case. And an effective lawyer reads the court file about the client's prior convictions,

especially when the prosecutor tells counsel he will use evidence from that file in aggravation.

ARGUMENT

I. RELIEF SHOULD BE GRANTED UNDER *SIMMONS*.

Pennsylvania is the only state with a life-without-parole alternative to death where this information routinely is withheld from capital sentencing juries. Petitioner's death sentence is unconstitutional under this Court's holding in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The state court decision is an "unreasonable application of" clearly established federal law, 28 U.S.C. § 2254(d).

A. Petitioner's Death Sentence Violates *Simmons*.

"Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible." *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring); *see also id.* at 163-64 (plurality). Petitioner's jurors were never informed that the only alternative to death is life without possibility of parole, even though they asked.

Petitioner's "future dangerousness [was] in issue." *Id.*, 512 U.S. at 178 (O'Connor, J., concurring). The prosecutor asserted that Petitioner is an extremely violent recidivist. Juries see prior violent crimes as predicting future violence,

as this Court often has noted.[10] The Pennsylvania Supreme Court, too, has recognized that jurors view prior violent crimes as predictive of future violence.[11] Indeed, the Pennsylvania Supreme Court had stated that the significant history of violent felonies aggravating circumstance, which the prosecution asserted and the jury found here, shows the defendant has "pronounced" and "uncontrolled recidivistic tendencies to violent assaults upon the person." *Commonwealth v. Holcomb*, 498 A.2d 833, 851-52 (Pa. 1985). Further, the suggestion of future violence was particularly strong here because the prior and current crimes were similar. *Id.* at 851-52 (especially "pronounced recidivist

[10] *E.g.*, *Nichols v. United States*, 511 U.S. 738, 752 (1994) (Souter, J., concurring) (prior crimes "predict[] the likelihood of recidivism"); *Heller v. Doe*, 509 U.S. 312, 323 (1993) ("Previous instances of violent behavior are an important indicator of future violent tendencies."); *Allen v. Illinois*, 478 U.S. 364, 371 (1986) (prior crimes "predict future behavior"); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is . . . inevitable."); *Johnson v. Texas*, 509 U.S. 350, 355-56 (1993) (future dangerousness shown by prior crimes); *Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (future dangerousness established through defendant's "significant criminal record" and failure to "rehabilitate himself"); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (jurors infer "propensity" for crime from prior crimes). As this Court recently reiterated, a "jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior" in the future. *Kelly v. South Carolina*, 534 U.S. 246, 253-54 (2002).

[11] *E.g.*, *Commonwealth v. Baker*, 614 A.2d 663, 676 (Pa. 1992) (prior convictions evidence allows capital sentencing jury to "explore the defendant's prior behavior and dangerousness before sanctions are imposed"); *Commonwealth v. Roots*, 393 A.2d 364, 368 (Pa. 1978) (prior crimes have "natural tendency . . . to be interpreted as indicative of the defendant's propensity to commit crime"); *Commonwealth v. Billa*, 555 A.2d 835, 841-42 (Pa. 1989) (same).

tendencies" when past crimes are similar to current crime).[12]

The prosecutor also elicited evidence that Petitioner was paroled from prior convictions just 3½ months before he committed this killing; that Pennsylvania parolees are released without assistance or rehabilitation services; and that Petitioner was unable to rehabilitate himself. This evidence confirmed the common belief that "parole [is] a mainstay of . . . sentencing regimes," *Simmons*, 512 U.S. at 169-70, and quite palpably showed that Petitioner is dangerous when released on parole.

The prosecutor's sentencing argument reinforced the future dangerousness message sent by his evidence. The prosecutor's argument that Petitioner "learned a lesson" from his prior convictions – to kill anyone who witnesses his crimes – firmly planted the idea that Petitioner would be dangerous if released. The prosecutor's assertions that Petitioner is violent, cold-blooded, brutal and merciless, and the prosecutor's emphasis on the "absolutely frightening . . . similarities" of Petitioner's repeated crimes, also highlighted the idea that Petitioner is a dangerous recidivist. The prosecutor thus encouraged the jury to see Petitioner as "absolutely frightening" because he repeatedly commits the same type of violent crimes when paroled.

[12] *See also Commonwealth v. Stanley*, 401 A.2d 1166, 1174 (Pa.Super. 1979) (jury especially likely to infer propensity for crime "when informed that the defendant's prior crime was the same as one of the crimes for which he is currently being tried"), *aff'd*, 446 A.2d 583 (Pa. 1982).

The message received was the message sent: this jury repeatedly interrupted its sentencing deliberations to ask questions that were "a clear expression of the jury's concern about the defendant's future dangerousness." JA286, *Commonwealth v. Rompilla*, 721 A.2d at 795 (Flaherty, C.J., dissenting).[13] As in *Simmons*, this jury was "denied a straight answer about . . . parole eligibility even when it was requested." *Id.*, 512 U.S. at 165-66 (plurality).[14] Petitioner's death sentence violates due process.

[13] *See also Simmons*, 512 U.S. at 170 n.10 (plurality) ("It almost goes without saying that" when jury interrupts deliberations to ask "Does the imposition of a life sentence carry with it the possibility of parole?", jury does not know "life" means without possibility of parole; otherwise, "there would have been no reason for the jury to inquire"); *id.* at 178 (O'Connor, J., concurring) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"); *California v. Ramos*, 463 U.S. 992, 1003 (1983) ("[T]he possibility that the defendant may be returned to society . . . invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. [This] focuses the jury on the defendant's probable future dangerousness.").

[14] Here, as in *Simmons*, the judge told the jury it should not "consider" the possibility of parole. JA183. "Far from ensuring that the jury was not misled, however, this instruction actually suggested that parole *was* available but that the jury, for some unstated reason, should be blind to this fact." *Simmons*, 512 U.S. at 170 (plurality) (emphasis original). Moreover, this judge's response that "I can't answer that question," JA183, further suggested that parole might be available, but that the judge could not tell the jury about it, or it was outside the judge's control. Indeed, the jury likely viewed the judge's "I can't answer" response as being intended to protect Petitioner by *concealing his parole eligibility*, just as other court rulings had protected him by concealing other information from the jury. *See, e.g.*, JA161 (prosecutor introduces prior convictions and tells jury they were things "we weren't permitted to tell you in the trial"); JA42 ("I was not permitted to tell you about [the prior convictions] earlier").

B. Habeas Relief Is Appropriate.

The Pennsylvania Supreme Court was provided these reasons why future dangerousness was in issue. That Court ignored most of them, addressing instead just one matter: whether presentation of the significant history of violent felonies aggravating circumstance, by itself, puts future dangerousness in issue. It then denied relief by asserting that this aggravating circumstance "only addresses [Petitioner's] past conduct, not his future dangerousness." JA284, *Commonwealth v. Rompilla*, 721 A.2d at 795. The Pennsylvania Supreme Court's decision is an unreasonable application of clearly established federal law, 28 U.S.C. § 2254(d)(1).

The decision is "objectively unreasonable," *Williams*, 529 U.S. at 409, because it ignores most of the factors that actually made future dangerousness an issue *in this case*. *Id.* at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts, as shown by its "fail[ure] even to mention" them). The prosecutor injected far more than just the aggravating circumstance into the jury's sentencing deliberations: there was the prosecutor's evidence about the extreme violence of this and the prior crimes; the prosecutor's evidence about the similarities between this and the prior crimes; the way the prosecutor presented the prior crimes evidence (through the reading of the prior victim's testimony about Petitioner's violence); the prosecutor's elicitation that Petitioner was released on parole from his prior convictions; the prosecutor's elicitation that Petitioner killed within months after being released on parole; the prosecutor's elicitation that parolees are released without rehabilitation; the prosecutor's elicitation that Petitioner could not rehabilitate himself; the prosecutor's argument that

Petitioner is cold-blooded, merciless and brutal; the prosecutor's argument that Petitioner is "absolutely frightening" because he repeatedly commits similar violent crimes; and the prosecutor's claim that Petitioner "learned a lesson" from his prior convictions to kill anyone who might witness his repeated offenses. Beyond the simple presence of the aggravating circumstance, there also were the jury's repeated questions about parole eligibility and rehabilitation and the judge's responses, which suggested that parole might be available but the jury should not know about it. *See* note 14, *supra*. The state court ignored all of this and, thus, unreasonably applied *Simmons*.

It is also unreasonable to assume, as the state court did, that a jury hearing evidence of Petitioner's violent "past conduct" would ignore that such evidence also shows "future dangerousness." Jurors believe that past violence predicts future violence. *See Holcomb*, 498 A.2d at 851-52; notes 10, 11 & 12, *supra*. The relevance of Petitioner's prior violence to the significant history aggravating circumstance *does not negate* the fact that the prior violence is also relevant to future dangerousness. Past conduct is predictive of future behavior even when that past conduct is also relevant to other matters.[15] Courts require limiting instructions when prior

[15] *Nichols*, 511 U.S. at 752 (Souter, J., concurring) (explaining that prior crimes evidence "reflect[s] the seriousness of his past criminal conduct" *and* "predict[s] the likelihood of recidivism"); *Johnson*, 509 U.S. at 369 ("forward-looking perspective of the future dangerousness inquiry" is "not independent of an assessment of personal culpability," and same evidence may be relevant to both inquiries); *Skipper*, 476 U.S. at 6 (error to make "distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct"); *Baker*, 614 A.2d at 676 (prior crimes evidence is used by capital sentencing juries to "explore" *both* "prior

(Continued on following page)

crimes evidence is admitted precisely because jurors view such evidence as demonstrating a propensity for crime even when it is relevant to other matters.[16] It was unreasonable for the state court to assume this jury would not consider that Petitioner's violent history signaled his future dangerousness, especially given the prosecutor's overall presentation.

As for the Third Circuit majority, it never really addressed whether the state court's actual decision was reasonable. Instead, it said *Simmons* "may be read . . . narrowly" to require a no-parole instruction only when the prosecutor explicitly says the defendant is a future danger; it then deemed the state court decision "reasonable" for supposedly adopting this narrow view of *Simmons*. *See* JA1384-1391, *Rompilla v. Horn*, 355 F.3d at 264-67. But the *state court did not adopt the Third Circuit majority's restriction* on *Simmons*. The state court agreed with Petitioner that *Simmons* applies when future dangerousness is "at issue," but held that future dangerousness is not put "at issue" by the significant history of violent felonies aggravating circumstance standing alone. JA284, *Commonwealth v. Rompilla*, 721 A.2d at 795. Since the Third Circuit majority's restriction on *Simmons* was not

behavior *and* dangerousness"); *see also* MCCORMICK ON EVIDENCE at 259 (5th ed.) ("An item of evidence may be logically relevant in several aspects, leading to different inferences or bearing upon different issues."). As this Court recently reiterated: "Evidence of future dangerousness . . . is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences." *Kelly*, 534 U.S. at 254.

[16] *E.g.*, *Billa*, 555 A.2d at 841 (other crimes evidence must be accompanied by limiting instructions to protect against jury's natural tendency to treat it as proof of propensity for crime); *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (same).

actually relied upon by the state court, it "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins v. Smith*, 123 S.Ct. 2527, 2539 (2003).

To be sure, this prosecutor *did argue future dangerousness*. This prosecutor asserted that Petitioner is "absolutely frightening" because he is a cold-blooded, violent recidivist who repeats the same type of violent crimes every time he is released from prison and because he "learned a lesson" from his prior convictions that he should kill any witness to his crimes.[17]

The Circuit majority tried to avoid the obvious import of the prosecutor's argument by saying the prosecutor's comments may have been intended to "explain why there was no eyewitness to the most recent crime." JA1401, *Rompilla v. Horn*, 355 F.3d at 272. The Circuit majority's approach, which looks to the possible motive for the prosecutor's statements rather than their effect on the jury, is akin to the position taken by the dissent in *Simmons*. *See id.*, 512 U.S. at 181-82 (Scalia, J., dissenting) (stating that "in context," the prosecutor's argument "was not made . . . in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence"). *Simmons* rejected the Circuit majority's approach. In *Simmons*, as in other contexts, constitutional significance depends on the jurors' "reasonable understanding." *See* JA1444, *Rompilla v. Horn*, 355 F.3d at 292 (Sloviter, J., dissenting); *see also Strickler v. Greene*, 527

[17] As in *Kelly*, 534 U.S. at 254 n.4, this Court need not decide here if a no-parole instruction is required "when the State's evidence shows future dangerousness but the prosecutor does not argue it."

U.S. 263, 288 (1999) (due process assesses "fairness of the proceeding," not intent of prosecutor). Whatever the prosecutor's intent, he sent the message to this jury that Petitioner is dangerous because he is a violent recidivist who "learned a lesson" to kill again if released.[18]

The Circuit majority acknowledged that its narrow view of *Simmons* is "difficult to police and arguably superficial," allowing prosecutors to evade *Simmons* by "encourag[ing] a jury to think about future dangerousness without expressly referring to that concept." JA1388-1389, *Rompilla v. Horn*, 355 F.3d at 266. But "[d]etermining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government . . . , is an enterprise that [this Court] ha[s] consistently eschewed." *Board of Cty. Com'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

This prosecutor sent a future dangerousness message throughout his evidence, his questions to defense witnesses and his argument. The jury's questions show they got the message.

II. RELIEF SHOULD BE GRANTED BECAUSE OF COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING.

Petitioner was denied his Sixth Amendment right to effective assistance of counsel at capital sentencing:

[18] *Cf.* JA1401, *Rompilla v. Horn*, 355 F.3d at 272 (court acknowledges that its interpretation of the prosecutor's argument could be incorrect, and prosecutor could have "meant to *imply* that Rompilla would present a future danger if he was ever released from prison") (emphasis original).

counsel's representation was unconstitutionally deficient because they failed to reasonably investigate Petitioner's background; their investigative failures prejudiced Petitioner because the jury never heard significant mitigating evidence when deciding whether Petitioner should live or die.

A. Counsel Failed To Reasonably Investigate.

Effective capital counsel "conduct a *thorough* investigation of the defendant's background" for "*all reasonably available* mitigating evidence." *Wiggins v. Smith*, 123 S.Ct. 2527, 2535, 2537 (2003) (quoting *Williams*, 529 U.S. at 396, and American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (1989)) (second emphasis in *Wiggins*).[19] In particular, one of the first steps counsel should take as part of a "thorough investigation of the defendant's background" is to seek "reasonably available" records about the defendant's history, including records about his "educational history," his "prior adult and juvenile record," his "prior correctional experience" and his "medical history." ABA Guideline 11.4.1(D)(2)(c)-(d) (cited in *Wiggins*, 123 S.Ct. at 2537); *see also Wiggins*, 123 S.Ct. at 2532-33 (counsel ineffective for failing to develop social history from "social services, medical, and school records, as well as interviews with petitioner and numerous family members");

[19] The ABA Guidelines articulate "reasonable" professional "standards for capital defense work"; they are "norms" and "standards to which [this Court] long ha[s] referred as 'guides to determining what is reasonable'" under the Sixth Amendment. *Wiggins*, 123 S.Ct. at 2536-37 (citing *Strickland*; *Williams*).

Williams, 529 U.S. at 395-96 (counsel ineffective for failing to obtain defendant's juvenile records).

Many records about Petitioner's history were "reasonably available" to trial counsel – *e.g.*, school records were maintained across the street from the courthouse; prior convictions and juvenile records were available from the local courts; prison records were in the court file on the prior convictions (or could have been obtained from the prison); medical records were available in the same local hospital where the Commonwealth had Petitioner's blood tested for this trial. But counsel did not get records about Petitioner's history – not even the prior case records counsel knew the prosecutor would use for aggravation purposes in a jurisdiction where the prosecution can introduce the "facts and circumstances" of prior crimes.

Several features of this case make counsel's failure to seek records about Petitioner's history particularly unreasonable, highlighting the inadequacy of this investigation.

First, counsel knew the people they spoke to (Petitioner and some family members) were not useful sources of information about Petitioner's history. Thus, counsel knew they had, at best, only a "rudimentary knowledge of [Petitioner's] history from a narrow set of sources." *Wiggins*, 123 S.Ct. at 2537. Under these circumstances, effective counsel would have expanded their investigation beyond their "narrow set of sources," and would have sought other sources of background information. *See Wiggins*, 123 S.Ct. at 2532-33 (effective counsel would have "chronicled petitioner's bleak life history" by obtaining "social services, medical, and school records, as well as interviews with petitioner and numerous family members").

Although there are reasons why the people counsel spoke to were not useful sources of information, *see* Statement of the Case at 7, *supra*, in the end the reasons are largely unimportant. The point is that counsel knew they had a "narrow set of sources" and had not developed a life history. Counsel therefore should have looked into other sources, the most obvious of which were *the records*. Similarly, counsel "had reason to inquire further as to the availability of *other family members* . . . who did know more about Rompilla's youth." JA1419-1420, *Rompilla v. Horn*, 355 F.3d at 281 (Sloviter, J., dissenting). Petitioner's sisters Randi and Barbara were available and would have provided significant information, but counsel failed to speak to them. *See Williams*, 529 U.S. at 415-16 (counsel deficient where they presented testimony from mother and two friends but failed to interview and present other "friends, neighbors and family").

Second, defense lawyers in Pennsylvania know that adult and juvenile criminal records often are a repository of life history and mental health information. Pennsylvania felony conviction records include presentence reports, which generally address "the particular circumstances of the offense and the character of the defendant," as evidenced by, *inter alia*, "the social history of the offender, including family relationships"; "the educational background of the offender"; "the offender's medical history and, if desirable, a psychological or psychiatric report"; and "supplementary reports from clinics, institutions and other social agencies with which the offender has been involved." *Commonwealth v. Martin*, 351 A.2d 650, 658 & n.26 (Pa. 1976) (quoting ABA Project on Minimum Standards of Justice, Standards Relating to Probation, § 2.3 (Approved Draft, 1970)). Pennsylvania

lawyers also know that juvenile records contain "facts relating to the child's background, environment and prior history." *Commonwealth v. Hodovanich*, 251 A.2d 708, 709 (Pa. Super. 1969); *see also id.* at 710 n.2 ("The juvenile's 'parental background is explored, his school record is examined and, in effect, his entire life becomes open for inspection.'") (quoting Propper, *Juvenile Court Practice*, 30 TEMPLE L.Q. 28 (1956)). Effective counsel would have reviewed these records.

Third, counsel here knew that Petitioner left school in 9th grade, and counsel believed this suggested "problems in school." JA677-678. Effective counsel would have obtained the school records. *See Wiggins*, 123 S.Ct. at 2537 (counsel should "pursu[e] . . . leads" created by known information). For the same reason, effective counsel would have obtained the prior convictions and juvenile records since, as noted above, they were likely to include information about Petitioner's educational history.

Fourth, counsel knew, from police reports provided by the prosecutor in pre-trial discovery, L111-120, that Petitioner was drinking so heavily around the time of the offense that he was described as being incoherent and passing out. *See also* JA315-317 (habeas petition, describing police reports). The police reports also noted that one of the conditions of Petitioner's parole was that he "[m]ust not consume alcohol." L120; *see also* L111 (Petitioner violated parole by drinking). Furthermore, the prior crimes, like this one, occurred in a bar. The prior convictions court/prison records were an obvious source of information about the development of Petitioner's problems with alcohol, especially since abstaining from alcohol was a condition of parole. Effective counsel would have obtained the records.

Fifth, counsel knew the capital sentencing jury would learn that Petitioner spent thirteen years in prison before this offense. Capital defense lawyers know that "evidence bearing on the defendant's ability to adjust to prison life" can be mitigating. *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986). Effective counsel would have obtained and reviewed Petitioner's prison records as a possible source of mitigating evidence. The need to obtain these records was particularly clear here because family members told counsel that their lack of knowledge about Petitioner arose in part from the fact that he was incarcerated for much of his life, beginning when he was a juvenile.

Sixth, counsel knew the Commonwealth would introduce evidence from the prior convictions court file as part of its aggravation evidence. Effective counsel would have reviewed that court file. *See Wiggins*, 123 S.Ct. at 2537 (counsel should seek "all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced" (quoting ABA Guideline 11.4.1(C) (1989))).[20] However,

[20] *See also* ABA Guideline 11.8.5(A) (counsel should investigate at "earliest possible time" areas that may relate to aggravation); ABA Guideline 11.8.3(A) ("Counsel should seek information . . . to rebut the prosecution's sentencing case."); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 337 (1983) ("counsel must investigate . . . any evidence of other crimes or circumstances in the defendant's background which the prosecution may be permitted to introduce in aggravation"); *Battenfield v. Gibson*, 236 F.3d 1215, 1228-35 (10th Cir. 2001) (counsel ineffective for failing to investigate prior convictions aggravation, where investigation of prior convictions would have revealed mitigating evidence); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994) ("basic concerns" of capital counsel "are to neutralize the aggravating circumstances . . . and to present mitigating evidence"; counsel ineffective for failing to challenge aggravating circumstances); *Lewis v. Lane*, 832 F.2d 1446, 1453-58 (7th Cir. 1987) (capital counsel ineffective for failing to investigate defendant's criminal record where it was used to establish aggravating

(Continued on following page)

these lawyers did not take the rudimentary investigative step of looking at the file on the prior convictions.[21] The court and prison records in that file contained valuable mitigating evidence. Moreover, the entries in that file would have led an effective lawyer to the juvenile and school records, since they show Petitioner had impaired intelligence, mental problems and a juvenile history.

Counsel did not obtain the records appropriate to a thorough investigation for mitigating evidence. Their investigation was not reasonable. The jury did not hear the substantial mitigation that a real investigation would have disclosed.

B. Petitioner Was Prejudiced.

Capital counsel needs to thoroughly investigate in order to present to the jury the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). When that does not occur, the defendant has not been treated as a "'uniquely individual human bein[g],'" there is no "reliable determination that death is the appropriate sentence," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *Woodson*, 428 U.S. at 304-05), and the death sentence is not a "reasoned moral response" to the

circumstance); *Esslinger v. Davis*, 44 F.3d 1515, 1529-30 (11th Cir. 1994) (non-capital counsel ineffective for failing to investigate defendant's criminal record where it was used to enhance sentence).

[21] Effective counsel also would have reviewed the juvenile files because Pennsylvania prosecutors can introduce juvenile adjudications to support the significant history of violent felonies aggravating circumstance. *See Baker*, 614 A.2d at 676.

offense and the offender, *Penry v. Johnson*, 532 U.S. 782, 788 (2001).

Even though they heard little mitigating evidence from the defense, these jurors deliberated for twelve hours. Valuable mitigating evidence was available. It would have provided a real case for life – evidence of childhood mistreatment and trauma, brain damage, mental retardation, alcoholism and serious mental and emotional disturbances. No doubt, this is evidence upon which a member of this jury reasonably could have relied to vote for a life sentence instead of death. This evidence also undermines the aggravation – the jury would have seen that there is a mitigating explanation for Petitioner's explosiveness and inability to conform to law. "Had the jury been able to place [this additional evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 123 S.Ct. at 2543.

C. Habeas Relief Is Appropriate.

The state court did not rule on prejudice. *See* JA271, *Commonwealth v. Rompilla*, 721 A.2d at 789 n.3. Thus, habeas "review is not circumscribed by a state court conclusion with respect to prejudice." *Wiggins*, 123 S.Ct. at 2542.

With respect to counsel's investigation, the Pennsylvania Supreme Court tried to excuse counsel's failure to seek records because: (1) the records supposedly are "not entirely helpful"; (2) counsel hired mental health experts; and (3) counsel conversed with Petitioner and some family members. JA272-273, *Commonwealth v. Rompilla*, 721 A.2d at 790. The state court did not address counsel's

failure to obtain the prior convictions records in order to investigate the Commonwealth's aggravation. Nor did the state court address counsel's failure to interview the two sisters who would have provided mitigation about Petitioner's traumatic childhood and the development of his mental problems and alcoholism. *See* JA1419, *Rompilla v. Horn*, 355 F.3d at 280 (Sloviter, J., dissenting).

The state court's decision is contrary to and an unreasonable application of clearly established federal law, § 2254(d)(1), and is based upon an unreasonable determination of facts, § 2254(d)(2).

1. The Pennsylvania Supreme Court tried to excuse counsel's failure to obtain records because the post-conviction hearing court said the records were "not entirely helpful." JA272, *Commonwealth v. Rompilla*, 721 A.2d at 790. This approach is contrary to, or at least an unreasonable application of, *Strickland* because it attempts to use the *contents* of records *never seen by counsel* to justify counsel's failure to get them. The state court thus improperly tried to use hindsight to justify counsel's investigative failure.[22]

Moreover, the post-conviction hearing court's actual "not entirely helpful" finding, which the Pennsylvania

[22] *See Williams*, 529 U.S. at 396 ("Of course, not all of the [unpresented] evidence [in records] was favorable to Williams. . . . But . . . failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision" because counsel did not adequately investigate and did not know what the records contained); *Wiggins*, 123 S.Ct. at 2535 (same); *Strickland*, 466 U.S. at 689 (reviewing court must evaluate counsel's "conduct from counsel's perspective at the time"); *Kimmelman v. Morrison*, 477 U.S. 365, 386-87 (1986) (evidence not known to counsel "sheds no light on the reasonableness of counsel's decision").

Supreme Court adopted, was that records about Petitioner's impaired intelligence and learning problems "were not entirely helpful to Mr. Rompilla's case. While they did reveal a low IQ, *low IQ can simply be part of the bell curve and a learning disability is not necessarily caused by an organic defect.*" JA264. This statement would apply to every person with impaired intellectual functioning. An assertion that such records are unhelpful is legally and factually unreasonable under § 2254(d)(1) & (2). *See Tennard v. Dretke*, 124 S.Ct. 2562, 2572 (2004) ("low IQ" of 69 is "obviously" mitigating); *Wiggins*, 123 S.Ct. at 2531 (observing, with respect to defendant with an IQ of 79, that his "diminished mental capacities further augment his mitigation case"). Petitioner's jury should have known he was impaired.

2. The Pennsylvania Supreme Court's suggestion that hiring mental health experts absolved counsel of the duty to investigate Petitioner's background is also unreasonable. "[C]ounsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background." *Wiggins*, 123 S.Ct. at 2541. Whether counsel hires mental health experts or not, counsel in a capital case has an independent "obligation to conduct a thorough investigation of the defendant's background." *Id.* at 2535 (quoting *Williams*, 529 U.S. at 396).

Moreover, counsel here did not ask the doctors to collect life history mitigation. Counsel only asked the doctors for opinions on Petitioner's mental state at the time of the offense and competency to stand trial. JA474, JA476. And even if counsel had asked the doctors to prepare a social history, the doctors themselves would have had the same "narrow set of sources" as did counsel,

who provided no life history records or information to the doctors.

3. The Pennsylvania Supreme Court was also unreasonable when it attempted to excuse counsel's failure to obtain any records because counsel spoke to Petitioner and some family members. Counsel *knew* they had not obtained useful background information from these sources. Counsel *wanted* to gather available mitigating information. Counsel did *not* curtail their investigation because of a tactical concern.

Effective counsel would have expanded their investigation beyond this "narrow set of sources" who had not provided even a "rudimentary knowledge" of Petitioner's background. *See Wiggins*, 123 S.Ct. at 2537. However, these lawyers obtained no records at all about Petitioner's history – not even records about the prior convictions used for aggravation purposes by the Commonwealth. They provided no life history records to the doctors. They were in no position to make reasonable decisions about the presentation of a mitigation case to the jury. They did not investigate thoroughly for reasonably available mitigation.

CONCLUSION

Petitioner's death sentence is unconstitutional. Habeas relief is appropriate.

Respectfully submitted,

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION
OF PHILADELPHIA
Federal Court Division
The Curtis Center –
Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
Counsel for Petitioner,
Ronald Rompilla

(**Counsel of Record*)

(14)

No. 04-5462

IN THE
Supreme Court of the United States

RONALD ROMPILLA,
Petitioner

v.

JEFFREY A. BEARD, SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania

RICHARD A. SHEETZ, JR.
Exec. Deputy Attorney General
Director, Criminal Law Division

JAMES B. MARTIN
Lehigh County District Attorney
455 W. Hamilton St.
Allentown, PA 18101

AMY ZAPP
Chief Deputy Attorney General
Appeals & Legal Services Sect.
Counsel of Record

Office of Attorney General
16th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 705-4487

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the state court reasonably apply *Simmons v. South Carolina*, 512 U.S. 154 (1994), in deciding petitioner's claim that the sentencing jury should have been instructed that he would not be eligible for parole if sentenced to life imprisonment?

2. Did the state court reasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), to petitioner's claim that trial counsel ineffectively investigated evidence of mitigation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 21

ARGUMENT 25

I. THE STATE COURT DID NOT UNREASONABLY APPLY *SIMMONS* WHEN IT RULED THAT NO "LIFE MEANS LIFE" INSTRUCTION WAS REQUIRED IN THIS CASE. 26

A. *Simmons* Required Instruction About Parole Ineligibility Only If The Prosecution Argued For Imposition Of The Death Penalty Based On The Defendant's Future Dangerousness..... 26

B. The State Court's Decision Did Not Unreasonably Apply *Simmons*. 30

II. THE STATE COURT REASONABLY APPLIED *STRICKLAND* WHEN IT REJECTED ROMPILLA'S CLAIM THAT TRIAL COUNSELS' REPRESENTATION IN THE PENALTY PHASE WAS INEFFECTIVE. 37

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases

Barker v. Wingo, 407 U.S. 514 (1972) 46

Beard v. Banks, No. 02-1603 (U.S, Jun. 24, 2004), slip op. 8 33

Bell v. Cone, 535 U.S. 685 (2002) 25, 31

California v. Ramos, 463 U.S. 992 (1983) 26, 27

Commonwealth v. Bomar, 573 Pa. 426, 826 A.2d 831 (2003) 15

Commonwealth v. Christy, 540 Pa. 192, 656 A.2d 877 (1995) 16

Commonwealth v. Clark, 551 Pa. 258, 710 A.2d 31 (1998) 15, 16, 31

Commonwealth v. Daniels, 537 Pa. 464, 644 A.2d 1175 (1994) 3

Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986) 2

Commonwealth v. Edwards, 521 Pa. 134, 555 A.2d 818 (1989) 14

Commonwealth v. Johnson, 368 Pa. 139, 81 A.2d 569 (1951) 14

Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) 15

Commonwealth v. Speight, 544 Pa. 451,
677 A.2d 317 (1996), *cert. denied*,
519 U.S. 1119 (1997).....16

Commonwealth v. Thomas, 522 Pa. 256,
561 A.2d 699 (1989)..... 3

Gregg v. Georgia, 428 U.S. 153 (1976) 28

Hegeman Farms Corp. v. Baldwin,
293 U.S. 163 (1934) 31

Heller v. Doe, 509 U.S. 312 (1993).....29

Johnson v. Texas, 509 U.S. 350 (1993) 29

Jurek v. Texas, 428 U.S. 262 (1976) 29

Kelly v. South Carolina,
534 U.S. 246 (2002) .....*passim*

Lockyer v. Andrade, 538 U.S. 63 (2003)..... 25, 26, 31

Marks v. United States, 430 U.S. 188 (1977) 28

Michelson v. United States, 335 U.S. 469 (1948).....29

Mills v. Maryland, 486 U.S. 367 (1988) 33

Nichols v. Unites States, 511 U.S. 738 (1994) 29

O'Dell v. Netherland,
521 U.S. 151 (1997) 26, 28, 30

Price v. Vincent, 538 U.S. 634 (2003) 25

Simmons v. South Carolina,
512 U.S. 154 (1994).....*passim*

Strickland v. Washington,
466 U.S. 668 (1984) .....*passim*

Teague v. Lane, 489 U.S. 288 (1989) 33

Weeks v. Angelone, 528 U.S. 225 (2000).....31

Weeks v. Commonwealth, 248 Va. 460,
450 S.E. 2d 379 (1994).....31

Wiggins v. Smith, 539 U.S. 510 (2003) 45, 46, 47

Williams v. Taylor,
529 U.S. 362 (2000) 25, 26, 31, 47

Woodford v. Visciotti, 537 U.S. 19 (2002) 31

Statutes

18 Pa.C.S.A. § 2502(a) 2

18 Pa.C.S.A. § 3502(a) 2

18 Pa.C.S.A. § 3503(a)(1)(ii)..... 2

18 Pa.C.S.A. § 3701(a)(1)(i)..... 2

18 Pa.C.S.A. § 3921(a) 2

18 Pa.C.S.A. § 3925(a) 2

18 Pa.C.S.A. § 9711(a) 2

18 Pa.C.S.A. § 9711(b) 2

18 Pa.C.S.A. § 9711(f)..... 2

28 U.S.C. § 2254 16

28 U.S.C. § 2254(d)(1).....*passim*

28 U.S.C. § 2254(e)(1) 25

42 Pa.C.S.A. § 9541 13

42 Pa.C.S.A. § 9711(d)(6) 2

42 Pa.C.S.A. § 9711(d)(8) 2

42 Pa.C.S.A. § 9711(d)(9) 2

61 P.S. § 331.21(a) 13

Other Authorities

ABA *Standards for Criminal Justice* § 4-4.1 (2d ed. 1980) 41, 42

ABA *Guidelines for the Appointment of Counsel and Performance of Defense Counsel in Death Penalty Cases* (1989) 41

STATEMENT OF THE CASE

1. In the early morning hours of January 14, 1988, petitioner, Ronald Rompilla, broke into a bar in Allentown, Lehigh County, Pennsylvania, shortly after closing time, and robbed and murdered the owner, James Scanlon. Scanlon's body was found lying in a pool of blood, N.T., vol. I, 38-39, 44.[1] He had been stabbed repeatedly, at least 16 times, and his body had been set on fire. N.T., vol. IV, 13-19. Scanlon's wallet had been stolen and approximately $500-$1000 was taken from the till. N.T., vol. I, 48-54.

Rompilla had been in the bar for about an hour just prior to its 2:00 a.m. closing. During that time he went to the men's room approximately ten times. N.T., vol. II, 57, 67-68. Police investigating Scanlon's murder determined that the bar was entered after it had closed through a window in the men's room. Though Rompilla told police investigators he left the bar near or shortly after closing time because he had run out of money—he said he was down to his last two dollars—N.T., vol. III, 126, a number of witnesses testified that they had seen him with a large amount of cash after he had left the bar. N.T., vol. II, 88-89; vol. III, 73-74, 81-82. Desk clerks from a local motel, which Rompilla had checked into using a false name, reported that he had flashed a large amount of money when he had paid $121.50 in cash for two nights' lodgings. N.T., vol. II, 87-88, 93, 98.

In executing a search warrant for Rompilla's motel room, police seized his sneakers which were found to match a footprint in blood located near Scanlon's body.

---

[1] "N.T." refers to the notes of testimony from guilt phase of the trial, which comprise six separate volumes. Because they are not continuously paginated, volume numbers are provided. Citations to "J.A." refer to the Joint Appendix filed in this Court.

N.T., vol. III, 38-40, 130. Blood on the sneakers matched Scanlon's rare blood type. N.T., vol. I, 132-133. Scanlon's empty wallet was found in some bushes outside of Rompilla's motel room. N.T., vol. II, 130-131; vol. III, 139-140. Rompilla's fingerprint was present on one of the two knives used to kill Scanlon. N.T., vol. I, 125-126; vol. II, 28. The jury convicted Rompilla of first degree murder, 18 Pa.C.S.A. § 2502(a), and other crimes, including robbery and burglary, 18 Pa.C.S.A. §§ 3701(a)(1)(i) and 3502(a).[2] N.T., vol. VI, 3-4.

In the penalty proceeding which followed, the Commonwealth sought to establish three aggravating circumstances which Pennsylvania law identifies: that Rompilla committed a killing while in the perpetration of a felony, 42 Pa.C.S.A. § 9711(d)(6); that the offense was committed by means of torture, 42 Pa.C.S.A. § 9711(d)(8); and that Rompilla had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S.A. § 9711(d)(9).[3] J.A. 42-43. To prove the first of those aggravating circumstances, the Commonwealth relied on the fact that, in connection with the same criminal episode as the murder, the jury had convicted Rompilla of burglary and robbery, both of which are qualifying felonies for this aggravating circumstance under Pennsylvania law. *See generally Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656 (1986). J.A. 161-162. As to the second, it presented expert testimony by a forensic pathologist to show that Rompilla had intended to inflict considerable and unnecessary pain and suffering on his victim so as to manifest exceptional cruelty and

[2] The jury also convicted Rompilla of: two counts of theft, 18 Pa.C.S.A. § 3921(a); two counts of receiving stolen property, 18 Pa.C.S.A. § 3925(a); and one count of criminal trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii). N.T., vol. VI, 4.

[3] In Pennsylvania death penalty cases, the determination of guilt and sentencing is bifurcated, and the jury alone determines the sentence to be imposed. 18 Pa.C.S.A. §§ 9711(a), (b) and (f).

depravity.[4] J.A. 91-114, 162-165. This testimony established that virtually all of the injuries Scanlon suffered—these included multiple stab wounds, a fractured nose, abrasions, lacerations and blunt force injuries—were inflicted while he was still alive and that, by their number and location, those injuries evinced an intention to cause the victim pain. *Id.*

Rompilla's prior convictions for rape, burglary and theft, which stemmed from a single criminal episode in 1974, were proffered by the Commonwealth as evidence of the last of those aggravating circumstances. The trial testimony of the victim, a female bar owner who lived above her place of business, was read to the jury. J.A. 54-90; 165-166. It showed that shortly before 2:00 a.m. on the morning of July 25, 1974, Rompilla had broken into her home while she was sleeping, demanding money at gunpoint. After ransacking the apartment and finding none, Rompilla repeatedly raped her. He used a knife to threaten, sexually assault, and slash her during the attack. *Id.* He then forced her to retrieve the bar's nightly receipts with which he fled. *Id.*

The Commonwealth did not present any evidence on the subject of the defendant's rehabilitation or lack thereof, or any evidence about the fact that the defendant had killed Scanlon three and one-half months after he had been on parole from the sentences he was serving for the 1974 convictions. J.A. 43-114. Likewise, the Commonwealth made no comment on either topic in its closing argument. J.A. 161-167.

[4] In order to prove the "torture" aggravating circumstance, the Commonwealth must show that a specific intent by the defendant to inflict "a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity." *Commonwealth v. Thomas*, 522 Pa. 256, 277, 561 A.2d 699, 709 (1989); *Commonwealth v. Daniels*, 537 Pa. 464, 473, 644 A.2d 1175, 1180 (1994).

2. The defense chose to appeal to the jury for mercy and tried to capitalize on any residual doubt the jury might have about Rompilla's direct culpability for Scanlon's murder. J.A. 156-161. In the guilt phase, Rompilla had denied any involvement in Scanlon's murder. He had argued, based on forensic evidence, specifically, some fibers and hairs found on Scanlon's hands that were not similar to either his own hair or to Scanlon's, that someone else had committed the crimes. N.T., vol. V, 12-17. During its deliberations on the issue of Rompilla's guilt, the jury asked the court for instruction on the question of accomplice liability. N.T., vol. V, 160-169. The court declined to give that instruction because the prosecution had neither charged Rompilla as an accomplice, nor had argued that the jury should convict him on that basis. *Id.* Rompilla's attorneys believed that the jury's question signaled some uncertainty on its part about whether Rompilla had personally delivered the blows that killed Scanlon. Defense counsel thought that if some members of the jury believed Rompilla had been only an accomplice, they might be inclined to sentence him less harshly. J.A. 518-581; 639-644.

The defense settled on this strategy only after its efforts to identify other possible areas of mitigation had proven fruitless. J.A. 567-569. At trial, Rompilla was represented by Frederick E. Charles, the Chief Public Defender of Lehigh County, and by an Assistant Public Defender, Maria Dantos, who had been with the office for approximately two and one-half years following her graduation from law school. J.A. 465; 633-634. Based on Dantos' prior work, Charles considered her to be a very able attorney, who had gained a lot of experience in the comparatively short time she had been with his office. J.A. 657. Charles personally oversaw every aspect of Rompilla's representation and "had the final say" on all matters related to it. J.A. 467; 634-635; 657. In the ten years that he then had been practicing criminal law, Charles had defended many murder cases

and in approximately six instances had prepared to present mitigation evidence in a capital sentencing proceeding. In his capacity as the head of the county public defender's office, he had also guided the work of subordinates who were responsible for gathering and presenting evidence of mitigation in capital cases they were handling. *Id.* His prior experience in developing mitigation evidence included using qualified mental health professionals for evaluation of the defendant. J.A. 653.

Defense counsel began preparing for the penalty phase from the time they undertook Rompilla's representation and their efforts continued throughout the guilt phase of his trial. J.A. 516. Though both worked closely on all aspects of the case, Charles made all of the decisions with respect to Rompilla's defense. Under the working arrangement he had with Dantos, Charles took the lead in preparing evidence to be presented by the defense in the guilt phase. Dantos' chief responsibility was the sentencing phase, assuming one would be required. J.A. 466-467; 634-635. In line with that arrangement, Dantos was primarily responsible for contacting the persons from whom information about Rompilla would be sought, although Charles would also, from time to time, be in contact with them as well. J.A. 471-493.

Based on what had proven in the past to be most successful in locating evidence of mitigation, and what had helped to maximize available resources, defense counsel decided to first approach Rompilla himself and several close family members to learn what, if any, experiences, problems or other significant developments in his life could be further explored in more detail. J.A. 662. In Charles' experience, gathering information in this fashion had proven more efficient and productive than a general canvass. *Id.* It also allowed him to make the best use of the investigative resources which were available to him. *See id.* (at the time of Rompilla's

case, the public defender's office had two investigators and 2,000 cases).

Both Charles and Dantos, as well as their investigator, communicated repeatedly and in detail with Rompilla about the sort of evidence that would be needed to be presented on his behalf should there be a penalty phase. J.A. 493-494; 668-669 (counsel asked him what it was like for him growing up, if there was anything in his background that had happened that might be of help in the penalty phase, and if there was anything at all that might be useful). They provided him with a written description of every mitigating circumstance that Pennsylvania law recognized as a follow-up to a meeting they had with him during which they had reviewed the same information. J.A. 575-576; 657 and Com. Exh. 1. On numerous occasions, over the course of their representation of Rompilla, they spoke with him on this subject, asking him if there was anything in his past that they might be able to use. J.A. 667-671. Rompilla's response was always the same: that there was nothing in his past that might be helpful. He had had, he told them, a "normal" life. J.A. 668. In their conversations with him, Rompilla had not indicated that he was reluctant to talk about any aspect of his life. *Id.*

They queried Rompilla about possible problems with alcohol, not just for purposes of mitigation but also for the possibility of presenting a diminished capacity defense in the guilt phase of the trial. J.A. 500-502. Again, he said, this was not a subject that would lead anywhere. *Id.*; J.A. 721-722. From their discussions with him about what had occurred in the early morning hours of January 14, 1988, too, counsel had gleaned nothing that suggested a problem with alcohol. Although, over time, Rompilla gave several different versions of what occurred, in none of his accounts, did he report experiencing blackouts or any other incapacity or impairment that would have flagged a

potential problem with alcohol. J.A. 561-566. Counsel believed that they had a good relationship with their client and that he was being truthful with them. J.A. 555.[5] Counsel had had no problems communicating with Rompilla, and had detected no signs of any mental impairment or retardation. J.A.736.

Counsel's extensive efforts to learn from Rompilla's family on what might be, from the standpoint of mitigation, the best areas to focus were likewise unfruitful. Dantos repeatedly met with several family members, including siblings who were close in age to Rompilla, and his ex-wife, the mother of his son, and developed a very good rapport with them. J.A. 493-494; 498; 669-670, 729-730 (Rompilla's family was a "constant source of information" for the defense team). She reviewed in detail with them the kind of information that could be helpful for the penalty phase and stressed the importance of presenting such information. J.A. 494; 669 (Dantos asked them to describe what Rompilla's life had been like, including when he was growing up, how he interacted with the members of his family, including his parents). Based on their ongoing interaction with her, she believed that they truly cared about the defendant and wanted to aid in his defense. J.A. 729-730; 734-735. No one, however, had anything helpful to offer. *Id.* All denied the existence of any problems during Rompilla's childhood and upbringing. J.A. 669-670 (from those numerous contacts came nothing which caused them to search for more information on any subject). None of

[5] Counsel were also aware of the "denial dynamic," *i.e.*, that "[s]ometimes people who are abused deny it for reasons of mental health and psychology . . . ." J.A. 499. Dantos explained that is why "you . . . rely on other people to give you information, such as siblings, such as your psychologists or psychiatrists to conduct their interviews and ask questions in a manner that would elicit [that] sort of information." *Id.* This was one of the reasons Rompilla, as discussed later, was sent to three mental health experts. J.A. 670-671.

the family members, who had been in contact with Rompilla during the three and one-half months he was on parole, mentioned problems on his part with alcohol or anything else. J.A. 500. They all echoed what Rompilla had told them: that he had had a normal life. J.A. 494 ("although [Dantos] asked them questions, they did not tell [her] anything noteworthy about his childhood, about his family dynamics"); 734-735. Both she and Charles believed that Rompilla's family members had communicated truthfully with them. J.A. 557-558.

The defense also sought the assistance of three experienced and very well-qualified mental health experts—Paul K. Gross, M.D, a psychiatrist; Gerald Cooke, Ph.D., a clinical and forensic psychologist; and Robert Sadoff, M.D., a board-certified forensic psychiatrist whose services had been previously retained in connection with other cases. J.A. 472; 559-560.[6] He knew their work to be thorough and of very high quality and he relied on their expertise to identify any mental health problems or deficiencies about which evidence could be submitted to a sentencing jury. J.A. 671-673.

When Dantos contacted them, she "requested full examinations from all three experts." J.A. 514. These experts were, *inter alia*, "to look for brain damage. . . organic brain damage, organicity . . . ." J.A. 512. She "explained to them the purpose for [her] contacting them, and the purpose was to see if there was any issue of mental infirmity or mental insanity for the guilt phase and subsequently to possibly use in mitigation if . . . the jury came back first degree." J.A. 472.

---

[6] Each of these individuals had extensive experience at the time they evaluated Rompilla. *See* J.A. 1084-1101 (Dr. Cooke's *curriculum vitae*); 1136-1159 (Dr. Sadoff's *curriculum vitae*). At the time of Rompilla's case Dr. Gross had been practicing psychiatry 13 years. J.A. 1017 (indicating that as of 1996 he had been a psychiatrist 21years).

Charles expected that, as part of their examination of Rompilla, they would obtain whatever information they required in order to evaluate Rompilla or that they would contact him if they needed something. J.A. 671-677; 705-710. He was prepared to retrieve anything they requested even if it involved going to great lengths. J.A. 672-673 (if the experts the defense retained had requested any of Rompilla's records, counsel would have taken steps to obtain them from wherever they might be located). They requested nothing from him. J.A. 676-677. These evaluations furnished nothing helpful. To the contrary, one concluded that Rompilla was a sociopath. J.A. 561.

In the wake of this, Charles and Dantos decided that the only course they could follow would be to appeal to the jury for mercy. J.A. 567-568. To this end, they presented the testimony of three of Rompilla's siblings, J.A. 128-146, his sister-in-law, J.A. 123-127, and his 14 year-old son, J.A. 147-149. Each in turn told the jury how they loved the defendant, how they had seen the good in him, and how they would maintain a relationship with him if he were sentenced to life imprisonment, and asked the jury to spare his life. *Id.* One of Rompilla's brothers offered his view that Rompilla "didn't have a chance . . . they didn't give him no rehabilitation [when he was in prison on prior charges,] which was wrong . . . ." J.A. 138.

In addition to emphasizing Rompilla's relationship with his family members, the defense's appeal urged the jury to appreciate that imposition of a death sentence would not bring the victim back. Dantos also told the jury it

> would be punishing [Rompilla] if [it gave] him life. Life is life. He will spend the rest of his life behind bars. He will not get out. Life is life. I'm not asking you to just let him walk away. I'm

just asking you to be better than what you found him to be.

J.A. 157-158.

As planned, she played upon any residual doubt the jury might have about Rompilla's guilt saying,

> I saw you all struggling with this. I saw it [during deliberations in the guilt phase] Monday night at 10:00 o'clock when we let you go for the evening. You looked tired, you looked nervous, and you looked like you've been struggling. I know that. Well, I'm struggling too, we're all struggling with it. But if you're struggling with it, the fact that you had some doubt, should also stay in your mind now. If there was any doubt, I submit to you that there has to be some doubt. There has to be. You don't know what happened. There's got to be some doubt there. What if he dies, and they find out whose hairs those were, what then? It's too late.

Id.

In its turn, the Commonwealth told the jury it should impose a sentence of death, not out of vengeance but because, based on the facts of this case, it was justified under the laws of Pennsylvania. The evidence, the Commonwealth maintained, proved beyond a reasonable doubt the existence of three aggravating circumstances the state legislature had decided made a sentence of death appropriate for a defendant convicted of first degree murder. J.A. 162. The prosecutor then discussed each of the three aggravating circumstances the jury was being asked to find, and pointed to what evidence, in the Commonwealth's view, proved the existence of each. J.A. 162-166.

As part of his discussion of the "torture" aggravating circumstances, the prosecutor reviewed for the jury the many brutal injuries Rompilla inflicted on Scanlon before Scanlon expired. J.A. 162-165. Those actions, he argued, justified a conclusion that Rompilla had intended to inflict pain and suffering on his victim and should cause the jury to reject his plea for mercy. *Id.* In addressing the evidence of Rompilla's 1974 convictions for rape, burglary and theft of an Allentown bar owner, which was presented to establish that he had a history of serious felonies involving violence or the use of violence, the prosecutor remarked about how closely the 1974 crimes and those in this case resembled each other, saying that the similarities between the two were "frightening." J.A. 165-166. There was, however, one difference he noted: in this instance he allowed the situation to escalate into murder, possibly in an effort to avoid apprehension and prosecution by eliminating a critical witness. *Id.* At no time in his relatively brief argument—it takes up fewer than 9 pages of transcript—did the prosecutor assert that a death penalty should be imposed because Rompilla posed a danger to society in general or anyone in particular. J.A. 161-167.

The jury paused three times its deliberations about Rompilla's sentence to ask questions of the trial court. It first wanted to know: " 'If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?' " J.A. 182-183. In reply, the court told them that it could not answer the question; that parole eligibility was not a matter before them; that they had to reach their decision based on the evidence presented and the law as detailed in its charge. *Id.*

The jury's next request was to be provided with two exhibits, the records of Rompilla's 1974 convictions, that had been admitted as evidence. The court, which had permitted no exhibits to go out with the jury, indicated it would not permit the jury to take

possession of these items, but would have any testimony about those exhibits read if they wished. The jurors explained that they were trying to learn from the exhibits if Rompilla had been released early from his prior sentence for any reason. J.A. 200-201. The court repeated its prior instruction that the circumstances of Rompilla's release from his last prison sentence were not something to be considered in reaching its verdict. They were required, the court told them, to reach a decision based on the evidence and the law as detailed in the court's charge.

The last inquiry from the jury asked: " 'was the Defendant offered any type for [*sic*] rehabilitation, either while in prison or after his release from prison?' " J.A. 216. Again, the court told the jury it could consider only the evidence presented in the sentencing hearing and the law as they had been instructed, and reiterated this when the jury foreman asked: "Could I change this question to the point that is—isn't rehabilitation available in prison?" *Id.*

The jury found all three aggravating circumstances advocated by the Commonwealth and two mitigating factors: "the son of the Defendant being present and put on the stand;" and the "possibility of no rehabilitation during incarceration and after release." J.A. 228.[7] Finding also that the aggravating circumstances outweighed the mitigating, the jury sentenced Rompilla to death. J.A. 231-232. On direct appeal, the Pennsylvania Supreme Court affirmed Rompilla's convictions and the sentences imposed. J.A. 241-257.

---

[7] Petitioner's brief misstates the second mitigating circumstance found by the jury as "the possibility of rehabilitation." Br. for Pet. at 7. The jury's verdict did not determine that the possibility that Rompilla might be rehabilitated in the future had a mitigating influence, but rather that the possible lack of past rehabilitation while he was previously incarcerated and/or on parole did.

3. Rompilla first raised his claims that this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994)(plurality), required the trial judge to tell the sentencing jury that, in Pennsylvania, a term of life imprisonment carries with it no possibility of parole,[8] and that trial counsel were ineffective in representing him in the penalty phase, in an application for state collateral relief made pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 *et seq.* He contended that his future dangerousness had been put in issue in the penalty phase and that the trial court should have answered the jury's inquiry about parole eligibility. Consolidated Petition for PCRA Relief at 6-39. Rompilla's ineffectiveness claim faulted trial counsel for not obtaining various records, which he said contained evidence of impaired mental functioning, organic brain damage and problems with alcohol; for failing to interview two of Rompilla's sisters who could have supplied information about adverse circumstances in the family home; and for not sufficiently instructing the experts who were to evaluate Rompilla about what information about Rompilla could be presented as mitigating evidence. *Id.* at 44-70.

The state post-conviction court conducted a hearing on Rompilla's application and heard testimony from: both Charles and Dantos, who explained how they had worked to prepare for the sentencing proceeding, J.A. 464-536, 546-587, 632-651, 654-744; mental health professionals who offered opinions as to what Rompilla's records reflected, J.A. 824-1279; and members of Rompilla's family who contradicted the testimony of trial counsel about the nature of their contacts with them. J.A. 745-822. The evidence before the post-conviction court established that the experts to whom counsel had referred Rompilla for evaluation had extensive experience in that area and understood what

---

[8] *See* 61 P.S. § 331.21(a)(prohibiting prisoners sentenced to death or to life imprisonment from being released on parole).

types of things would be helpful to the defense in the sentencing phase. After testing and other evaluation, none of the three experts had found anything useful to the defense. *See* J.A. 1358-1369 (where the Court of Appeals summarizes the evidence before the post-conviction court).

The state post-conviction court denied both claims. J.A. 257. It determined that Rompilla was not entitled to relief under *Simmons* because, unlike that case, where the prosecutor had urged the jury to impose a death sentence to act in self-defense and to deal with someone who was a threat, the Commonwealth had not made any argument of the kind in this matter. J.A. 259-260. Further, it said that the trial judge had instructed the jury properly under state law when he told them in response to their question about parole eligibility that this was not a matter for them to ponder.[9] *Id.* There was no evidence, he noted, that they did not abide by the court's admonition. *Id.* The court also pointed out that the jury's questions about the availability of rehabilitation related to issues "raised by the *defense* witnesses during the penalty phase who complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole . . . ." J.A. 260 (emphasis added).

[9] It was well-established state law that if the court in a capital case was asked by a sentencing jury about whether a term of life imprisonment included the possibility of parole, "the reply of the court . . . 'should be, in substance, that whether the defendant might at any future time be pardoned or have his sentenced commuted is no concern of theirs and should not enter in any manner whatsoever into their consideration of the penalty to be imposed, which should be determined solely in light of the relevant facts and circumstances as then existed.'" *See, e.g., Commonwealth v. Edwards*, 521 Pa. 134, 158, 555 A.2d 818, 830 (1989)(quoting *Commonwealth v. Johnson*, 368 Pa. 139, 148, 81 A.2d 569, 573 (1951)).

In ruling on Rompilla's ineffectiveness claim, the state post-conviction court found the testimony of Rompilla's attorneys to be credible and rejected that of his family members. J.A. 264. Applying the standard in *Strickland v. Washington*, 466 U.S. 668 (1984), the PCRA court first determined that there was arguable merit to Rompilla's contention that the jury should have been provided with relevant mitigation information, but also found "that counsel had a reasonable basis for proceeding as they did during the penalty phase." J.A. 263-264.[10]

On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief. J.A. 269-287. It rejected Rompilla's contention that *Simmons* required that the jury should have been told about the defendant's ineligibility for parole if sentenced to life imprisonment when it asked for information about the possibility of parole during its deliberations. The court said that Pennsylvania law required that the jury be informed about parole ineligibility only if the defendant's future dangerousness had been put in issue by the state. J.A. 284 (citing *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31, 35-36 (1998)).[11]

[10] Pennsylvania case law pertaining to ineffectiveness claims uses the same standard as *Strickland*. *See Commonwealth v. Pierce*, 515 Pa. 153, 158-161, 527 A.2d 973, 975-977 (1987). To aid review, state case law breaks down *Strickland*'s "performance" component into two steps. The court reviewing a claim must decide first whether there is arguable merit to the defendant's underlying claim about counsel's performance. If the court finds there is arguable merit to the underlying claim, then it must consider whether counsel had a reasonable strategic or tactical basis for the action or omission in dispute. *See Commonwealth v. Bomar*, 573 Pa. 426, 467 n. 19, 826 A.2d 831, 855 n. 19 (2003).

[11] In *Clark*, the court reiterated what it had said previously about *Simmons*' impact on longstanding state precedent barring consideration of the possibility of parole or other forms of early release from imprisonment by sentencing juries in capital cases.
(continued...)

Because the Commonwealth had not argued Rompilla's future dangerousness, no instruction was required in this case. The state supreme court also rejected an argument that *Simmons* required an instruction because the prosecution had submitted evidence of his 1974 crimes in support of the "history of serious felonies involving violence or the threat of violence" aggravating circumstance, 42 Pa.C.S.A. § 9711(d)(9). That aggravating circumstance, the state supreme court explained, is retrospective—not prospective—in character and therefore did not require a *Simmons* instruction. J.A. 284 ("this aggravating circumstance only addresses Appellants past conduct, not his future dangerousness"). [12]

The Pennsylvania Supreme Court also concluded that trial counsel were not ineffective in their representation of Rompilla. It agreed with the post-conviction court that counsel had acted reasonably in the circumstances of this case.

4. Rompilla filed his *habeas* petition pursuant to 28 U.S.C. § 2254 ("Section 2254") on June 23, 1999. J. A. 1 (Entry 5). Included in it were his claims of counsel's

---

(...continued)
See n. 9, *supra*. Sentencing juries were not to be furnished with information about parole unless the prosecution, in advocating for the death penalty, had put the defendant's future dangerousness at issue. *Clark*, 551 Pa. at 269, 710 A.2d at 31 (citing *Commonwealth v. Christy*, 540 Pa. 192, 656 A.2d 877 (1995)). *Accord Commonwealth v. Speight*, 544 Pa. 451, 677 A.2d 317 (1996), *cert. denied*, 519 U.S. 1119 (1997).

[12] One member of the court dissented because he viewed the jury's question as an expression of its concern about Rompilla's future dangerousness. J.A. 286-87. He added that it was his personal view that the meaning of a life sentence should be explained in all capital cases. *Id.* While the author of the majority opinion noted his agreement on the latter point, he also expressed his view that, under the controlling law, no instruction was required in this case. J.A. 284 n. 10.

ineffectiveness during the penalty phase and his *Simmons*-based claim that the jury should have been told that "life means life." Petition for Writ of Habeas Corpus at 3-86; 98-149.

Though it said "[i]t was a very close call in this case because trial counsel [had] performed so admirably according to [its] review of the record," J.A. 1308, the district court held that the state court's ruling was an unreasonable application of this Court's decision in *Strickland* and granted Rompilla relief. J.A. 1287-1310. The district court did not explain how, in its view, the state court's ruling could be an unreasonable application of *Strickland* when the state court's ruling was admittedly a "very close call." Instead, the district court's decision found fault with the state court's ruling for failing to discuss in depth the duty of defense counsel to investigate evidence of mitigation and standards of the American Bar Association ("ABA") on this subject. J.A. 1300-1301. It concluded from its assessment of the facts that trial counsel "were obliged to go a bit farther to fulfill their duty to investigate." J.A. 1306. The district court vacated Rompilla's death sentence and ordered that the state court either sentence him to life imprisonment or initiate a new penalty phase within 270 days. J.A. 1324.

The district court denied relief as to all of Rompilla's other claims, including his *Simmons* claim. J.A. 1309-1324. It found that "a fair reading [of the prosecutor's closing argument] leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable, savage and cowardly beating Petitioner inflicted on his victim." J.A. 1311-1312. The state court's ruling on that claim, it said, was not contrary to or an unreasonable application of the rule in *Simmons*. J.A. 1311-1312.

The Commonwealth appealed the district court's grant of habeas relief and Rompilla cross-appealed as to the denial of relief on his *Simmons* claim. The Third Circuit majority held that the district court erred in granting Rompilla relief on his ineffectiveness claim and reversed its judgment vacating Rompilla's death sentence. J.A. 1357-1375. The district court had failed to take the proper measure of Rompilla's claim under § 2254's "unreasonable application" clause. Rompilla had failed to demonstrate that the ruling of the Pennsylvania Supreme Court adjudicating the merits of his claim had applied *Strickland* in an objectively unreasonable manner to the facts of this case as determined by the post-conviction court. *Id.*

In this case, the Court of Appeals explained, "[t]he findings of the PCRA court and uncontradicted testimony at the PCRA hearing establish that trial counsel conducted an extensive examination for mitigating evidence." J.A. 1357. Counsel had established good relationships with Rompilla and his family members and had questioned all "in detailed manner" in their search for potentially helpful information. J.A. 1357-1358; *see also* J.A. 1359 (quoting testimony in the post-conviction hearing about the kinds of questions Dantos had put to Rompilla and members of his family and Charles' recollection that Dantos was "meticulous to cover points" with them). "At least some of the siblings who were interviewed must have been aware of the lurid conditions in the family home that were portrayed at the [post-conviction] hearing, but they never mentioned anything about these matters to trial counsel, despite being interviewed 'in a detailed manner.' " J.A. 1358-1359. In view of this, it was not, the Court of Appeals said, "constitutionally ineffective for trial counsel to fail to anticipate that interviewing [two other siblings] would have yielded important new information about the family home." *Id.*

> It was likewise not unreasonable for trial counsel to rely on its mental health experts to detect whether there was any basis for further pursuit of mitigating evidence relating to their client's mental condition. Trial counsel retained no fewer than three highly qualified experts. Dr. Cooke and Dr. Sadoff looked for any evidence that could be used in mitigation and found none. A battery of tests was performed but yielded no indication of mental retardation or anything else that would have been useful for mitigation. Although all three of the experts testified that the records that [post-conviction] counsel subsequently obtained would have caused them to do further investigation, none of the experts asked for records or suggested that further testing be done.

J.A. 1361-1362. The Third Circuit concluded that "[i]n view of these circumstances it was not unreasonable for the state courts to conclude that trial counsel did not fall below the constitutionally mandated level of representation by failing to search out the records at issue and by failing to provide those records to their mental health experts." *Id.* This was not a case where counsel knew of information and did not act on it, but one where counsel had proceeded responsibly to seek information but their efforts were unsuccessful. *Id.*

The Court of Appeals affirmed the district court's denial of relief on Rompilla's *Simmons* claim. J.A. 1384-1404. A critical flaw in Rompilla's claim was his interpretation of the rule announced in *Simmons*. J.A. 1385-1388. The controlling opinion, Justice O'Connor's concurrence joined by the Chief Justice and Justice Kennedy, had held that in capital sentencing proceedings where the only alternative to the death penalty under state law was life imprisonment without possibility of parole, a jury had to be instructed of the defendant's ineligibility for parole if the prosecution

expressly argued his future dangerousness as a basis for a capital sentence. *Id.* While the Court of Appeals noted that this Court's more recent decision in *Kelly v. South Carolina*, 534 U.S. 246 (2002), arguably broadened the holding in *Simmons* when it held that a defendant's future dangerousness was put in issue in ways other than express argument, *Kelly* could not be considered controlling federal law at the time of the state court's ruling in this case fourteen years earlier. J.A. 1390-1391. Because the Commonwealth had not argued to convince the jury that the death penalty should be imposed because Rompilla represented a future danger, the state court ruling's that a "life means life" charge was not required was neither contrary to nor an unreasonable application of the rule announced in *Simmons*. J.A. 1385.

Rompilla's petition for writ of certiorari was filed on July 23, 2004, and was granted on September 28, 2004.

SUMMARY OF ARGUMENT

1. In 1998, at the time of the state court's ruling in this case, *Simmons* was the clearly established federal law governing when a sentencing jury in a capital case had to be instructed that, under the law of the jurisdiction, the defendant would not be eligible for parole if sentenced to life imprisonment. The Pennsylvania Supreme Court did not unreasonably apply *Simmons* to the facts of this case when it denied Rompilla's claim that his sentencing jury should have been instructed about his ineligibility for parole. The holding in *Simmons*, expressed in Justice O'Connor's concurring opinion, was that the defendant was entitled to such an instruction when the prosecution had argued his future dangerousness in asking the jury to impose the death penalty. In this case, the prosecution never argued that the death penalty should be imposed because he was a future danger. Rather, the prosecution sought the death penalty because, in its view, the evidence proved beyond a reasonable doubt three aggravating circumstances, all of which focused only on Rompilla's past behavior, including his actions in the course of the crime for which he was being sentenced. The prosecution's argument was limited to a discussion of those aggravators and did not address whether Rompilla would present a danger in the future. Because *Simmons* did not mention any situation other than the one presented in the case, *i.e.*, where there is an express argument by the prosecution that the death penalty should be imposed because the defendant posed a future danger, it was not unreasonable for the state court to deny Rompilla's claim because there had been no argument of his future dangerousness by the state.

Even if the state court should have understood *Simmons* to apply in situations where a defendant's future dangerousness is put in issue less directly, *e.g.*, through the presentation of evidence, its denial of relief

to Rompilla was not an unreasonable application of *Simmons*. The Commonwealth did not portray Rompilla as a future threat, either in its argument or through the evidence it presented. The overall tenor of the state's case was that because the evidence proved the existence of three aggravating circumstances specified by the Pennsylvania General Assembly a capital sentence was justified in this instance. The Court of Appeals was correct in denying Rompilla relief on his *Simmons* claims for these reasons.

2. The state court's conclusion that trial counsel were not ineffective in their investigation and presentation of mitigation evidence in the penalty phase of Rompilla's trial likewise did not involve an unreasonable application of the controlling federal law, this Court's decision in *Strickland*. The state court properly reviewed Rompilla's claim, which faulted counsel for not obtaining various records which he said would have shown problems during his childhood, brain damage and problems with alcohol, from the perspective of counsel at the time they were representing him and with the information they knew at that time.

The evidence showed that counsel were aware of their duty to investigate possible evidence of mitigation to be presented in the event a penalty phase would be required and undertook to do so from the time they began representing Rompilla. Counsel decided, as initial steps, to interview Rompilla and several family members and to have Rompilla evaluated by highly-qualified mental health professionals whose work was known by them to be of very high caliber. Rompilla's attorneys decided upon this course in order to make the most of the limited resources available to them. Based on what past experience had proven to be most productive, they sought first to learn from interviews with Rompilla and his family and the evaluations by the mental health professionals what areas might be

developed most profitably for his case in the penalty phase. Counsel placed no limitations on the interviews or evaluations. To the contrary, they indicated to Rompilla and his family that they were willing to consider anything the family had to tell them, and counsel instructed the experts to do "full" evaluations.

Counsel diligently followed through as planned and met on numerous occasions with Rompilla and with his family members, who had indicated to counsel that they were willing and eager to help with his case. The experts to whom Rompilla was referred, who were familiar with what type of information might be helpful for the defense, conducted evaluations and testing. Counsel relied on the experts to request any material they might need for their assessment of Rompilla and were prepared to go to great lengths to obtain what they wanted. None of them, however, asked for anything, including any of Rompilla's records. Counsels' efforts to locate evidence of mitigation in this way were unsuccessful. Rompilla repeatedly told them he had a "normal" life and his relatives confirmed it. Neither Rompilla nor his relatives said anything about difficult conditions in the family home during his childhood, problems in or out of school or alcohol abuse. Counsel had had no problem communicating with Rompilla and nothing in their interaction with him had suggested that he might be mentally impaired. The experts offered nothing helpful either. One concluded that Rompilla was a sociopath.

It was only after their extensive efforts had not panned out that counsel concluded their only option was to plead for mercy and to try to take advantage of any residual doubt the jury might have signaled by its question about accomplice liability in the guilt phase. Counsel's actions did not fall below an objective standard of reasonableness. Counsel proceeded in a responsible and appropriate way in investigating as they did. Their investigation was designed to elicit

exactly the type of information that might be used in mitigation. Rompilla and his relatives could be considered to be good, first-hand sources of information that could be later fully explored and developed. Similarly, counsel could reasonably rely on experts to furnish other potentially valuable evidence that neither Rompilla nor his family members could. Given these facts, the state court did not unreasonably apply *Strickland* when it concluded that there was no basis for relief under that ruling's "performance" component. The Court of Appeals properly concluded that, under § 2254(d)(1), Rompilla was due no relief.

ARGUMENT

Rompilla's application for a writ of habeas corpus was subject to the changes made to federal law by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As reshaped by AEDPA, the federal habeas statute permits issuance of the writ only if a state court's decision adjudicating the merits of a claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court] . . . ." 28 U.S.C. § 2254(d)(1). *See Bell v. Cone*, 535 U.S. 685, 693 (2002)(AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law").

In a series of decisions since AEDPA's enactment, this Court has reiterated that, even if a federal court disagrees with a state court's ruling, it is not authorized to disturb that ruling unless it is contrary to the Court's controlling precedent or involves an unreasonable application of the same. *See Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Price v. Vincent*, 538 U.S. 634, 638-639 (2003); *Bell, supra*, 535 U.S. at 693-694; *Williams v. Taylor*, 529 U.S. 362, 399-413 (2000). State court determinations of fact are to be presumed to be correct unless shown by clear and convincing evidence to be otherwise. § 2254(e)(1).

The Third Circuit's ruling on Rompilla's claims was informed by and strictly adhered to these principles. J.A. 1334-1335. Quite properly, it resisted engaging in any *de novo* review of those claims and viewed them as it was required to do "through the lens of § 2254(d)." *Price*, 538 U.S. 639. The conclusion it reached—that the state court's decision rejecting Rompilla's *Simmons* and ineffectiveness claims involved no unreasonable

application of this Court's jurisprudence—was correct, and therefore its denial of relief to Rompilla was entirely appropriate and should not now be disturbed.

I. THE STATE COURT DID NOT UNREASONABLY APPLY *SIMMONS* WHEN IT RULED THAT NO "LIFE MEANS LIFE" INSTRUCTION WAS REQUIRED IN THIS CASE.

A. *Simmons* Required Instruction About Parole Ineligibility Only If The Prosecution Argued For Imposition Of The Death Penalty Based On The Defendant's Future Dangerousness.

The threshold step in determining whether habeas relief should be granted under § 2254(d)(1) is identifying what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." *Andrade*, *supra*, 538 U.S. at 71. "Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' " *Id.* (quoting *Williams*, 529 U.S. at 412).

In 1998, at the time of the Pennsylvania Supreme Court's ruling in this case, this Court's decision in *Simmons* set forth the legal principles which governed when a sentencing jury in a capital case had to be informed that, under state law, a defendant sentenced to life imprisonment would not be eligible for parole.[13] The ruling in *Simmons* represented an exception to the general principle the Court had previously recognized in its decision in *California v. Ramos*, 463 U.S. 992, 2002-1003 (1983): that what a jury is to be told (or not told) about sentencing is a matter for the individual States to determine. *Simmons*, 512 U.S. at 168; *id.* at 176-177 (O'Connor, J., concurring)(observing that "[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States").[14]

In *Simmons*, the defendant had been convicted of murdering an elderly woman and had a history of assaulting others. In the sentencing hearing, witnesses presented by both sides agreed that he posed a continuing danger to elderly women. 521 U.S. at 175-176. In his closing argument, the prosecutor told the jury to treat the defendant as a threat and to make their verdict " 'an act of self-defense.' " *Id.* The defense attempted to show in response that Simmons was capable of making a good adjustment in prison, a place where he would not have occasion to encounter the class of persons for whom he was potentially a threat, and asked to have the jury told that a sentence of life imprisonment meant he would never be eligible for parole, and hence never in a position where he might prey on elderly women. This Court ruled that the trial judge's refusal to give an instruction which specifically clarified that the defendant, if sentenced to a life term, would be ineligible for parole violated due process. *Id.* at 171.

The plurality opinion of four Justices stated "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 154. The prosecution could not, the plurality opinion said, "create a false dilemma by advancing

---

[13] There had been no further instruction by this Court on that issue in the four years between the 1994 decision in *Simmons* and the state court's ruling in this case. In 1997, in *O'Dell v. Netherland*, 521 U.S. 151 (1997), the Court had occasion to decide if *Simmons* should be applied retroactively to cases on collateral review. *O'Dell* did not, however, modify *Simmons* in any way.

[14] Justice O'Connor's concurring opinion in *Simmons* also observed that the Court had "previously noted with approval . . . that '[m]any state courts have held it to be it improper for the jury to consider or be informed—through argument or instruction—of the possibility of commutation, pardon or parole.' " 512 U.S. at 176 (quoting *Ramos*, 463 U.S. at 1013 n. 13).

generalized arguments regarding the defendant's dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 171.

Justice O'Connor's concurring opinion, in which the Chief Justice and Justice Kennedy joined, however, stated a more narrow rule: "that due process requires that the defendant be allowed to [supply information about parole ineligibility] in cases in which the only available sentence to death is life imprisonment without the possibility of parole and the prosecution *argues* that the defendant will pose a threat to society in the future." *Id.* at 177 (emphasis added). Justice O'Connor's concurrence thus states the controlling rule in *Simmons*. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that portion taken by those Members who concurred in the judgments on the narrowest ground . . . ") (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, J.J.)). *See O'Dell, supra*, 521 U.S. at 159 (referring to Justice O'Connor's concurrence as the "decisive opinion" in *Simmons*); *id.* at 169 (Stevens, J., dissenting)(describing Justice O'Connor's concurrence as having "been treated as the narrowest ground on which the decision rested"). *See also Kelly v. South Carolina*, 534 U.S. 246, 258 (2002)(Rehnquist, C.J., dissenting)(referring to Justice O'Connor's concurrence as "the prevailing opinion" in *Simmons*).

Neither the plurality opinion nor Justice O'Connor's concurrence considered any situation other than that presented by the facts in *Simmons*, *i.e.*, where the prosecution has expressly appealed to the sentencing jury to impose a capital sentence because of the future danger the defendant presents. As a result, in the wake of *Simmons* it was an open question—and when the

state court decided this case it remained an open question—whether a defendant's future dangerousness could be put in issue in other some way.

Rompilla argues that the mere presentation of evidence of a defendant's criminal history necessarily puts his future dangerousness in issue, and that the Court's decision had made this clear by 1998, but this is incorrect. He points to a series of cases, including this Court's decision in *Kelly*, *supra*, which he says "reiterated [that] a 'jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude he presents a risk of violent behavior' in the future." Br. for Pet. 22-23 and n. 10. *Kelly* post-dates the ruling by the state court, and therefore cannot be considered part of the legal landscape of "clearly established Federal law" which is relevant for analyzing Rompilla's claim under § 2254(d)(1). The other cases he cites as illustration of the principle which *Kelly* "reiterated," in fact, do not support his position. None of the cases supplies controlling legal precedent on the issue of whether proof of a defendant's criminal history, by itself, served to put a defendant's future dangerousness in issue.[15]

---

[15] The issue before the Court in *Nichols v. United States*, 511 U.S. 738, 752 (1994), involved the federal sentencing guidelines and the fragments Rompilla has taken from Justice Souter's concurring opinion were part of a discussion of how certain evidence should be treated in calculating the defendant's sentence. In *Heller v. Doe*, 509 U.S. 312, 333 (1993), the statements were made in conjunction with a discussion of the relevancy of evidence for purposes of a civil commitment matter. In both *Johnson v. Texas*, 509 U.S. 350, 355-356 (1993) and *Jurek v. Texas*, 428 U.S. 262, 272-272 (1976), the defendant's future dangerousness was in issue and evidence of past crimes was submitted in each as proof of the same. The Court's discussion of that evidence was in that context and did not generalize about the nature of criminal convictions. In *Michelson v. United States*, 335 U.S. 469, 475-476 (1948), the court's discussion of criminal history information involved whether such evidence could be admitted in order to prove a defendant had committed a (continued...)

Contrary to what Rompilla says, at the time of the state court's decision, whether a defendant's future dangerousness could be put in issue by implication or by means less direct than express argument was a question unanswered by this Court's cases. Not only did this Court's jurisprudence at the time not make it clear if evidence of a defendant's criminal history could put a defendant's future dangerousness in issue, but also it did not address the separate question of whether the submission of such evidence necessarily and always has that effect.

When the Pennsylvania Supreme Court decided this case, the governing rule was that a jury must be instructed on parole ineligibility only if the prosecution in a capital case *argues* that a death sentence should be imposed because of the defendant's future dangerousness. Eighteen months before the state court rendered its decision, this Court in *O'Dell* had described *Simmons*' holding in just that way. *See* 521 U.S. at 153 (*Simmons* "requires that a capital defendant be permitted to inform his sentencing jury that he is parole ineligible if the prosecution *argues* that he presents a future danger . . . ")(emphasis added). Thus, for purposes of the review to be conducted under § 2254(d)(1) in this case, that was the "clearly established Federal law."

B. The State Court's Decision Did Not Unreasonably Apply *Simmons*.

The Pennsylvania Supreme Court's ruling on Rompilla's claim that he was entitled to have the jury told that he would be ineligible for parole if he were sentenced to life imprisonment does not involve an

(...continued)
particular crime, *i.e.*, whether from his past crimes a jury might conclude the defendant had a propensity to commit the offense for which he was being tried. The court only addressed evidence of past criminal behavior in that very limited fashion.

unreasonable application of the rule in *Simmons*.[16] "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, *supra*, 529 U.S. at 411. Instead, the state court's application must be objectively unreasonable. *Id.* at 409. *Andrade*, 538 U.S. at 75-76 (citing *Bell*, 535 U.S. at 699; *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). This can occur if a state court decision correctly identifies the proper controlling precedent but unreasonably applies it to the facts of a particular case. *Williams*, 529 U.S. at 407. It is the reasonableness of the state court's judgment that matters, not the rationale it used. *See, e.g., Weeks v. Angelone*, 528 U.S. 225 (2000).[17]

In reviewing Rompilla's claim that the jury should have been instructed about parole ineligibility, the state court correctly identified *Simmons* as the law which governed Rompilla's claim and referenced its own rulings which had effected the change in Pennsylvania law mandated by *Simmons*. J.A. 284 (citing *Clark*, *supra*, 551 Pa. at 269-270, 710 A.2d at 36). Its

[16] Though the second question presented in Rompilla's brief involving *Simmons* encompasses § 2254(d)(1)'s "contrary to" clause, *see* Br. for Pet. i, he has abandoned this point by not arguing it. *See id.* at 26-30; *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 168 (1934).

[17] In *Weeks*, the court held that the state court's ruling denying the defendant's claim involving jury instructions in the penalty phase of his trial was neither "contrary to" nor an "unreasonable application of" its decisions and denied relief under § 2254(d)(1). The court did not examine the state court's reasoning but reviewed the controlling precedent contained in its decisions and concluded, based on its discussion, that no habeas relief was justified. 528 U.S. at 231-237. The state court opinion in fact provided no rationale for its conclusion that the claim lacked merit. *Weeks v. Commonwealth*, 248 Va. 460, 465-467, 450 S.E. 2d 379, 388-390 (1994).

application of what was then the clearly established precedent of this Court to the facts of this case was not unreasonable, and therefore does not support granting the writ, for two reasons.

1. It was not objectively unreasonable, before this Court's ruling in *Kelly*, to construe *Simmons* as only applying to cases where the prosecution expressly argues future dangerousness. In light of *Simmons*' specific holding, and the questions it left unanswered, it was not unreasonable for the state court to conclude that, absent overt argument of the defendant's future dangerousness by the prosecution, no instruction about a lifer's prospects for parole needed to be given.

Certainly, *Simmons* established no rule requiring that a sentencing jury must be provided with parole-related information if it requests it. To the contrary, *Simmons* reaffirmed the settled principle that this is a matter typically left to the judgment of the States, 512 U.S. at 168, 176-177, to which the rule announced in *Simmons* was an acknowledged exception. Nor did *Simmons* hold that an inquiry by the jury about parole eligibility must be treated as though the defendant's future dangerousness has been placed in issue. Nor did *Simmons* hold that evidence of a defendant's past criminal record, by itself, places a defendant's future dangerousness in issue and requires that a jury be instructed on parole eligibility.

Indeed, *Simmons* offered no guidance on any situation other than the one which was directly before the Court—where the prosecution has expressly argued future dangerousness—and it was therefore unclear, in the wake of *Simmons*, if some less direct means could suffice to put a defendant's future dangerousness in issue, necessitating a suitable jury instruction about parole. It was not until the decision in *Kelly* that the Court held that when determining whether a "life means life" instruction must be given, a court must

consider more than whether the state has affirmatively asked the jury to take the prospect of the defendant's future dangerousness into account in arriving at his sentence. *Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting)(discussing how *Kelly* had changed the way in which *Simmons* claims are to be scrutinized, specifically, that "the test [for determining if a jury is to be informed about parole ineligibility] is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society").

Rompilla was entitled to relief under § 2254(d)(1) only if it was clear at the time of the state court's decision that a defendant's future dangerousness could be put in issue by something short of express argument at the time. It was not. The 5-4 decision of this Court in *Kelly*, shows that the rule in *Simmons* could be reasonably understood to mean different things. *See id.* and at 263 (Thomas, J., dissenting)(describing *Simmons* as having provided "an imprecise standard").[18]

For a court in 1998, given the ambiguity that existed, it was entirely reasonable to conclude, as the state court did here, that if a prosecutor had not actively argued a capital defendant's future dangerousness to the jury, the usual rules of its

---

[18] We are not arguing that *Kelly* was wrongly decided but rather that the views expressed in dissent illustrate that there could have been reasonable disagreement about what precisely *Simmons* had held. *See Beard v. Banks*, No. 02-1603 (U.S, Jun. 24, 2004), slip op. 8, (where in analyzing whether its decision in *Mills v. Maryland*, 486 U.S. 367 (1988), was a "new rule" for purposes of *Teague v. Lane*, 489 U.S. 288 (1989), the Court viewed the dissent by four Justices to have demonstrated that reasonable jurists could have disagreed about the holding of an earlier ruling). In *Kelly*, this Court had no occasion to address whether the state court's ruling was an unreasonable application of the controlling precedent of this Court because review in this Court followed the petitioner's direct appeal in the state court.

jurisdiction about providing a jury with parole-related information applied. Pennsylvania law generally did not allow juries to be given information about parole. *See* n. 9, *supra*. Because the prosecution did not argue Rompilla's future dangerousness as justification for imposing the death penalty, the state court's conclusion that no relief was appropriate under the rule of *Simmons* was objectively reasonable.

2. Even if it could have been understood in 1998 that the rule in *Simmons* was not limited to situations in which the prosecution had argued future dangerousness—that the state court should have evaluated the trial record in the way *Kelly* did—the state court's opinion does not reflect any unreasonable application of federal law. On the facts of this case, even under the scrutiny that *Kelly* requires, it is clear that the Commonwealth did not put Rompilla's future dangerousness in issue in the penalty phase, either by argument, the evidence it introduced, or the combination of both.

The Commonwealth asked the jury to sentence Rompilla to death because—and only because—the evidence had proved beyond a reasonable doubt three of the things that the Pennsylvania legislature had decided caused a murder to come within the narrow category of cases in which a death penalty is appropriate. J.A. 161-162. None of those three aggravators spoke to the defendant's future behavior, but focused instead solely on his *past* actions: his commission of felonies concurrent to the murder; his infliction of unnecessary pain and suffering on his victim as he was killing him; and his prior criminal episode in which he had, in very similar fashion, broken the law. The Commonwealth's arguments were strictly limited to what Rompilla had done in the past as the basis for imposition of sentence, not anything he might do in the future. J.A. 162-167.

To be sure, the Commonwealth discussed the particularly horrible way Rompilla had killed Scanlon in addressing the "torture" aggravator and presented evidence of one past criminal episode in support of the "significant history" aggravating circumstance.[19] That evidence was necessary proof for each. In his closing argument the prosecutor did not stray from only discussing that evidence against that framework. He did not address in any way what the evidence portended for the future, nor did he ask the jury to factor any perceptions they might have about Rompilla's future behavior into their decision. *Id.*

At no time did the Commonwealth remark in any way about the future or do anything to imply that Rompilla presented a future danger. For example, there was no argument by the Commonwealth that Rompilla should be sentenced to death because he was incapable of rehabilitation. To the contrary, the topic of rehabilitation was raised solely *by Rompilla*, whose witness offered his views that Rompilla had not received any rehabilitation, as a mitigating circumstance. J.A. 138. The prosecution never mentioned the subject in its presentation of evidence in its case in the penalty phase or in closing argument and only made brief reference to the topic on cross-examination in follow-up questions to statements by the defendant's witnesses.[20] J.A. 141-142.

---

[19] The state court determined that the prosecution's presentation of the evidence of Rompilla's prior criminal case had been accomplished in a way that minimized any inflammatory impact. J.A. 281-282.

[20] Similarly, the prosecution did not mention parole in its presentation of evidence or argument in the penalty phase. Again, that was first brought up only by defenses witnesses as well, J.A. 124, and only one question on cross-examination referenced it to focus the witness on a particular point in time. J.A. 127. It was also not part of the Commonwealth's penalty phase case to elicit, or (continued...)

The record of the penalty phase of Rompilla's trial stands in stark contrast both to those in *Simmons* and *Kelly* and to the description of the proceeding that Rompilla has carefully crafted in his brief by using words and phrases selectively snipped from the record, and mischaracterizations, to fit his theme that the Commonwealth was out to "send a message" about Rompilla's future dangerousness to the jury. Br. for Pet. 30.

No one offered opinions that Rompilla posed a continuing danger to others. *Simmons*, 512 U.S. at 157 ("witnesses for both the defense and the prosecution agreed that the petitioner posed a continuing danger to elderly women"); *Kelly*, 534 U.S. at 250 ("[t]he prosecutor told the jurors that '[Kelly] doesn't have any mental illness. He's intelligent . . . He's quick-witted. Doesn't that make somebody a little more dangerous —' " and also said " 'murderers will be murderers' "). The Commonwealth never asked the jury to "act in self-defense" when it imposed its sentence, *Simmons*, 512 U.S. at 157, or emphasized the jury's physical proximity to someone who had engaged in a heinous act. *Kelly*, 534 U.S. at 248 ("prosecutor began [his opening statement in the penalty phase] by telling jurors that 'I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer.' ")

No one told the jury about any involvement by Rompilla in jailhouse violence, escape attempts or plots

(...continued)
to emphasize information that the defendant had been on parole for only three and one-half months when he committed the crimes in this case. On cross-examination, in an effort to impeach the testimony of Rompilla's witnesses who had said that they were in contact with him when he was on parole, the prosecution asked about the length of time they had been in touch with him. The witnesses acknowledged that it had been for three and one-half months. J.A. 123-131.

to take hostages. *Id.* at 248-249 (prosecutor presented testimony "that while in prison Kelly made a knife (or shank) and had taken part in an escape attempt, even to the point of planning to draw a female guard into his cell where he would hold her hostage"). No one tagged him with grisly epithets. *Id.* at 249-250 (in closing argument, "the prosecutor spoke of Kelly as 'the butcher of Batesburg,' 'Bloody Billy,' and 'Billy the Kid'").

On this very different record, it was reasonable for the state court to conclude that, by its narrowly-focused case in the penalty phase, the Commonwealth had not, even indirectly, put Rompilla's future dangerousness into issue and that there was therefore no requirement to instruct the jury about parole ineligibility. The state court's ruling therefore affords no basis for relief under the "unreasonable application" clause of § 2554(d)(1).

II. THE STATE COURT REASONABLY APPLIED *STRICKLAND* WHEN IT REJECTED ROMPILLA'S CLAIM THAT TRIAL COUNSELS' REPRESENTATION IN THE PENALTY PHASE WAS INEFFECTIVE.

The state court correctly identified this Court's decision in *Strickland* as the "clearly established Federal law" which governed Rompilla's claim challenging trial counsels' representation of him in the penalty phase. *Strickland* prescribes a two-step test to evaluate whether an attorney's representation of a criminal defendant satisfies the Sixth Amendment. Under *Strickland*'s "performance" prong, a court must determine if "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 at 688. Under its "prejudice" prong, the court must assess if "counsel's deficient performance prejudiced the defendant," that is, whether "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Id.* at 694. A reviewing court may deny relief upon determining that either one of the prongs has not been met. *Id.* at 697. The state court did not address the "prejudice" element but denied Rompilla's claim after determining that he had failed to meet *Strickland*'s "performance" component. J.A. 270-273. The state court's holding—that counsels' performance did not fall below "an objective standard of reasonableness"—reasonably applied the rule in *Strickland* to the facts of this case.

Strickland made it clear that "[j]udicial scrutiny of counsel's performance must be highly deferential," and that every effort [had to] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The reviewing court must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* There are, this Court said, "countless ways to provide effective assistance in any given case." *Id.* Hence, there is no "checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

In taking the measure of counsel's professional performance, a reviewing court may look to "[p]revailing norms of practice as reflected in the American Bar Association standards and the like" as "guides to determining what is reasonable," but stressed that "they are *only* guides." *Id.* (emphasis added). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel of the range of

legitimate decisions how best to represent a criminal defendant." *Id.*

The state court's review of Rompilla's claim that counsel did not properly investigate evidence of mitigation was conducted from the proper temporal perspective. Also, as *Strickland* instructs, the court reconstructed the circumstances that existed at the time counsel were involved in representing Rompilla. It took care, too, to guard against having its evaluation skewed by the benefit of hindsight and to orient its review from Charles' and Dantos' perspective. J.A. 271-273.

1. Indisputably, both attorneys were aware that they were obliged to search for evidence of mitigation to be presented in the event a penalty phase would take place and undertook to do so from the time they began to represent Rompilla. J.A. 657-660 (acknowledging the importance of mitigation evidence, that the duty to investigate for mitigation evidence is equal to duty to investigate for the guilt phase, and agreeing that an attorney "should use [his] maximum resources to investigate . . . a capital offense and anything else that would help his client"); 516 (preparation for guilt phase continued "all throughout," including during the trial's guilt phase). Counsel did not make a decision to limit their investigation to only certain types of information but instead kept the subject matter of their investigation open-ended. Charles made it a practice to routinely begin investigating by first asking his client wide-reaching questions such as:

> 'How was your childhood? Were there any problems that you suffered? Any kind of abuse? Tell me, is there anything that sticks out? Don't think whether it's important or not. You just tell us something about – is there anything you can tell me from your youth till now that can help us? Don't think whether it's

> important or not. Just tell us, and then we'll determine whether or not we can use it.'

J.A. 662. Dantos also cast a wide net. In meeting with his family members she, too, posed questions designed to allow them to bring any topic they might think would be valuable. J.A. 669 (Dantos asked them " 'What can you tell me about Ron? What was it like for him? What was his life like? What was it like growing up? What was his relationship? What kind of brother was he? What kind of brother-in-law was he? What do you know?' ") Their experts were told to do "full" evaluations. J.A. 514.

In beginning the task of identifying and gathering potentially relevant evidence of mitigation, counsel chose to take a two-pronged approach: to interview Rompilla and several close family members, and to have him evaluated by experienced mental health professionals. Counsel envisioned those efforts as a first step, not the whole of their investigation. They believed that these sources would highlight for them areas that could be further explored and developed. As they explained to the state post-conviction court, in proceeding as they did, they were attempting to make the most of the investigative resources they had at their disposal. J.A. 662-673.

In pursing this investigation plan, counsel's professional performance did not fall below an objective standard of reasonableness. The ABA's standards *circa* 1988, when counsel were engaged in Rompilla's representation, for example, offered little specific guidance with respect to counsel's duty to investigate.[21]

---

[21] In February of 1989, the ABA issued guidelines for the performance of counsel in capital cases which supplied more detail in terms of recommending what should be done in an investigation of possible evidence of mitigation, including the collection of a (continued...)

In its entirety, ABA Standard 4-4.1 ("Duty to Investigate") provided that:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admission or statements to the lawyer constituting guilt or the accused stated desire to plead guilty.

ABA *Standards for Criminal Justice* § 4-4.1 (2d ed. 1980). The relevant part of the commentary which follows that standard, adds that

> [t]he lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or by the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of

---

(...continued)
defendant's records. *See Guidelines for the Appointment of Counsel and Performance of Defense Counsel in Death Penalty Cases* (1989). Because those guidelines post-date counsel's representation in this case by a few months, they cannot fairly serve as an objective standard against which their performance can be measured as they were not the "prevailing norms," *Strickland*, 466 U.S. at 688-689, at the time of counsel's representation.

> the offense itself. Investigation is essential to fulfillment of these functions.

ABA *Standards for Criminal Justice* § 4-4.1 cmt. (2d ed. 1980)

Neither the standard itself nor its commentary identified any one path to be followed by counsel. Neither said that, in any instance, let alone every instance, an attorney had to obtain a defendant's records as part of his or her investigation. While it is true that review of a defendant's records can be of great assistance in locating the types of information described in the commentary, it is not the only means by which that information can be located. Certainly nothing in the ABA standards that may be used in this case as a gauge of prevailing norms suggested that counsel could not, or should not, take an alternative route to the same place.

Counsel's plan in this case, while not calling for collection of the full spectrum of Rompilla's records in its initial step, was nevertheless aimed at mining exactly the sort of information the ABA standards counseled. Rompilla and his siblings, who were on either side of him in the family birth order, were logical sources of first hand knowledge about his upbringing and his life experiences. His family members were informed of the importance of the information they were providing to counsel and were eager to help. J.A. 493-494; 669-670; 729-730. Counsel could reasonably expect that in speaking to them they would be alerted to any problems in the family's home, any physical or mental problems Rompilla experienced, any difficulties Rompilla had had in or out of school, and any watershed developments during his childhood and teenage years. Rompilla's sister-in-law, who had some contact with him when he was incarcerated and who had given him a home when he was on parole, J.A. 123, as well as his ex-wife, with whom he had lived as an

adult and with whom he shared a son, likewise could offer information and insight about his adult years. All of these individuals, too, were likely to know positive information about Rompilla that could be presented to the jury.

In disparaging counsels' efforts, Rompilla says that they knew his relatives were poor sources of information about him because his relatives had had only limited contact with him. Br. for Pet. 9. That is misleading: it is true only for the period during Rompilla's adult life when he was imprisoned for his 1974 crimes and for some time when he was in juvenile detention.[22] They did not lead counsel to believe they would not know conditions in the family home when Rompilla lived in it or his experiences and any problems during that time. J.A. 493-496 (family members had very limited knowledge of Rompilla while he was in prison). But as the Court of Appeals pointed out, it was certainly reasonable for counsel to expect that these relatives—especially Rompilla's siblings—would be knowledgeable sources about other aspects of Rompilla's life, especially the childhood events on which he now places such emphasis. J.A. 1358-1359 They were, after all, members of the same family and bracketed him by their ages. J.A. 128, 134, 144 (brother Nicholas was six years older; brother Robert, 9 years younger; sister Sandra, one year older). After several of Rompilla's siblings had all told counsel the same thing he had—that there was nothing helpful in Rompilla's childhood or family life—it was not unreasonable to forego interviews with his other two sisters.

The panoply of mental health experts to whom counsel also turned were well versed in evaluating criminal defendants and in identifying mitigating

---

[22] Those who were in contact with him during the time reported nothing significant.

information. These were persons who, as the result of their expertise, might be able to supply material for mitigation that the family could not. They included courtroom veterans who had testified in many state and federal cases before participating in this matter and were well aware of what sort of evidence would be helpful for the defense. *See* J.A. 1365-1369 and n. 12 (where the Court of Appeals pointed out that the evidence presented to the state post-conviction court showed that the experts understood what was expected of them and catalogued some of the cases in which Drs. Sadoff and Cooke had testified previously). Counsel placed no restrictions on the manner in which they were to evaluate Rompilla or the subjects they could cover with him. Counsel was ready to obtain whatever information, including any of Rompilla's records that they may have wanted, no matter how burdensome that task may have been. None of the experts gave any indication to counsel that they were unable to perform the full evaluations that had been requested. J.A. 1363-1364.

It was therefore not unreasonable for the state court to reject Rompilla's claim that counsel should have instructed them in more detail about what to look for in the course of their evaluations of Rompilla, or his claim that counsel's performance was deficient for failing to obtain and provide Rompilla's records to them. Given their obvious expertise and experience, counsel could reasonably rely on them to seek whatever information or records were required in order to conduct their respective evaluations. Thus, as conceived, counsel's investigative plan was eminently reasonable and did not fall below an objective standard of reasonableness.

2. In execution as well, counsels' performance reflected diligence and extensive effort. They met repeatedly with Rompilla and his family members and questioned them in a detailed manner designed to elicit relevant information. Counsel also consulted with the

experts that the defense had retained and was prepared to aid them in any way the experts might require. Counsel's communications with their experts disclosed what, to any reasonable person, would appear to be suitable professional action by those experts, *e.g.*, that they had conducted various tests to ascertain deficiencies or problems in Rompilla's mental and cognitive faculties. In other words, they reasonably believed that the experts had done their job. When the extensive interviews and multiple professional evaluations produced nothing significant in terms of possible evidence of mitigation, it was entirely reasonable, as the Court of Appeals observed, J.A. 173-175, for counsel to conclude that they would have to take another approach in the penalty phase.

The defense settled on the strategy they did only after they had exhausted these avenues. There was no tactical decision not to investigate, *cf. Strickland*, 466 U.S. at 673-674, nor any decision to treat investigation of possible mitigation evidence as subordinate to efforts to pursue a different strategy in the penalty case. *Cf. Wiggins v. Smith*, 539 U.S. 510, 515-516 (2003). At no time did counsel representing Rompilla choose not to take advantage of available resources. *See id.* at 524 (counsel chose not to commission social history report despite available funds for the same). To the contrary, they conceived the plan they did deliberately to *maximize* the resources available to them. In trying to make the most of what counsel had available to them, counsel performed in the best interests of their client.

These practical realities, as the Third Circuit found, had to be included in the recreation of their perspective for purposes of the evaluation that *Strickland* mandated. J.A. 1364-1365. In faulting counsel for not obtaining records and other material, Rompilla is conducting a critique in hindsight, working backwards from subsequently-obtained materials to show how "easily" they could have been obtained. This improperly

re-shapes the review of counsel's performance that *Strickland* specifies. Counsel's decisions must be evaluated based on what was known to counsel at the time they acted, not from "[h]indsight [which] is, of course 20/20." *Barker v. Wingo*, 407 U.S. 514, 555 n. 39 (1972).

Counsel's performance in this case differs from that in *Wiggins* in other important ways. In *Wiggins*, even given the comparatively limited scope of the investigation into evidence of mitigation, there were signposts pointing to areas which should have been explored "by any reasonably competent attorney . . . ." *See* 539 U.S. at 523 (noting that in a pre-sentence investigation report that counsel had received Wiggins had said that his childhood had been "disgusting"). Counsel's efforts in *Wiggins*, this Court said, had "uncovered no evidence in their investigation to suggest that . . . further investigation would have been fruitless."[23] *Id.* at 525. For the lawyers here, in contrast, there were only dead ends.[24] Rompilla told Charles and Dantos that his childhood and been "normal," and five of the six family members they spoke to—the sixth was his son, who obviously had no

[23] Approximately eight months before Wiggins' trial, the ABA issued its first set of Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which provided guidance on investigating and presenting the defense's case in the penalty phase. *See* n. 21, *supra*. In reviewing the performance of Wiggins' attorneys, this Court looked to those guidelines as the polestar for professional conduct at the time of their representation. 539 U.S. at 524. Those standards could not be used to measure the performance of the defense attorneys in this case because they were promulgated three months *after* Rompilla's trial.

[24] Rompilla contends that a statement in the correspondence from one of the experts alluded to his problems with alcohol and should have served as a "red flag." As the Third Circuit's opinion points out, the statement did not actually identify this as a problem area but noted that additional evaluation might be warranted. J.A. 1372-1373. After receiving the correspondence, *id.*, counsel had Rompilla evaluated by the two other experts.

knowledge on this score—all confirmed it. The evaluation of several mental health experts had not shown otherwise. The Court of Appeals aptly summarized the critical differences between *Wiggins* and this case this way:

> In short, the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so. Rompilla's attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources. In our view, *Wiggins* is critically different from the present case.

J.A. 1372.

In view of these marked differences, the state court's decision appreciated this and adhered to this Court's instruction. The state court reasonably applied the *Strickland* rule in this case.

The district court failed to appreciate this and improperly substituted its view of the record for that of the state court. A federal habeas court, however, is not entitled to grant the writ simply because it believes the state court has incorrectly or erroneously resolved an issue. *Williams*, 529 U.S. at 410 ("an *unreasonable* application of federal law is different from an *incorrect* application of federal law"). The Court of Appeals' ruling re-focused the scrutiny properly and conducted a thorough evaluation of the record from the perspective that § 2254(d)(1) requires. Its conclusion that the state court's decision did not unreasonably apply *Strickland* is sound and warrants no correction by this Court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

GERALD J. PAPPERT
Attorney General
Commonwealth of Pennsylvania

RICHARD A. SHEETZ, JR.
Exec. Deputy Attorney General
Director, Criminal Law Division

JAMES B. MARTIN
Lehigh County District Attorney
455 W. Hamilton St.
Allentown, PA 18101

Office of Attorney General
16th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 705-4487

AMY ZAPP
Chief Deputy Attorney General
Appeals & Legal Services Sect.
Counsel of Record

COUNSEL FOR RESPONDENT

DATE: December 17, 2004

No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION
OF PHILADELPHIA
Federal Court Division
The Curtis Center –
Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
Counsel for Petitioner,
Ronald Rompilla

(**Counsel of Record*)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. RELIEF SHOULD BE GRANTED UNDER *SIMMONS V. SOUTH CAROLINA*, 512 U.S. 154 (1994) 1

II. RELIEF SHOULD BE GRANTED BECAUSE OF COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING 6

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Commonwealth v. Clark, 710 A.2d 31 (Pa. 1998) 4, 5

Commonwealth v. May, 710 A.2d 44 (Pa. 1998) 4

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) 8

Kimmelman v. Morrison, 477 U.S. 365 (1986) 9

Simmons v. South Carolina, 512 U.S. 154 (1994) 1, 4, 5

Skipper v. South Carolina, 476 U.S. 1 (1986) 2

Weeks v. Angelone, 528 U.S. 225 (2000) 6

Weeks v. Commonwealth, 450 S.E.2d 379 (Va. 1994) 6

Wiggins v. Smith, 539 U.S. 510 (2003) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) 6, 9, 12, 13

STATUTES

28 U.S.C. § 2254(d) 6, 7

MISCELLANEOUS

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913 (2003) 8

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 7, 8, 9, 10, 16

American Bar Association Standards for Criminal Justice (2d ed. 1980) ..... *passim*

Brief for American Bar Association as *Amicus Curiae* in *Wiggins v. Smith*, No. 02-311, 2003 WL 252551 8

ARGUMENT[1]

I. RELIEF SHOULD BE GRANTED UNDER *SIMMONS V. SOUTH CAROLINA*, 512 U.S. 154 (1994).

Respondent does not dispute that this jury was worried Petitioner would be paroled if sentenced to life imprisonment, nor does Respondent dispute that this jury was denied the information it needed to accurately assess Petitioner's future dangerousness, *i.e.*, that Petitioner would not be paroled if sentenced to life.

– A –

Respondent fails to confront the future dangerousness argument the prosecutor actually made. *See* Pet. Br. at 4-5 (describing prosecutor's argument). Respondent's avoidance is particularly striking with respect to the prosecutor's argument that Petitioner "*learned a lesson* from" his prior convictions and "[t]hat lesson was *don't leave any witnesses. Don't leave anyone behind* that can testify against you. *Don't leave any eyewitnesses. . . .*" JA165-166. This is a future dangerousness argument plain and simple.[2] It is hard to imagine anyone more dangerous when

[1] All emphasis herein is supplied unless otherwise indicated. The Joint Appendix and Lodging are cited as "JA" and "L." The briefs for Petitioner, Respondent, the American Bar Association, the National Association of Criminal Defense Lawyers, the United States and the Criminal Justice Legal Foundation are cited as "Pet. Br.," "Resp. Br.," "ABA Br.," "NACDL Br.," "U.S. Br." and "CJLF Br."

[2] Respondent tries to sanitize the future dangerousness message this argument sent the jury, presenting instead only a paraphrase – that Petitioner "allowed the situation to escalate into murder, possibly in an effort to avoid apprehension and prosecution by eliminating a critical witness." Resp. Br. at 11.

released than a recidivist who "learned" the "lesson" to not "leave anyone behind that can testify" about his crimes. And the prosecutor asserted this during an argument haranguing the jury with characterizations of Petitioner as cold-blooded, merciless, brutal, "a very strong individual," a "very violent individual" and "absolutely frightening" because he repeatedly commits similar violent crimes. *See* Pet. Br. at 3-7, 22-27.

Respondent says the prosecutor "did not present any evidence" regarding parole, rehabilitation or that Petitioner committed this offense 3½ months after being released from his prior prison term. Resp. Br. at 3; *see also id.* at 14, 35-36 & n.20. Actually, the prosecutor *did* elicit and emphasize such evidence in his cross-examination of defense witnesses at the penalty phase. *See* Pet. Br. at 3-4. The prosecutor's questioning of Darlene Rompilla concerned just two issues: that Petitioner was paroled 3½ months before this offense and that her children were afraid of Petitioner when he was released on parole. JA126-127. Nearly half of the prosecutor's questioning of Nick Rompilla focused on the fact that Petitioner was released from prison 3½ months before this offense. JA131-132. About one-third of the prosecutor's questioning of Robert Rompilla focused on the lack of rehabilitation in prison and Petitioner's inability to rehabilitate himself. JA141-142. The fact that the prosecutor elicited this evidence on cross-examination made it no less a part of the prosecutor's future dangerousness message to the jury. *See Skipper v. South Carolina*, 476 U.S. 1, 9 (1986) (Powell, J., concurring

in judgment) (prosecutor sent a future dangerousness message in "the course of cross-examining petitioner").[3]

Respondent also shies from the prosecutor's actual presentation of the prior crimes evidence. *See* Resp. Br. at 2-3, 35 & n.19. The prosecutor did more than prove the existence of the prior convictions. The prosecutor put an assistant district attorney on the stand to recite the prior victim's testimony. *See* JA54-89; Pet. Br. at 3, 26. The prosecutor thus detailed the violence of the prior crimes – describing how the victim was threatened with a gun, assaulted with a knife, robbed and raped – and highlighted the victim's fear of Petitioner, including her fear that Petitioner would *return and kill her if he was not picked up*. *See* JA75 (victim was "petrified" with fear); JA77 ("I had begged him not to do it to me"); JA82 ("I felt I was gonna have a coronary"); JA83 ("I felt he was going to kill me"); JA87 (feared "he was coming back for me, and I was petrified"); JA88 ("terrified"); JA89 ("fear[ed] that he'd come back after me before they had a chance to pick him up"). The prosecutor firmly planted the future dangerousness message by presenting the evidence this way.

[3] Respondent points out that at least one juror found as a mitigating circumstance the "possibility of no rehabilitation during incarceration and after release." Resp. Br. at 12 (quoting JA228); *cf.* Pet. Br. at 7 (quoting Third Circuit majority, JA1331). Respondent says this shows jurors "did not determine that the possibility that Rompilla might be rehabilitated in the future had a mitigating influence, but rather the possible lack of past rehabilitation while he was previously incarcerated and/or on parole did." Resp. Br. at 12 n.7. Respondent's statement of what the jury found only confirms that the jury received the future dangerousness message sent by the prosecutor's cross-examination of defense witnesses. After all, a man who was not rehabilitated by thirteen years of prison is unlikely to be rehabilitated by another term of imprisonment.

Future dangerousness suffused the prosecutor's evidence and argument. The jury's questions show it received the future dangerousness message the prosecutor sent.

– B –

Respondent, like the Third Circuit majority, tries to graft onto the state court decision an idiosyncratic and narrow reading of *Simmons* that would require a no-parole instruction only "where the prosecution has *expressly* appealed to the sentencing jury to impose a capital sentence *because of* the future danger the defendant presents." Resp. Br. at 28; *see also id.* at 32 (Respondent's assertion that it "was not objectively unreasonable to construe *Simmons*" in Respondent's way at the time of the Pennsylvania Supreme Court's ruling in *Rompilla*); *but see* Pet. Br. at 29-30; NACDL Br. at 9-10 (describing why Respondent's view of *Simmons* is not reasonable).

The Pennsylvania Supreme Court *did not employ* Respondent's version of *Simmons*. Instead, the Pennsylvania Supreme Court said *Simmons* requires a no-parole instruction "when the defendant's future dangerousness is *at issue*." JA284, *Commonwealth v. Rompilla*, 721 A.2d 786, 795 (Pa. 1998).[4] Because Respondent's argument is

[4] The Pennsylvania Supreme Court cited two of its prior decisions. *See* JA284, citing *Commonwealth v. May*, 710 A.2d 44, 47 (Pa. 1998) (saying no-parole instruction required when "future dangerousness is *at issue*" or "prosecutor *injects concerns* of the defendant's future dangerousness into the case"), and *Commonwealth v. Clark*, 710 A.2d 31, 36 (Pa. 1998) (saying no-parole instruction required "where the issue of the defendant's future dangerousness was *raised*" or "is *at issue*"). Neither *May* nor *Clark* adopted Respondent's narrow view of *Simmons*. Indeed, *Clark* said a *Simmons* instruction is required when *defense counsel*'s

(Continued on following page)

based on a view of *Simmons* that was not adopted by the state court, it "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003).

The Pennsylvania Supreme Court's actual *Rompilla* decision is objectively unreasonable, *see* Pet. Br. at 26-30; NACDL Br. at 6-21, and Respondent does not really defend it. After all, the Pennsylvania Supreme Court misunderstood Petitioner's argument as being *solely* "that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence," and rejected only that contention. JA284, *Rompilla*, 721 A.2d at 795.[5]

---

argument raises the possibility of parole, *see Clark*, 710 A.2d at 36, which is inconsistent with Respondent's approach.

[5] Petitioner's argument involves much more than the mere presentation of the prior crimes aggravating factor. There was the prosecutor's evidence about the extreme violence of this crime and the prior crimes and about the similarities between this crime and the prior crimes; the way the prosecutor presented the prior crimes evidence (reading the victim's testimony about Petitioner's violence and the victim's fear); the prosecutor's elicitation of evidence that Petitioner was paroled from his prior convictions, that he killed shortly after being paroled, that parolees are released without rehabilitation and that Petitioner could not rehabilitate himself; the prosecutor's argument that Petitioner is cold-blooded, merciless, brutal, strong and violent; the prosecutor's argument that Petitioner is "absolutely frightening" because he repeatedly commits similar violent crimes; the prosecutor's argument that Petitioner "learned a lesson from" his prior convictions and "[t]hat lesson was don't leave any witnesses. Don't leave anyone behind that can testify against you. Don't leave any eyewitnesses"; the jury's repeated questions about parole eligibility and rehabilitation; and the judge's responses suggesting parole might be available but the jury

(Continued on following page)

Respondent says *Weeks v. Angelone*, 528 U.S. 225 (2000) shows that 28 U.S.C. § 2254(d) review "should not examine the state court's reasoning" or consider "the rationale [the state court] used." Resp. Br. at 31 & n.17. But *Weeks* involved a *silent* state court denial of relief – it was not a case where the state court articulated its "reasoning" or "rationale." *See Weeks v. Commonwealth*, 450 S.E.2d 379, 383, 390 (Va. 1994). In that silent denial setting, this Court provided *de novo* review to the claim at issue, *found it meritless*, *see* 528 U.S. at 227-37, and only then concluded that "it follows *a fortiori* that the adjudication of the [state court denying relief] neither was 'contrary to,' nor involved an 'unreasonable application of,' any of our decisions," *id.* at 237.

Weeks does not suggest that when the state court says what its rationale is the federal court should nevertheless ignore the state court's rationale and substitute a new rationale that the state court did not employ. This Court's decisions address the actual rationale of the state court when the state court gives one. *See Wiggins*, 539 U.S. at 529-30; *Williams v. Taylor*, 529 U.S. 362, 391-98, 413-16 (2000); Pet. Br. at 28-29; NACDL Br. at 7-9 (citing cases).

II. RELIEF SHOULD BE GRANTED BECAUSE OF COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING.

Respondent does not dispute that Petitioner has a tragic life history of childhood mistreatment and trauma, mental retardation, brain damage, alcoholism and serious

---

should not know about it. The state court ignored all of this. *See* Pet. Br. at 3-7, 22-27.

mental and emotional disturbances. It is undisputed that counsel wanted to present such mitigating evidence. It is undisputed that this jury heard *nothing* about this mitigating evidence. It is undisputed that the mitigating evidence was available and, indeed, *easy to get* at the time of trial – from prior convictions court records, school records, juvenile records and prison records. It is undisputed that counsel did not try to get a single piece of paper about Petitioner's life history.

The question then is whether a reasonable capital defense lawyer would have obtained Petitioner's records, *i.e.*, whether trial counsel's life history mitigation investigation – which consisted only of conversations with Petitioner and some family members who counsel knew *were not good sources of background information* – was the thorough investigation required by the Sixth Amendment in a capital case. It was not.[6]

– A –

As Respondent acknowledges, this Court regards the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("1989 ABA Guidelines") as a "polestar" for evaluating counsel's investigation. Resp. Br. at 46 n.23; *see Wiggins*, 539 U.S. at 524. Respondent, however, urges this Court to view the 1989 ABA Guidelines as irrelevant

[6] Respondent does not try to defend the state court's ruling that counsel did not have to seek any records because the records supposedly are "not entirely helpful." JA272, *Rompilla*, 721 A.2d at 790. *See* Pet. Br. at 38-39 (discussing why this ruling is contrary to and an unreasonable application of clearly established law, and factually unreasonable, under 28 U.S.C. § 2254(d)(1) & (2)).

because they were published a few months after Petitioner's trial. *See* Resp. Br. at 40-41 n.21, 46 n.23. But the contours of a reasonable investigation did not materially change between 1988 and 1989 – the 1989 ABA Guidelines "articulated" existing standards for what effective capital defense lawyers were doing at the time of Petitioner's trial. *Wiggins*, 539 U.S. at 524.[7]

Petitioner cited the 1989 ABA Guidelines in support of two points. First, that counsel were derelict in failing to review the prior convictions records that the prosecutor said he would be using for aggravating evidence. *See* Pet. Br. at 35 & n.20; *see also* ABA Br. at 16-18. Surely, these lawyers should have conducted an "investigation into the prosecution's case" in order to make the proceedings "a

[7] *See Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) ("Although the instant case was tried before the 1989 ABA edition of the standards was published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases."); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 920 (2003) (1989 ABA Guidelines were "designed to express existing practice norms and constitutional requirements") (quotation marks omitted); ABA Br. at 6 n.7 (1989 ABA Guidelines "reflect prevailing norms in the profession that have existed since the early 1980s"); *id.* at 8 ("Because they reflect professional norms that prevailed in the 1980s, the [1989 ABA Guidelines] are an appropriate benchmark against which counsel's conduct should be judged in this case."); *id.* at 10 n.9 (citing "[a]rticles and attorney handbooks" pre-dating Petitioner's trial that emphasized importance of "reviewing a defendant's prior conviction records, prison records, juvenile court records, school records, and records relating to childhood abuse and substance abuse"); Brief for American Bar Association as *Amicus Curiae* in *Wiggins v. Smith*, No. 02-311, 2003 WL 252551, *4 ("The standard of care set forth in the [1989 ABA] Guidelines resulted from the ABA's study of what reasonably performing lawyers *were* doing and what ineffectively performing lawyers *were not* doing.").

reliable adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citations omitted).

Second, Petitioner cited the 1989 ABA Guidelines because they indicate that effective capital counsel routinely seek records as part of investigating the defendant's background for mitigating evidence. *See* Pet. Br. at 31; *see also* ABA Br. at 12-16; Resp. Br. at 40-41 n.21 (acknowledging that 1989 ABA Guidelines contemplate "collection of a defendant's records" as necessary for a reasonable investigation). Surely, these lawyers should have obtained records about Petitioner's life history as part of a mitigation investigation.

– B –

Respondent urges the Court to rely upon the ABA Standards for Criminal Justice (2d ed. 1980) ("1980 ABA Standards"), instead of the 1989 ABA Guidelines. *See* Resp. Br. at 40-42. But those 1980 ABA Standards themselves highlight that a reasonable capital defense lawyer in this case *would have obtained the records* about Petitioner's life history.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court observed that those 1980 ABA Standards require "a *thorough investigation* of the defendant's background" for mitigation. *Williams*, 529 U.S. at 396 (citing 1980 ABA Standard 4-4.1, commentary, at 4-55). Based upon this duty of "thorough investigation," the *Williams* Court found counsel ineffective for failing to obtain the defendant's *juvenile records*. *Id.*, 529 U.S. at 395-96. Here, as in *Williams*, counsel were ineffective because they did not

conduct the "thorough investigation" that the 1980 ABA Standards themselves discuss.[8]

The 1980 ABA Standards say counsel's investigation should "explore all avenues leading to . . . information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like," *id.*, 4-4.1 & commentary, and the defendant's records are an obvious "avenue" where that information can be found. In Respondent's words, "review of a defendant's records can be of great assistance in locating" mitigation. Resp. Br. at 42.

School, juvenile, prior conviction, prison and medical records are the basic stuff of any effective capital defense lawyer's investigation. But even assuming it might be reasonable in some case for a capital defense lawyer to not seek records about the client's life, counsel were not reasonable here given what they knew, the types of records available and the ease with which the records could have been obtained.

Counsel knew Petitioner had problems in school and left school in ninth grade. *See* Pet. Br. at 13, 34. Thus, the need to "explore all avenues leading to . . . information" about Petitioner's "education," 1980 ABA Standard 4-4.1 & commentary, was especially apparent. These lawyers made no effort to get school records – the most obvious documentation of Petitioner's educational history. Nor did they try

[8] *See also Wiggins*, 539 U.S. at 516, 522, 524-25 (citing 1980 ABA Standards and 1989 ABA Guidelines and finding counsel ineffective for failing to develop a social history from "*social services, medical, and school records*, as well as interviews with petitioner and numerous family members").

to get juvenile and prior conviction records, which in Pennsylvania contain information about educational background. *See* Pet. Br. at 33-34 (citing Pennsylvania cases).

Counsel knew Petitioner had a juvenile and adult criminal history. Pennsylvania lawyers know that prior conviction and juvenile records contain "information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like," 1980 ABA Standard 4-4.1 & commentary, because Pennsylvania law *requires* those records to contain such information, *see* Pet. Br. at 33-34 (citing Pennsylvania cases). These lawyers made no effort to get Petitioner's prior convictions and juvenile records.

Counsel knew Petitioner had spent much of his life in juvenile detention and prison. *See* Pet. Br. at 8. Effective defense lawyers know that the defendant's ability to adjust to imprisonment can be mitigating, *see* Pet. Br. at 35, and therefore review prison and juvenile records as part of "explor[ing] all avenues" relating to mitigation, 1980 ABA Standard 4-4.1, especially when, as in this case, the jury will learn that the defendant has spent many years in prison. These lawyers made no effort to get prison or juvenile records.

Counsel knew, from police reports provided by the prosecutor before trial, that a condition of Petitioner's parole was that he not drink alcohol and that witnesses described Petitioner as incoherent and passing out from drinking around the time of the offense. *See* Pet. Br. at 34. Effective counsel would have reviewed the court and prison records from Petitioner's prior convictions to "explore all avenues" relating to alcohol problems, 1980 ABA

Standard 4-4.1, especially since abstaining from alcohol was made a condition of Petitioner's parole. These lawyers made no effort to get such records.

Pennsylvania capital defense lawyers know the prosecution can introduce as aggravating evidence the *facts and circumstances* of prior convictions and juvenile adjudications, as reflected in the *prior case court files*. *See* Pet. Br. at 9-10, 35-36 & n.21. While effective lawyers seek information "in the possession of the prosecution and law enforcement authorities," 1980 ABA Standard 4-4.1 & commentary, these lawyers made no effort to review Petitioner's juvenile or prior convictions court records. Their inaction is profound because the prosecutor *told them* he would be using Petitioner's prior convictions court file as part of his aggravating evidence. *See* Pet. Br. at 9.

Counsel's failure to "explore all avenues," 1980 ABA Standard 4-4.1, by obtaining records is also profound because they knew that the few "avenues" they did "explore" for background information – Petitioner and some family members – were poor sources of information about Petitioner's history. *See* Pet. Br. at 7-8, 32-33, 40. Under these circumstances, "a thorough investigation of [Petitioner's] background," *Williams*, 529 U.S. at 396 (citing 1980 ABA Standard 4-4.1, commentary, at 4-55), plainly required counsel to seek other "avenues" for information.

Finally, counsel's failure to obtain any records is remarkable because of how easily available the records were – much information was available just a short walk

from the capital case courtroom itself. *See* Pet. Br. at 14, 32.[9]

– C –

Respondent says counsel hired mental health experts, *see* Resp. Br. at 7 n.5, 8-9, 13-14, 19, 22-24, 40, 43-45, 47, to conduct "full evaluations," *id.* at 8, 23, 40, 44, and assumed "the experts had done their job," *id.* at 45. But the purported "full evaluations" counsel requested were for opinions about Petitioner's *mental state at the time of the offense* – counsel *did not ask the experts to gather or consider life history mitigation information*. *See* Pet. Br. at 15-16 & n.3, 39-40 (citing JA474, JA476); Resp. Br. at 8 (quoting JA472). As in *Wiggins*, "counsel's decision to hire [mental health experts] sheds no light on the extent of [counsel's] investigation into petitioner's social background." *Id.*, 539 U.S. at 532; *see also Williams*, 529 U.S. at 368-69 (counsel ineffective for failing to "thoroughly investigate" defendant's background by, *inter alia*, obtaining juvenile records, in case where defendant was evaluated by defense psychiatrist and two other mental health experts); Pet. Br. at 29-40.[10]

[9] Respondent and its Amici thus err when they say Petitioner would require a "scorched earth," "no-stone-unturned" search for the "full spectrum" of all possible records. *See* Resp. Br. at 42; U.S. Br. at 23 n.6; CJLF Br. at 4, 14, 18. To "explore [these] avenues" of investigation in Petitioner's case, 1980 ABA Standard 4-4.1, counsel just had to stroll down main roads, not search obscure alleys.

[10] Respondent's post-conviction expert, Dr. Dattilio, explained that the trial experts' evaluations were unreliable even as to mental state at the time of the offense, because counsel did not give the trial experts any background information about Petitioner; background information, like that in the records, is essential to a reliable forensic mental health

(Continued on following page)

– D –

Respondent emphasizes that counsel spoke to some family members. *See* Resp. Br. at 5-8, 18, 39-40, 42-44, 46. Respondent acknowledges that counsel "knew [Petitioner's] relatives were poor sources of information about him," but claims this "is true only for the period during Rompilla's adult life when he was imprisoned for his 1974 crimes and for some time when he was in juvenile detention." Resp. Br. at 43.

Counsel, however, testified that this was not "the type of family that would provide you information when asked," JA557, for *several reasons*: because Petitioner had been incarcerated for much of his life, including as a juvenile, JA495, JA557-558, JA669; because family members believed Petitioner was innocent and were not interested in identifying mitigation, JA494; and because "of their own whatever was going on with them," JA558. Thus, counsel knew the family members they spoke to were not a good source of information about any part of Petitioner's life.

Respondent concedes that counsel "were aware of the 'denial dynamic,' *i.e.*, that 'sometimes people who are abused deny it.'" Resp. Br. at 7 n.5 (quoting JA499, attorney Dantos); *see also* JA670 (attorney Charles: "It's hard to determine when someone says, 'No, I had a great childhood. I had no problems,' the difference between that

evaluation. *See* JA1248-1249, JA1258-1261, JA1264 (Dr. Dattilio); *see also* JA353-355 (habeas petition, detailing Dr. Dattilio's testimony); JA382-386 (habeas petition, further describing importance of background information to a reliable evaluation). The trial experts themselves made it clear in their post-conviction testimony that counsel's failure to provide background information adversely affected their evaluations. *See* Pet. Br. at 16-17.

[being true] and being in denial."); Pet. Br. at 8-9. Counsel had no reason to believe the siblings they spoke to – raised in the same home as Petitioner – would be any more forthcoming than Petitioner.[11] As Respondent's post-conviction expert (Dr. Dattilio) testified, when one child is abused it is likely that other children in the family are too. JA1262-1263.[12]

Finally, even under Respondent's view that the family was a poor source of information "only" for the period when Petitioner was in prison and juvenile detention, *i.e.*,

[11] Moreover, at least one of the siblings counsel spoke to, Nick Rompilla, is *mentally retarded*, *see* Pet. Br. at 13, as is Petitioner, *see* Pet. Br. at 11, 13. Mentally retarded people are poor historians. *See* Pet. Br. at 8.

[12] The post-conviction evidence confirms this was the case here. Petitioner *and his siblings* experienced severe neglect, deprivation, physical abuse and mental abuse in the violent home of alcoholic parents – *e.g.*, "*[a]ll of the children* lived in terror. . . . His father locked Rompilla *and his brother Richard* in a small wire mesh dog pen that was filthy and excrement filled. . . . They had no indoor plumbing in the house, . . . and the children were not given clothes and attended school in rags"; Petitioner "*and his brothers* eventually developed serious drinking problems." JA1415-1416, *Rompilla v. Horn*, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J., dissenting) (describing family post-conviction testimony; citations omitted); *see also* JA300-310 (habeas petition, detailing family post-conviction testimony).

Respondent suggests the state court rejected the family members' post-conviction testimony, *see* Resp. Br. at 15 (citing JA264), but the state court's ruling was quite narrow. The judge disbelieved only part of Nick Rompilla's testimony – *i.e.*, that trial counsel had asked Nick only about his relationship with Petitioner during the time they lived together just before this offense. The judge did *not* find that Nick misrepresented the nature of the childhood home; nor did the judge question the veracity of sisters Barbara Harris and Randi Rompilla, who were able to describe the dysfunctional home but were *never interviewed* by counsel. *See* Pet. Br. at 14-15; JA1416-1417.

much of his life, counsel should have obtained Petitioner's prison and juvenile records, which covered that period.

– E –

Respondent says it was reasonable for counsel to rely on Petitioner for information. *See* Resp. Br. at 6-7. But counsel testified that they knew Petitioner was not reliable;[13] they knew that people with traumatic childhoods often deny it, *see* JA499, JA670; and they knew Petitioner had an "unrealistic" view of the guilt-phase trial, JA582-583, so that "[w]henever [counsel] tried to talk penalty phase and death penalty with him, he was resistant to that," JA667.[14] A reasonable lawyer would not rely on Petitioner for information.[15]

[13] *See, e.g.*, JA556 (Petitioner gave counsel "some information that we checked out . . . and it turned out not to be truthful"); JA583 ("There were things he told us that proved to be inaccurate."); JA663 ("He told us stories. . . . We went and checked them and found, one by one, the stories to be just absolute fabrications."); JA272, *Rompilla*, 721 A.2d at 385 (state court found Petitioner "made contradictory statements to counsel").

[14] The post-conviction evidence also highlights that Petitioner is a poor historian because of his traumatic childhood and cognitive impairments. *See* Pet. Br. at 8-9.

[15] *See also* 1980 ABA Standard 4-3.2, commentary at 4-33 (defendant often reluctant to reveal background information to counsel); 1980 ABA Standard 4-4.1 ("The duty to investigate exists regardless of the accused's admissions or statements to the lawyer constituting guilt or the accused's stated desire to plead guilty."); *id.*, commentary ("The lawyer . . . has a substantial and important role to perform in raising mitigating factors. . . . This cannot effectively be done . . . on the strength of statements made to the lawyer by the defendant."); 1989 ABA Guideline 11.4.1(C) ("The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.").

– F –

Respondent says counsel's failure to seek any records was a reasonable use of "limited resources." *See* Resp. Br. at 5, 22, 39-40, 45-47.[16] The state court did not rely on this rationale, which "therefore has no bearing on whether the [state court's] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins*, 539 U.S. at 529-30. In any event, it would have taken virtually no "resources" to get Petitioner's school, juvenile, prior convictions and prison records, which were easily available. *See* Pet. Br. at 14, 32. The records here are exactly what effective capital defense lawyers routinely obtain. But Petitioner's lawyers did not get a single scrap of paper about his life history.

CONCLUSION

The jurors got the future dangerousness message the prosecutor sent, and then were denied the information they needed to accurately assess Petitioner's future dangerousness. The jurors did not get any mitigating evidence about Petitioner's tragic life and diminished functioning, and thus were denied the information they needed to accurately assess Petitioner's moral culpability.

[16] Respondent's "limited resources" rationale comes from a comment in the testimony of attorney Charles. Respondent says Mr. Charles had experience, especially in dealing with mental health experts. *See* Resp. Br. at 4-5, 39-40. But Mr. Charles delegated primary responsibility for capital sentencing to Ms. Dantos, 2½ years out of law school, and it was Ms. Dantos who had almost all the contact with Petitioner and family members, and had the only contact with the mental health experts. *See* Pet. Br. at 2-3 n.2.

Either error demonstrates that this death sentence is not constitutionally reliable and that habeas relief is appropriate.

Respectfully submitted,

BILLY H. NOLAS*
DAVID W. WYCOFF
MICHAEL WISEMAN
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY
Chief Federal Defender
DEFENDER ASSOCIATION
OF PHILADELPHIA
Federal Court Division
The Curtis Center –
Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
Counsel for Petitioner,
Ronald Rompilla

(**Counsel of Record*)

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

(16)

No. 04-5462

In the Supreme Court of the United States

RONALD ROMPILLA, PETITIONER

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

(CAPITAL CASE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

TRACI L. LOVITT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether capital defense counsel renders ineffective assistance under the Sixth Amendment to the Constitution where, after hiring three mental health experts to evaluate the defendant, interviewing the defendant himself, three of his siblings, his ex-wife and his sister-in-law, and uncovering no mitigation evidence from the investigation, counsel concludes that further investigation into the defendant's background is unwarranted.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	12
Argument:	
Defense counsel's investigation into potential theories of mitigation was constitutionally adequate	14
A. Defense counsel's investigation was constitutionally reasonable under *Strickland*	15
1. Under *Strickland*, counsel must conduct an investigation that is reasonable in view of the totality of circumstances	15
2. The decision not to obtain petitioner's records was reasonable in light of the totality of the circumstances in this case	17
B. Neither this Court's decision in *Wiggins* nor the prevailing norms require capital counsel to obtain all reasonably available records without regard to relevance	18
C. Unlike the investigation in *Wiggins*, the investigation in this case revealed that further investigation would have been fruitless	26
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Bell v. *Cone*, 535 U.S. 685 (2002)	2, 14, 15
Burger v. *Kemp*, 483 U.S. 776 (1987)	13, 16, 18, 25
Pennsylvania v. *Hodovanich*, 251 A.2d 708 (Pa. Super. Ct. 1969)	28
Pennsylvania v. *Martin*, 351 A.2d 650 (Pa. 1976)	28

Cases—Continued: Page

Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 2, 16, 22, 23, 24
Strickland v. *Washington*, 466 U.S. 668 (1984) ..... *passim*
Wiggins v. *Smith*, 539 U.S. 510 (2003) ..... *passim*

Constitution and statutes:

U.S. Const. Amend. VI 14
28 U.S.C. 2254 ..... 1, 9
28 U.S.C. 2254(d)(1) 9, 14, 15
28 U.S.C. 2255 1

Miscellaneous:

American Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989) 20, 21, 1a, 2a, 3a
American Bar Ass'n, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, reprinted in* 31 Hofstra L. Rev. 913 (2003) 23
Federal Judicial Center, I *Resource Guide for Managing Capital Cases* (Apr. 2004) 22
National Legal Aid & Defender Ass'n, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (1988) 21
Subcomm. on Federal Death Penalty Cases Comm. on Defender Services, Judicial Conference of the United States, *Federal Dealth Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (May 1998) 21

In the Supreme Court of the United States

No. 04-5462

RONALD ROMPILLA, PETITIONER

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

(CAPITAL CASE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Claims of ineffective assistance of counsel alleging inadequate investigation are frequently asserted on collateral review in federal criminal cases. Although this case involves a claim by a state prisoner under 28 U.S.C. 2254, the Court's analysis will likely affect federal prisoners' ineffectiveness claims under 28 U.S.C. 2255. The United States therefore has a substantial interest in the resolution of the question presented. The government has previously participated in numerous cases raising similar ineffective assistance of

counsel questions. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Bell* v. *Cone*, 535 U.S. 685 (2002); *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000); *Strickland* v. *Washington*, 466 U.S. 668 (1984).

STATEMENT

1. On January 14, 1988, the body of James Scanlon was found lying in a pool of blood in his bar, the Cozy Corner Cafe, in Allentown, Pennsylvania. Scanlon had been repeatedly stabbed in the back, head, and neck, and his body had been set on fire.[1] His wallet had been stolen, as well as approximately $500 to $1000 from the bar. A police investigation revealed that the assailant had used a window in the men's bathroom to enter after the bar had closed. J.A. 1283.

Petitioner was seen in the Cozy Corner Cafe from approximately 1:00 a.m. to 2:00 a.m. on the night of Scanlon's murder. During that time, he was observed going into the men's bathroom roughly ten times. Although petitioner claimed that he left the bar between 2:00 a.m. and 2:30 a.m. to have breakfast after spending all but $2.00, a cab driver testified that he drove petitioner from a diner to the George Washington Motor Lodge, and petitioner paid the more-than-$9 fare in cash. At the motel, petitioner used a false name to rent a room for two nights, paying $121 in cash and flashing a large amount of cash to the desk clerks. J.A. 1283-1284.

During a search of petitioner's motel room, police found bloody sneakers. The treads on the sneakers matched those in a bloody footprint near Scanlon's body, and the blood on the sneakers matched Scanlon's

[1] No forensic evidence suggests that Scanlon was alive when set on fire. See J.A. 93

blood type. A motel groundskeeper later discovered Scanlon's wallet in some bushes that were six to eight feet outside of petitioner's room. Petitioner's fingerprint was also found on one of two knives used to commit the murder. J.A. 1283-1284.

2. Petitioner was charged with Scanlon's murder and related crimes, and the prosecution sought the death penalty. After a jury trial, petitioner was found guilty of first degree murder, burglary, criminal trespass, theft, and receiving stolen property. J.A. 1283 & n.1.

During the sentencing phase, the prosecution attempted to prove three aggravating factors: (1) petitioner committed the murder while perpetrating a felony, *i.e.*, the burglary and robbery of the bar; (2) petitioner committed the murder by means of torture, *i.e.*, repeatedly stabbing Scanlon in the neck and back of the head while he was alive and conscious; and (3) petitioner had a significant history of felony convictions involving the use or threat of violence, *i.e.*, raping and robbing a female bar owner after her bar had closed. J.A. 1328, 55-89, 93-99.

Defense counsel attempted to invoke the sympathy of the jurors and any lingering doubt they may have had about petitioner's culpability for the murder.[2] Two of petitioner's brothers, petitioner's sister, and his sister-in-law begged for petitioner's life and testified that

[2] Defense counsel suggested at trial that someone else had murdered Scanlon, and during its deliberations, the jury asked the court about the standards for accomplice liability (which the court did not provide because of the absence of any accomplice-liability charge). Based on the jury's question, counsel made a strategic decision during sentencing to argue that the jury likely had lingering doubts about petitioner's precise role in the murder. J.A. 636-643.

they did not believe petitioner was guilty of murder, that they loved him, and that petitioner was a good family member. In addition, petitioner's 14-year-old son testified that he loved his father and would visit him if he were imprisoned. J.A. 124, 131, 136, 138, 144, 145, 147-148, 157-160.

The jury unanimously sentenced petitioner to death. It found the three aggravating circumstances alleged by the prosecution and two mitigating factors—"[petitioner's] son being present" and the possibility of rehabilitation—and concluded that the aggravating circumstances outweighed the mitigating factors. The Pennsylvania Supreme Court affirmed the conviction and sentence on direct appeal. J.A. 228, 241-256.

3. a. In December 1995, petitioner sought post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541 *et seq.* (West 1998). In those proceedings, petitioner raised numerous claims, including that his lawyers had rendered ineffective assistance by failing to conduct a complete investigation into his mental impairments and background. J.A. 262.

During the PCRA hearing, petitioner supported his claim with the testimony of two expert witnesses: Dr. Barry Crown, a psychologist who testified that petitioner has brain damage that likely dates from his childhood, if not to his development in utero; and, Dr. Carol Armstrong, a neuropsychologist who concluded that petitioner has an organic brain impairment. In addition, two of petitioner's sisters who claimed that they had not been interviewed by defense counsel (J.A. 769-770, 814), and one of his brothers, who was interviewed by counsel but claimed that he was never asked about the family background (J.A. 790-791, 798-799), testified that petitioner's parents were alcoholics;

that petitioner's mother drank while pregnant with petitioner; that petitioner's father physically abused petitioner; that petitioner was locked in an outdoor dog pen as a child; and that petitioner was an alcoholic. J.A. 262, 747-752, 757-760, 778, 780-793, 794-804, 805-823.

The two attorneys who represented petitioner at trial—Frederick Charles, the Chief Public Defender for Lehigh County at the time of petitioner's trial, and Maria Dantos, then a full-time assistant public defender with two years of experience—testified at length about their investigation into petitioner's mental state and background. J.A. 464-537, 546-587, 632-745.

With respect to petitioner's mental capabilities, Charles testified that he sent petitioner to "the best forensic psychiatrist around here, to [another] tremendous psychiatrist and a fabulous forensic psychologist." Charles testified that he relied on the experts to administer tests to determine whether petitioner suffered from brain damage or a personality disorder; to request any information that in their view was necessary to evaluate petitioner; and to determine whether petitioner was withholding information about his family life or alcohol use. J.A. 660-661, 664, 671-677, 680-681, 684-685.

The three mental health professionals who examined petitioner pre-trial—Drs. Gross, Cooke, and Sadoff—all testified that their examinations revealed nothing useful to the defense. Dr. Gross concluded that, although petitioner exhibited some evidence of antisocial behavior, "[t]here was no other evidence for underlying psychiatric or mental disorder." "There was nothing at all in [his] interview that suggested [petitioner] had a cognitive impairment at all. So as far as I was concerned, there was no reason to go into anything other than what was very straightforward about this case."

Dr. Gross added that he did not see anything in petitioner's school, medical, or prison records that "would have changed [his] opinion." J.A. 1029, 1045.

Dr. Cooke testified that, although he had not retained his evaluations of petitioner, he was certain that he would have tested petitioner's IQ. In addition, he knew that petitioner's IQ must have been above the mentally-retarded range, because if that test had indicated mental retardation, he would have ordered further testing, but he had not. Dr. Cooke concluded that he had found nothing in his testing of petitioner "that [he] felt could be helpful" to petitioner's case. J.A. 1068-1071, 1076.

Dr. Sadoff testified that his evaluation of petitioner also revealed "nothing favorable" to the defense. When asked whether he typically requests records in a case like petitioner's, the doctor responded "[n]ot necessarily," explaining that "[i]f he gives you an average background and he has an average IQ and everything looks pretty normal and you have no reason to suspect a discrepancy, you might not ask for anything more, especially if you have particular questions that you are asked to address." J.A. 1122, 1130.

With respect to petitioner's background, Dantos testified that she "discussed the family dynamics and what [petitioner's] family relationship was with his parents" with petitioner, three of his siblings, his ex-wife, and his sister-in-law, and there was no indication "that there was any sort of abuse within the family." When Dantos asked petitioner about school, he told her "[t]hat there was nothing unusual about it." Petitioner admitted to Dantos that he drank alcohol but denied that he was an alcoholic, claiming to have consumed only "three or four beers" on the night of Scanlon's murder. Likewise, "there was nothing exceptional presented to [her] about drinking within the family." Dantos explained that she had no reason to doubt the information provided by petitioner and his family, because her relationship with them was "very close," and she and petitioner had "developed a relationship of trust." J.A. 494-495, 498-501, 555, 557-558, 563-564, 566, 584.

Charles similarly testified that petitioner and his family members had responded to questions about petitioner's childhood by saying that he was not abused and his childhood was normal. Charles was also told that petitioner was not an alcoholic, and while not a good student, petitioner claimed to have had a typical educational background. J.A. 677-678, 721-722, 668-671, 733-736, 737. Nothing in petitioner's or his family's manner of answering questions suggested to Charles that they were in denial or withholding information:

> [We would ask] "[i]s there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, smooth about it. It wasn't that he was reluctant to talk about anything. * * * There was no indicator from anything he told us that would send us searching for * * * any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. * * * I remember [Dantos] specifically going one by one and talking to him. "Is there anything you can tell me? Tell me about yourself. Tell me about your background." She was, you know, meticulous to cover points.

J.A. 668-669; see J.A. 669 (describing interviews with family).

Petitioner's denials of abuse and alcoholism were further corroborated by his mental health experts. According to Dr. Gross, petitioner "denied any abuse as a child, by either parent" and claimed to have "a good relationship with his father." Petitioner described to Dr. Gross a "fairly normal childhood except for the fact that he didn't like school, which he left in the ninth grade. So what he described to me was really unremarkable in terms of his childhood upbringing." Petitioner also denied drinking heavily. J.A. 1027, 1054.

The state court denied post-conviction relief, holding that "counsel had a reasonable basis for proceeding as they did during the penalty phase." The court concluded that defense counsel's investigation into petitioner's mental capabilities was reasonable, because counsel hired three well-qualified mental health experts who concluded that petitioner had "no organic brain damage" and found "nothing that could be used in mitigation." The court refused to fault defense counsel for failing to acquire petitioner's records and provide them to the experts, observing that "these experts did not request them." In addition, the court held that counsel's investigation into petitioner's background was reasonable, because defense counsel specifically interviewed petitioner and three of his siblings about their family background but learned nothing that "was particularly useful, nor was it consistent to what [petitioner] now says was his background." The court rejected the argument that petitioner's family members were not asked about abuse in the family, expressly crediting the testimony of defense counsel "that they spoke with members of the family in a detailed manner and that what now is claimed by them in support of [petitioner's PCRA challenge] was not revealed to defense counsel at the time of trial." J.A. 263, 264.

b. The Supreme Court of Pennsylvania affirmed. The court agreed that defense counsel's investigation was reasonable in light of the facts that "the experts found nothing helpful to [petitioner's] case," and "none of the family members revealed abuse or other circumstances that could be used as mitigation evidence." J.A. 272-273. Moreover, the court held that "counsel reasonably relied upon their discussion with [petitioner] and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances." J.A. 272.

4. In June 1999, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Pennsylvania. Noting that its decision was "a very close call" and that "trial counsel were intelligent, diligent and devoted to their task of representing [p]etitioner," the district court held that defense counsel were ineffective, because they "had reason to know of [p]etitioner's past and should not have relied on defendant alone or his family to reveal the true nature of his background." In the district court's view, "there were pretty obvious signs, at least superficially from what counsel knew of [p]etitioner's criminal past, including his rape conviction, that [p]etitioner may have had a drinking problem, may have had a poor school record, and probably had a difficult childhood." J.A. 1298, 1307, 1308.

5. a. A divided panel for the Third Circuit reversed. Applying the standard of review defined in 28 U.S.C. 2254(d)(1), the court of appeals held that the "Pennsylvania Supreme Court's conclusion that trial counsel acted reasonably and rendered effective assistance was not an unreasonable application" of, or in conflict with, Supreme Court precedents. The court observed that

"[t]he findings of the PCRA court and uncontradicted testimony at the PCRA hearing establish that trial counsel conducted an extensive investigation for mitigating evidence." Specifically, "trial counsel got to know [petitioner] well during the course of their representation and established a good relationship with him"; counsel "questioned [petitioner] about his background but [he] provided no useful information or leads"; "[t]rial counsel also spoke to three of [petitioner's] siblings, as well as a sister-in-law and [petitioner's] ex-wife * * * * 'in a detailed manner,' but they did not allude to any of the new evidence adduced at the PCRA proceeding." Finally, counsel "retained three well-qualified mental health experts to examine [petitioner]," but all three found "nothing useful" for the defense. J.A. 1357-1358.

The court rejected petitioner's argument that his attorneys were deficient for failing to interview additional family members, observing that counsel did interview three siblings—one of whom "knew about the conditions in the home," and two others who "must have been aware of the lurid conditions in the family home"—but none hinted about family abuse. On these facts, the court concluded, it was "not constitutionally ineffective for trial counsel to fail to anticipate that interviewing [additional siblings] would have yielded important new information about the family home." J.A. 1358-1359, 1372.

With respect to petitioner's argument that counsel failed to acquire petitioner's records, the court of appeals held that counsel reasonably concluded that the records were "not promising avenues of investigation," given counsel's interviews with petitioner and his family, and the experts' evaluations. In this respect, the court emphasized that counsel "w[ere] permitted to

rely on statements made by their client in deciding on the extent of the investigation that should be conducted in particular areas." J.A. 1360.

Finally, the court of appeals rejected petitioner's argument that defense counsel were ineffective in light of *Wiggins* v. *Smith*, 539 U.S. 510 (2003), which held that defense counsel conducts an unreasonable investigation where the available evidence suggests that additional investigation would be fruitful. The court stated that "*Wiggins* [wa]s critically different from the present case," because "the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so." In contrast, petitioner's "attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources." J.A. 1372.

b. Judge Sloviter dissented. In her view, petitioner's trial counsel had a duty to "inquire further as to the availability of [petitioner's] other family members," because those that counsel interviewed hardly knew petitioner. In addition, Judge Sloviter faulted the attorneys for relying on mental health experts "to determine the records needed to evaluate [petitioner's] mental health," stating that "[c]ounsel cannot so easily shed their constitutional obligations." Finally, Judge Sloviter observed that petitioner's counsel were generally deficient for failing to find the abundant records suggesting that petitioner had a troubled background and a mental impairment. J.A. 1419-1420, 1423.

The court of appeals denied petitioner's petition for rehearing or rehearing en banc. J.A. 1448-1453.

SUMMARY OF ARGUMENT

A. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), courts considering ineffective assistance of counsel claims must accord a high degree of deference to counsel's performance and presume that counsel had a sound strategic justification for litigation choices. *Strickland* requires counsel to conduct an objectively reasonable pre-trial investigation, but the investigation need not be unlimited in depth or scope. Rather, counsel may make "reasonable professional judgments" to forgo certain investigatory steps, and in particular, the scope of the investigation "may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. For example, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Ibid.*

In this case, defense counsel conducted a reasonable investigation into petitioner's family background and mental health by hiring three mental health experts to evaluate petitioner and interviewing, at length, petitioner, three of his siblings, his ex-wife, and a sister-in-law. The consistent results of counsel's investigations were that nothing about petitioner's mental health or background would contribute to the mitigation case. Defense counsel's conclusion that further investigation into petitioner's records would be fruitless was thus supported by a broad investigation and reasonable professional judgment. In addition, counsel's investigation was reasonable, because petitioner expressly and repeatedly represented to counsel that his mental

health and background were not viable areas for mitigation evidence.

B. Petitioner and the American Bar Association (ABA) suggest that this Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and the ABA standards cited in that case, require capital counsel to obtain a defendant's reasonably available records in all cases in an effort to develop a mitigation case. That contention is unsound. The ABA standards cited in *Wiggins* do not require capital counsel to acquire a defendant's records in all instances, regardless of the facts and other investigatory steps taken. Rather, the professional norm, as recognized in *Wiggins* and the ABA standards the Court cited, is for counsel to *make efforts to discover* all reasonably available evidence by, first, conducting an interview with the defendant and then, based on that interview, acquiring all *relevant* records—which is precisely what counsel did in this case. *Id.* at 525. Reading *Wiggins* more broadly, to impose an inflexible rule that counsel must always procure all reasonably available records, would render *Wiggins* inconsistent with this Court's decisions in *Strickland* and *Burger* v. *Kemp*, 483 U.S. 776 (1987), both of which recognized that courts may not impose rigid checklists on counsel but must evaluate an attorney's performance in view of the totality of circumstances, and both of which upheld investigations where counsel failed to seek the defendant's records after conducting interviews of the defendant and family members.

C. Petitioner's claim that his counsel's investigation revealed so many potential red flags that counsel should have gone on to acquire his records is factually unfounded. Counsel interviewed family members who should have had knowledge of the abuse petitioner now

claims and consulted three experts who were well qualified to evaluate petitioner's family background, abuse of alcohol, and mental state. No one hinted at a possible mitigation case. There were thus no red flags to warn counsel or to render their investigation unreasonable.

ARGUMENT

DEFENSE COUNSEL'S INVESTIGATION INTO POTENTIAL THEORIES OF MITIGATION WAS CONSTITUTIONALLY ADEQUATE

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court developed a two-prong test for determining whether counsel's performance was unconstitutionally ineffective under the Sixth Amendment: (i) the defendant must show that "counsel's representation fell below an objective standard of reasonableness"; and (ii) the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

Petitioner contends that his counsel rendered ineffective assistance by failing to acquire all "reasonably available records" pertaining to him, "including records about his educational history, his prior adult and juvenile record, his prior correctional experience and his medical history." Pet. Br. 31 (internal quotations and citation omitted). Petitioner's contention should be rejected.[3]

[3] Because this case arises on federal habeas corpus, petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell* v. *Cone*, 535 U.S. 685, 698-699 (2002). Under 28 U.S.C. 2254(d)(1), petitioner "must show that the [Pennsylvania Supreme Court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." 535 U.S. at 699. "[A]n unreasonable application is different from an incorrect one." *Id.* at 694. Because this brief explains why counsel's performance satisfied the constitutional requirements for effective assistance of counsel under *Strickland*, it follows *a fortiori* that the state court did not apply *Strickland* in an unreasonable manner within the meaning of Section 2254(d)(1).

A. Defense Counsel's Investigation Was Constitutionally Reasonable Under *Strickland*

1. Under Strickland, counsel must conduct an investigation that is reasonable in view of the totality of circumstances

In evaluating counsel's performance, this Court has repeatedly recognized that "[j]udicial scrutiny * * * must be highly deferential," with "every effort * * * be[ing] made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bell* v. *Cone*, 535 U.S. 685, 698 (2002) (internal quotations and citation omitted). Otherwise, it is "all too tempting" for a convicted defendant to "second-guess counsel's assistance" and "all too easy" for a court to find an act or omission "unreasonable" because defense counsel was "unsuccessful." *Strickland*, 466 U.S. at 689. Accordingly, a court "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell* v. *Cone*, 535 U.S. at 702 (quoting *Strickland*, 466 U.S. at 689).

Where a court is evaluating an attorney's pre-trial investigation, there is no "checklist for judicial evaluation of attorney performance." *Strickland*, 466 U.S. at 688. "[T]he Federal Constitution imposes [only] one general requirement: that counsel make objectively

reasonable choices." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000). Thus, counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. When counsel decides that an investigation is complete, the decision "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

One circumstance that "may be critical to a proper assessment of counsel's investigation decisions" is "counsel's conversations with the defendant." *Strickland*, 466 U.S. at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," because "[c]ounsel's actions are usually based, quite properly, * * * on information supplied by the defendant." *Ibid.* Thus, "what investigation decisions are reasonable depends critically on such information," and "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Ibid.*

Applying those standards, in *Strickland*, the Court rejected a defendant's claim that his counsel was deficient in failing to investigate his background and mental state, holding that "[t]rial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help." 466 U.S. at 690-691, 699. Similarly, in *Burger* v. *Kemp*, 483 U.S. 776 (1987), the Court concluded that a decision "not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment," where counsel had "interview[ed] all potential witnesses who had been called to his attention," and the attorney reasonably believed that explaining petitioner's background to the jury "would not have minimized the risk of the death penalty." *Id.* at 794-795.

2. The decision not to obtain petitioner's records was reasonable in light of the totality of circumstances in this case

In view of the standards governing duty-to-investigate claims, the findings of the Pennsylvania Supreme Court, and the uncontradicted testimony at the PCRA hearing, defense counsel's investigation into petitioner's mental impairments and family background was reasonable notwithstanding counsel's failure to obtain petitioner's records.

The record demonstrates that defense counsel "retained three well-qualified mental health experts to examine [petitioner]." J.A. 1358. The experts performed "a battery of tests" for brain damage and personality disorders, but "found nothing helpful to [petitioner's] case." J.A. 263, 272, 1358. No expert suggested that petitioner's records were necessary to evaluate petitioner's mental state; to the contrary, all three experts completed their evaluations without asking for these records. J.A. 263-264, 1052-1056, 1082-1083.

In addition, defense counsel developed a relationship of "trust" with the petitioner before questioning him about his background (J.A. 555, 557-558), but petitioner persistently maintained to counsel, as well as his mental health experts (J.A. 1027, 1054), that he had a "normal" childhood and did not have a drinking problem. J.A. 1054. Petitioner's manner of discussing his family back-

ground gave no indication that he was withholding information from counsel. J.A. 668, 669. Counsel nonetheless checked and corroborated petitioner's claim of a normal childhood by questioning "in a detailed manner" three of petitioner's siblings, his sister-in-law, and his ex-wife about his background. J.A. 264. "[N]one * * * revealed abuse or other circumstances that could be used as mitigation evidence." J.A. 273. In light of these facts, defense counsel's conclusion that an investigation into petitioner's records would be fruitless "was supported by reasonable professional judgment." *Burger*, 483 U.S. at 794.

The reasonableness of the scope of counsel's investigation is underscored by petitioner's statements to his trial counsel. Petitioner expressly and repeatedly denied that anything in his background—his education, family history, or use of alcohol—could help the mitigation case. Because petitioner "[gave] counsel reason to believe that pursuing [these] investigations would be fruitless," he may not now challenge counsel's failure to investigate as unreasonable. *Strickland*, 466 U.S. at 691.

B. Neither This Court's Decision In *Wiggins* Nor The Prevailing Norms Require Capital Counsel To Obtain All Reasonably Available Records Without Regard To Relevance

Petitioner (Pet. Br. 31), the American Bar Association as *amicus curiae* (ABA Amicus Br. 12-16), and the dissenting judge in the court of appeals (J.A. 1422-1423) suggest that this Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and the ABA's standards governing investigations in capital cases, require capital counsel to acquire a defendant's reasonably available records in all instances. Pet. Br. 31; see ABA Amicus Br. 12-14. That

argument, however, misreads both *Wiggins* and the ABA's standards.

In *Wiggins*, the Court held that defense counsel acted unreasonably by conducting only a narrow investigation into the defendant's family background and then abandoning the investigation after uncovering numerous leads. There, the investigation consisted of counsel's reviewing a pre-sentence investigation report (PSI) and records kept by the Baltimore City Department of Social Services (DSS records). These records revealed that the defendant's mother was an alcoholic, that defendant was "shuttled from foster home to foster home," and that the defendant displayed some emotional difficulties. Despite that information, counsel halted the investigation and gave up on using petitioner's family background as a mitigating factor. *Wiggins*, 539 U.S. at 525.

In holding counsel's investigation constitutionally deficient, the Court observed, first, that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989." *Wiggins*, 539 U.S. at 524. The "standard practice in Maryland" at the time "included the preparation of a social history report." *Ibid.* In addition, the Court observed that the standards for capital defense attorneys articulated by the ABA provided that "investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Ibid.* (internal quotations and citations omitted). "Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Ibid.* The Court held, next, that the

scope of counsel's investigation "was also unreasonable in light of what counsel actually discovered in the DSS records," namely numerous "leads" indicating that petitioner's childhood was traumatic. *Id.* at 525. "Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Ibid.* Thus, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Ibid.*

Focusing on the first part of the Court's opinion and the Court's reliance on ABA standards, petitioner and the ABA claim that this Court requires counsel to procure and review all "'reasonably available' records" in all capital cases. Pet. Br. 31; ABA Amicus Br. 12-16. But neither the ABA Guidelines nor *Wiggins*, when fairly read, establishes a such duty.

The 1989 version of the ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*1989 ABA Guidelines*) (set forth in the appendix to this brief, App., *infra*, 1a-5a), which the Court cited in *Wiggins*, established an overarching duty for counsel to conduct an "investigation for preparation of the sentencing phase" that "should comprise *efforts to discover* all reasonably available mitigating evidence." App., *infra*, 1a (emphasis added). It then identifies several potential "[*s*]*ources* of investigative information," the second of which is "[t]he accused." App., *infra*, 1a, 2a (emphasis added). Specifically, the ABA instructs counsel to conduct "[a]n interview of the client," as well as family members and friends (App., *infra*, 4a), to "collect information relevant to the sentencing phase of trial, including, but not limited to:

medical history[;] * * * educational history[;] * * * family and social history[;] * * * prior adult and juvenile record; [and] prior correctional experience." App., *infra*, 2a, 3a. While that subsection addresses the categories of *information* that should be covered in the client interview, it does not specifically address *records*. The next subsection addresses records and provides that counsel should also "seek necessary releases for securing confidential records," but that duty is expressly limited to securing releases for records "relating to * * * the *relevant* histories." App., *infra*, 3a (emphasis added).

The *1989 ABA Guidelines* did not prescribe a universal requirement to search out all records. Rather, the *1989 ABA Guidelines* specifically focused on counsel's acquiring "relevant" records, and relevance obviously can be shaped by what the defendant, and family members who know him, reveal about possible lines of mitigation.[4] When those sources reliably and consistently indicate that the defendant's background holds no promising mitigation evidence, counsel are not

---

[4] See Nat'l Legal Aid & Defender Ass'n, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* 60-66 (1988) (providing same standard for investigation as is contained in *1989 ABA Guidelines*); *id.* at 67 (Commentary) (observing that "[c]lient interviews are vital for establishing the trust between attorney and client necessary to allow the attorney to learn the facts"); Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* I.B.4(a) (May 1998) (*Federal Death Penalty Recommendations*) (observing that "consultation with the client" is important source for client's "[e]xperiences of mental illness, substance abuse, emotional and physical abuse, social and academic failure, and other 'family secrets' ").

required to acquire all records. Thus, the *1989 ABA Guidelines* contemplated that counsel would satisfy the duty to make "efforts to discover all reasonably available mitigating evidence" by discussing all potential theories of mitigation with the defendant and family members, and acquiring records that, based on those discussions, could be relevant.[5]

In any event, nothing in *Wiggins* purported to constitutionalize the ABA Guidelines or to overrule *Strickland*'s reasonableness test. In *Wiggins*, as in *Strickland*, this Court recognized that the ABA's standards are useful reflections of "[p]revailing norms of practice." *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 524. But the Court has repeatedly declined to treat the ABA's guides as the standard-bearers of reasonableness, observing more than once that "prevailing norms of practice as reflected in American Bar Association standards and the like are only guides, and imposing specific guidelines on counsel is not appropriate." *Roe* v. *Flores-Ortega*, 528 U.S. at 479 (internal quotations and citation omitted); see *Strickland*, 466 U.S. at 688 (observing that prevailing

[5] In federal death penalty cases, a "mitigation specialist" is "one of the more common experts" "requested by defense counsel," and the costs associated with hiring a mitigation specialist are typically permitted under 21 U.S.C. 848(q)(9). Federal Judicial Center, I *Resource Guide for Managing Capital Cases* 14, 20-21 (Apr. 2004). The services performed by a mitigation specialist generally include "obtaining and evaluating birth, school, social welfare, employment, jail, medical, and other records"; "interviewing the defendant and his or her family and friends regarding sensitive areas of mitigation evidence"; and "analyzing drug and alcohol use history." *Id.* at 14. The use of mitigation specialists in federal death penalty cases, however, does not set a constitutional floor for effective assistance of capital counsel.

norms defined by the ABA "are only guides"); *Wiggins*, 539 U.S. at 524 (same). Thus, the Court has refused to hold that counsel are constitutionally required to consult with their client about the possibility of appeal, even though ABA and state standards generally require such a discussion. *Roe* v. *Flores-Ortega*, 528 U.S. at 479.

Indeed, however useful the ABA's standards may be as guides for counsel, they often exceed the constitutional minimum of reasonableness and, if viewed as immutable rules, could impose considerable, potentially fruitless, burdens on defense counsel—a point amply demonstrated by the ABA's current standards, which the ABA repeatedly cites in its brief (ABA Amicus Br. 9-14) for the proposition that capital counsel must always obtain all records relating to the defendant. See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003) (*Current Guidelines*), *reprinted in* 31 Hofstra L. Rev. 913, 1024-1025 (2003).[6] Thus, while the ABA's standards may describe the ideal for defense counsel in considering a mitigation case, the standards

[6] The *Current Guidelines* require counsel to obtain and review not only all available records concerning the defendant but also all such records relating to the defendant's "parents, grandparents, siblings, cousins, and children, including school records, social service records, family court records, family birth, marriage and death records, medical records, employment records, military records, and INS records." See *Current Guidelines* 10.7, *reprinted in* 31 Hofstra L. Rev. at 1024-1025. But no court has suggested that such a broad and exhaustive records search is constitutionally required. Conducting such a search, indeed, could be an unreasonable use of counsel's time if no information suggests that, for example, a cousin's INS record is relevant to the mitigation case.

do not always define the constitutionally-required minimum.

Reading *Wiggins* more broadly, to require defense counsel to acquire all reasonably available records in every capital case, would render *Wiggins* irreconcilable with both the analytical framework and the results in *Strickland* and *Burger*. The legal framework developed in *Strickland* disavowed the view that inflexible rules govern counsel's performance; it instead requires the evaluation of an attorney's challenged conduct "on the facts of the particular case, viewed as of the time of counsel's conduct," and not against a "checklist for judicial evaluation of attorney performance." 466 U.S. at 688, 690. The Court observed that adopting a "particular set of detailed rules for counsel's conduct" would undercut the goals of the Sixth Amendment. *Id.* at 688. Because no single set of standards "can satisfactorily take account of the variety of circumstances faced by defense counsel," any such rules would "restrict the wide latitude counsel must have in making tactical decisions" and "interfere with the constitutionally protected independence of counsel." *Id.* at 688-689. Thus, this Court has "consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation." *Roe* v. *Flores-Ortega*, 528 U.S. at 481.

In both *Strickland* and *Burger*, moreover, counsel failed to acquire the defendant's records when investigating potential mitigating circumstances, but the Court upheld counsel's investigation as reasonable under the circumstances. In *Strickland*, the Court described defense counsel's investigation into the defendant's family background as consisting of only discussions with the defendant "about his background," and telephone conversations with the defendant's wife

and mother. 466 U.S. at 672-673. Counsel "did not otherwise seek out character witnesses" and did not request a psychiatric examination of his client. *Id.* at 673. The Court concluded that this conduct could not "be found unreasonable" in light of the standards it had adopted. *Id.* at 698. Similarly, in *Burger*, defense counsel's "investigation" consisted only of roughly six-hours of interviews with the defendant, "talk[s]" with the defendant's mother "on several occasions," discussions with an attorney who had befriended the defendant, and a review of a report by a single psychologist who counsel had hired. 483 U.S. at 790-791 & 791 n.8. While observing that "[t]he record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation," the Court held that counsel's decision to end the investigation was "reasonable." *Id.* at 794-795.

Wiggins does not purport to displace *Strickland* and *Burger*. To the contrary, the Court reconciled the three cases by observing that, in *Strickland* and *Burger*, counsel "uncovered no evidence" to suggest that "further investigation would have been fruitless." *Wiggins*, 539 U.S. at 525. *Wiggins* involved, in contrast, defense counsel who conducted only a "rudimentary" investigation, and then abandoned the investigation when even the rudimentary steps they took pointed to significant mitigation evidence. *Id.* at 524-525. *Wiggins* thus does not mandate that counsel who turn up no leads after conducting significant investigations of the defendant's background nevertheless must go on to obtain all reasonably available records.

C. Unlike The Investigation In *Wiggins*, The Investigation In This Case Revealed That Further Investigation Would Have Been Fruitless

Contrary to petitioner's final claim (Pet. Br. 32-36), there were no red flags signaling that further investigation into petitioner's mental health and background was necessary. The investigation here was much broader than the investigation in *Wiggins* and failed to uncover any "leads." Petitioner insisted that his childhood was "normal" and that he was not an alcoholic; his family members failed to reveal any abuse or anything else about the family that could be used in mitigation; and three mental health professionals concluded that petitioner had no mitigation case. See pp. 17-18, *supra*.

Petitioner nonetheless attempts to fit this case within *Wiggins* by arguing that counsel "knew" six facts that should have prompted further investigation: (i) the family members they interviewed had "only a rudimentary knowledge" of petitioner; (ii) petitioner's adult and juvenile criminal records likely contained life history and mental health information; (iii) petitioner left school after the ninth grade; (iv) police reports suggested that petitioner was drinking heavily the night of Scanlon's murder and could not drink as a condition of parole; (v) petitioner's "ability to adjust to prison life" could be a mitigating factor; and, (vi) the Commonwealth of Pennsylvania would seek to introduce evidence of his prior crimes as part of its aggravation case. Pet. Br. 33- 36. These six purported "leads," however, are factually unfounded or legally irrelevant.[7]

---

[7] The ABA also suggests that petitioner's family members were uncooperative. ABA Amicus Br. 18-21. That claim, however, lacks support in the record and is inconsistent both with the undisputed testimony that petitioner and his family members were not recalcitrant but had a "very close" relationship with defense counsel and appeared to be forthcoming, and the PCRA court's findings that counsel had, in fact, "spoke[n] with members of the family in a detailed manner." See J.A. 264, 555, 557-558, 668-669.

First, petitioner is wrong to claim (Pet. Br. 32-33) that defense counsel interviewed family members with only "rudimentary knowledge" of the *relevant* background. Some family members did suggest that, because of petitioner's many years in prison, they did not know petitioner that well. J.A. 495. But the interviewed family members were both younger and older than petitioner and lived in the same household as petitioner during his childhood. J.A. 1372. Thus, with respect to the questions put to them—about the conditions of petitioner's life while he resided at home as a child—the family members were undoubtedly the most promising source of information, notwithstanding their distance from petitioner later in life. Indeed, the record establishes that, instead of denying knowledge of the relevant issue, the interviewed family members *answered* questions defense counsel put to them about petitioner's family life and background. See J.A. 498-499; pp. 6-7, 18, *supra*. In addition, at least one of the interviewed siblings had actual knowledge of "the conditions in the home on which [petitioner] now relies, but he never provided that information to trial counsel." J.A. 1372. Accordingly, with respect to the relevant line of inquiry, the interviewed family members were knowledgeable.

Second, the suggestion (Pet. Br. 33-34) that defense counsel should have obtained petitioner's adult and juvenile criminal records for "life history and mental health information" incorrectly assumes that counsel

lacked any other source for that information. But defense counsel were able to investigate petitioner's life history and mental health with petitioner, his family members, and three experts, and had no reason to believe that petitioner's criminal records would supply any new information. See pp. 17-18, *supra*. The two cases petitioner cites (Pet. Br. 33-34) for the proposition that Pennsylvania records may contain useful information, moreover, do not hold that such records are necessarily more useful than interviews by counsel and experts, and certainly do not impose an inflexible duty on capital counsel to obtain the reports when investigating mitigation evidence. See *Pennsylvania* v. *Martin*, 351 A.2d 650, 657-659 (Pa. 1976); *Pennsylvania* v. *Hodovanich*, 251 A.2d 708, 710 (Pa. Super. Ct. 1969).

Third, the record demonstrates that petitioner's leaving high school was not a red flag requiring further investigation in the circumstances of this case (Pet. Br. 34). Undisputed evidence in the record shows that Dr. Gross was aware of petitioner's failure to complete high school, found the fact unremarkable, and failed to request petitioner's school records, all of which suggests that petitioner's high school experience was not viewed as a promising lead to the well-qualified mental health expert. See J.A. 1054 (observing that petitioner left school, because "he wanted to work"). Dr. Sadoff, moreover, stated that pulling the school records of a 40-year-old defendant, like petitioner, is unnecessary unless there are inconsistencies between the results of expert testing and the defendant's statements about his education. J.A. 1120-1121. Because petitioner's failure to graduate from high school was consistent with his low-average intelligence revealed by expert testing (see J.A. 1083), petitioner's leaving school was consistent with what the experts knew.

Fourth, the facts that police reports indicated that petitioner had been drinking heavily on the night of Scanlon's murder and that petitioner had agreed not to drink as a condition of parole (Pet. Br. 34) do not render defense counsel's investigation unreasonable, because counsel investigated the possibility that petitioner abused alcohol. See pp. 6-8, 17-18, *supra*. The uniform conclusion of mental health experts, petitioner and his family members, however, was that petitioner was not an alcoholic. *Ibid.* On these facts, there was no imperative for counsel to consult, as petitioner suggests (Pet. Br. 34), petitioner's court and prison records for evidence of petitioner's use of alcohol.

Fifth, contrary to petitioner's claim (Pet. Br. 35), defense counsel had no duty to investigate petitioner's prison records for mitigating evidence about petitioner's ability to adjust to prison life. The record, again, demonstrates that defense counsel conducted extensive interviews with petitioner in which information about petitioner's life in prison should have been uncovered. See pp. 6-8, 17-18, *supra*.

Finally, petitioner's (Pet. Br. 35-36) and the ABA's (ABA Amicus Br. 16-18) reliance on defense counsel's investigation into the State's aggravation case is misplaced. Petitioner does not claim that defense counsel was constitutionally deficient in defending against the State's *aggravation* evidence. Nor can he. The record demonstrates that counsel put on a spirited defense over the relevance and prejudice of the primary aggravation evidence the State introduced. See J.A. 16-40 (arguments concerning State's introduction of evidence about circumstances of petitioner's prior felony conviction), 100-104 (cross-examination of state forensic expert). Petitioner fails to explain, moreover, how review of his prison records would have assisted

counsel. The State argued that petitioner had previously committed a felony involving the use of violence. Petitioner's prison records and juvenile records were simply not relevant to understanding whether this crime was violent. Accordingly, the consistent result of defense counsel's investigation was that further investigation would have been fruitless.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

TRACI L. LOVITT
Assistant to the Solicitor General

DECEMBER 2004

APPENDIX

American Bar Association, *Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases* (1989).

GUIDELINE 11.4.1 INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double Jeopardy) which can be raised to attack the charging documents.

2. The Accused:

An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

C. [c]ollect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and Juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.

D. seek necessary releases for securing confidential records relating to any of the relevant histories.

E. [o]btain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (c) above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.* weather, time of day, and lighting conditions).

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

(2)

No. 04-5462

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RONALD ROMPILLA,
Petitioner,

v.

JEFFREY A. BEARD, SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:

TERRI L. MASCHERIN
DAVID E. WALTERS
JARED O. FREEDMAN

ROBERT J. GREY, JR. *
President
AMERICAN BAR ASSOCIATION
321 N. Clark
Chicago, IL 60610
(312) 988-5000

* Counsel of Record

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

This *amicus* brief will address the following questions on certiorari:

1. Did the defendant receive effective representation at capital sentencing where counsel did not review prior conviction records counsel had been informed the prosecution would use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?

2. Did the defendant receive effective representation at capital sentencing where:

(a) counsel's background mitigation investigation was limited to conversations with a few family members;

(b) the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation;

(c) other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and

(d) the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE ABA GUIDELINES REFLECT PREVAILING PROFESSIONAL NORMS WITH RESPECT TO INVESTIGATION OF A CAPITAL CASE AND THUS ARE INDICATIVE OF REASONABLENESS. 6

II. UNDER THE ABA GUIDELINES, COUNSEL ARE EXPECTED TO CONDUCT A THOROUGH INVESTIGATION OF MITIGATING AND AGGRAVATING EVIDENCE, INCLUDING A THOROUGH INVESTIGATION OF THE CLIENT'S BACKGROUND. 8

A. Counsel Has A Duty To Conduct A Thorough Investigation In Preparation For The Penalty Phase 8

B. Counsel Has An Obligation To Investigate All Reasonably Available Mitigating Evidence Regarding The Client's Background 12

C. Counsel Has A Responsibility To Investigate The Aggravating Evidence 16

D. Counsel's Duty To Conduct A Thorough Investigation Is Not Excused Merely Because The Client Or Family Members Are Uncooperative. 18

E. Counsel Should Not Delegate To Experts The Determination Of The Scope Of The Investigation. 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES **PAGE**

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001) 15

Allen v. Woodford, 366 F.3d 823 (9th Cir. 2004) 7, 17

Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) 15

Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998) 23

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) 7, 15, 19

Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001) 20

Dobbs v. Turpin, 142 F.3d 1383 (11th Cir. 1998) 19, 20

Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) 19

Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1994) 17

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) 15

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) ..... *passim*

Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001) 15

Kimmelman v. Morrison, 477 U.S. 365 (1986) 6

Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987) 18

Penry v. Lynaugh, 492 U.S. 302 (1988), *rev'd on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2003) 12

Roccisano v. Menifee, 293 F.3d 51 (2d Cir. 2002) 7

Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) ..... *passim*

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) 19, 20

Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004) 7

Smith v. Stewart, 140 F.3d 1263 (9th Cir. 1998) 19

Smith v. Stewart, 189 F.3d 1004 (9th Cir. 1999) 22

Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994) 17

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

Wiggins v. Smith, 539 U.S. 510 (2003) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) 6, 11, 14

Woodson v. North Carolina, 428 U.S. 280 (1976) 12

AMERICAN BAR ASSOCIATION MATERIALS

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ..... *passim*

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) ..... *passim*

House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) 2

Model Rules of Prof'l Conduct, R. 1.3 (2002) 8

Model Rules of Prof'l Conduct, R. 1.4 (2002) 9

Model Rules of Prof'l Conduct, R. 1.4 cmt. 5 (2002) 8

Standards for Criminal Justice § 4-4.1 cmt. (2d ed. 1980) 9

Standards for Criminal Justice: Providing Defense Services, § 5-1.2 cmt. (3d ed. 1992) 2, 3

Standards for Criminal Justice: Prosecution Function and Defense Function, § 4-1.2(c) (3d ed. 1993) 3

Standing Comm. on Legal Aid & Indigent Defendants Section of Criminal Justice Section of Litigation, *Report to the House of Delegates* (1989) 6

Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 Am. U. L. Rev. 1 (1990) 2

MISCELLANEOUS

Goodpaster, Gary, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983) 10

Heaney, Lois, National Jury Project, *Constructing a Social History* (1983) 10

Keller, Kit, *Indiana Death Penalty Manual* (1985) 10

Morrissey, Michael, *Investigating the Death Case, in Illinois Death Penalty Defense Manual* 7-2 (Andrea D. Lyon ed., 1988) 10

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. Its more than 408,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[2]

The ABA's mission is, in part, to serve the public and the profession by advocating for the ethical and effective representation of all clients. For nearly one hundred years, the ABA has provided leadership in legal ethics and professional responsibility, establishing the foundation for a lawyer's obligations to his client in all representations. In 1908, the ABA adopted the original Canons of Professional Ethics; in 1969, the Model Code of Professional Responsibility; and, in 1983, the ABA adopted the Model

---

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Rules of Professional Conduct, which were amended by the work of the "Ethics 2000" Commission in February 2002.

The ABA has a well-established tradition of advocating for the effective representation of clients in criminal cases in general, and in capital cases in particular. The ABA takes no position on the death penalty as a general matter. However, the ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. The ABA is especially concerned about the effective representation of criminal defendants who might be or have been sentenced to death.[3] One of the several ABA entities that focus on legal issues related to capital punishment is the Special Committee on Death Penalty Representation, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (hereinafter the "*ABA Guidelines*"), which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *ABA Guidelines*,[4] intro. cmt.

---

[3] *See, e.g., ABA Standards for Criminal Justice: Providing Defense Services*, § 5-1.2 cmt. (3d ed. 1992) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990).

[4] The *ABA Guidelines* can be found at http://www.abanet.org/deathpenalty.

(1989).[5] In February 2003, the ABA House of Delegates approved revisions to the *ABA Guidelines* to update and expand upon the obligations of death penalty jurisdictions and lawyers to ensure due process of law and justice. *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) (hereinafter the "*Updated ABA Guidelines*").[6]

Both versions of the *ABA Guidelines* are based on the experiences of practitioners and ABA members who have handled post-conviction cases on collateral review. They reflect lessons learned from problems created by inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. Today, the ABA calls upon each death penalty jurisdiction to adopt the *Updated ABA Guidelines*.

The ABA submits this brief as *amicus curiae* because the *ABA Guidelines* may be helpful to this Court's determination whether counsel's performance in preparing for the capital sentencing hearing in this case was objectively reasonable in light of prevailing professional norms.

---

[5] *See also ABA Standards for Criminal Justice: Providing Defense Services*, § 5-1.2 cmt. at 12 (3d ed. 1992) ("These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards]."); *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, § 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [ABA Guidelines.]").

[6] The *Updated Guidelines* also appear at http://www.abanet.org/deathpenalty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Third Circuit Court of Appeals reinstating Petitioner Ronald Rompilla's death sentence should be reversed. Trial counsel's investigation did not comply with prevailing professional norms such as those reflected in the *ABA Guidelines*. The *ABA Guidelines* codify longstanding standards prevalent in the profession for the "minimal resources and practices necessary" for competent representation of a client in a capital case. *ABA Guidelines*, intro. cmt. Counsel's conduct in this case fell far short of what the *ABA Guidelines* require, for counsel failed to investigate adequately either the mitigating or aggravating evidence that was reasonably available.

As the *ABA Guidelines* demonstrate, lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough background investigation. Lawyers have an independent duty to see that this investigation is conducted, and must not delegate the responsibility to others, including experts hired by counsel. Lawyers also have a duty to conduct a thorough background investigation even if the client and his or her family members are not cooperative. Lawyers and their clients must be properly informed with regard to the many choices that must be made concerning the guilt/innocence phase and the penalty phase of a capital trial. They cannot act reasonably if they lack an informed basis for choosing one defense over another, presenting some facts over others, or pursuing one sentencing strategy over another.

In this case, a review of the reasonableness of counsel's investigation under the standards codified by the *ABA Guidelines* suggests that counsel did not perform reasonably in view of prevailing professional norms. Mr. Rompilla's

counsel failed to conduct a basic background investigation and to obtain records that were readily available; counsel improperly delegated their responsibility to investigate to experts; and counsel failed to conduct even a minimal investigation of the aggravating evidence that the prosecution gave notice it intended to introduce, which contained leads to key mitigating evidence. Under the *ABA Guidelines*, counsel cannot excuse their deficient investigation based on uncooperativeness of the defendant or his family.

Long before the *ABA Guidelines* were promulgated, the profession recognized that competent counsel must investigate the range of mitigating evidence that may be available, and must also investigate the aggravating evidence likely to be offered by the State. The *ABA Guidelines* cautioned lawyers against the consequences of incomplete investigations. The standard of care set forth in the ABA Guidelines resulted from the ABA's study of what reasonably performing lawyers were doing and what ineffectively performing lawyers were not doing.

The *ABA Guidelines* and the *Updated Guidelines* are not proffered to this Court as a substitute for counsel's own determination of the necessary scope of investigation in light of the unique character and background of his or her client. Instead, they can serve as a starting point, reflecting a consensus within the legal profession regarding a minimum standard of reasonable performance, from which a court can, under the circumstances of a particular capital case, determine what investigation was necessary to fulfill counsel's obligations to the client. In this case, counsel did not meet prevailing professional norms reflected in the *ABA Guidelines*.

ARGUMENT

I. THE ABA GUIDELINES REFLECT PREVAILING PROFESSIONAL NORMS WITH RESPECT TO INVESTIGATION OF A CAPITAL CASE AND THUS ARE INDICATIVE OF REASONABLENESS.

This Court has long recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g. *ABA Standards for Criminal Justice* . . . are guides to determining what is reasonable." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (relying on ABA Standards for Criminal Justice in finding counsel ineffective).[7] Even before the promulgation of the *ABA Guidelines* in February 1989, this Court had recognized the importance of ABA Standards, including the importance of defense counsel's conducting a thorough investigation, a mandate in line with the *ABA Guidelines*. *See, e.g.*, *Strickland*, 466 U.S. at 691; *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

[7] The first ABA Guidelines were adopted in February 1989. They reflect prevailing norms in the profession that have existed since the early 1980s. As the ABA made clear in 1989, "the Guidelines amplif[ied] previously adopted Association positions on effective assistance of counsel in capital cases and the need for adequate compensation and support." ABA Standing Comm. on Legal Aid & Indigent Defendants Section of Criminal Justice Section of Litigation, *Report to the House of Delegates*, at 2 (1989); *see Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) (*ABA Guidelines* did not "represent norms newly discovered after *Strickland*."). The *Updated ABA Guidelines* reinforce the same minimal standards of investigation as the *ABA Guidelines*. They provide more extensive language and examples regarding the rationale for the policy behind the norms and are cited in this brief to explain the ABA's policy more thoroughly.

This Court has specifically recognized the *ABA Guidelines* as examples of "well-defined norms" of reasonable conduct by defense counsel with respect to the investigation of mitigating and aggravating evidence in capital cases. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). In *Wiggins*, this Court relied on the *ABA Guidelines* as an appropriate benchmark for determining whether counsel's conduct "fell below an objective standard of reasonableness" under *Strickland*. *Wiggins*, 539 U.S. at 521-24. The Court concluded that where "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources," counsel did not meet the norms expressed in the *ABA Guidelines*. *Id.* at 524 (citing *ABA Guidelines* § 11.4.1(C) and § 11.8.6).

There is also consensus among the lower federal courts that the *ABA Guidelines* evidence prevailing norms against which counsel's conduct should be measured.[8]

Based on this history and precedent, the ABA submits that its *Guidelines* are indicative of prevailing professional

[8] For example, the Sixth Circuit has concluded that "the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases," adding "clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland*." *Hamblin*, 354 F.3d at 486; *see also Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (citing ABA standards as guides for determining reasonable attorney performance); *Allen v. Woodford*, 366 F.3d 823, 845 (9th Cir. 2004) (noting Supreme Court's reliance on the *ABA Guidelines* in *Wiggins)*; *Roccisano v. Menifee*, 293 F.3d 51, 60 (2d Cir. 2002) (referring to the ABA Standards as "well established principles" of effective assistance of counsel); *Carter v. Bell*, 218 F.3d 581, 596-600 (6th Cir. 2000) (relying on *ABA Guidelines* and concluding that counsel's failure to investigate defendant's family, social or psychological background constituted ineffective assistance of counsel).

norms by which defense counsel's conduct should be evaluated for reasonableness under *Strickland*. Because they reflect professional norms that prevailed in the 1980s, the *ABA Guidelines* are an appropriate benchmark against which counsel's conduct should be judged in this case.

II. UNDER THE ABA GUIDELINES, COUNSEL ARE EXPECTED TO CONDUCT A THOROUGH INVESTIGATION OF MITIGATING AND AGGRAVATING EVIDENCE, INCLUDING A THOROUGH INVESTIGATION OF THE CLIENT'S BACKGROUND.

Lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough background investigation including investigating both mitigating and aggravating evidence. Lawyers have an independent duty to see that this investigation is conducted, and must not delegate the responsibility to others, including experts hired by counsel. Lawyers also have a duty to conduct a thorough background investigation even if the client and his or her family members are not cooperative.

A. Counsel Has A Duty To Conduct A Thorough Investigation In Preparation For The Penalty Phase.

A lawyer has an obligation to act with reasonable diligence and promptness in representing his or her client. *See Model Rules of Prof'l Conduct* R. 1.3 (2002). A lawyer's execution of that obligation at all times during the representation enables the client "to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." *Id.* at R. 1.4 cmt. 5. In the context of representing a client in a capital case, and the penalty phase in particular, the obligation to act

with reasonable promptness and diligence applies directly to counsel's decisions to investigate the client's background. To satisfy their ethical obligations, counsel must pursue a thorough investigation of all reasonably available background information. Only when fully armed with the reasonably available information obtained from a thorough investigation can counsel effectively advise the client with respect to different courses of action and comport with *Model Rule 1.4*. *Id.* at R. 1.4.

The *ABA Guidelines* specifically address how counsel should fulfill those ethical obligations in the context of defending a capital case. The *Guidelines* reflect the fact that prevailing professional norms in death penalty cases require that "at every stage of the proceedings, counsel has a duty to investigate the case thoroughly." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted). The *ABA Guidelines* recommend careful preparation by counsel for the penalty phase through investigation, consultation with the client, analysis of the prosecution's case and evaluation of all reasonably available evidence in mitigation. *See ABA Guidelines* § 11.4.1, § 11.8.3, § 11.8.5, and § 11.8.6. Specifically, the *Guidelines* require counsel to conduct sufficient investigation "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Guidelines* § 11.4.1(C); *see also* § 11.8.6.; *see also Wiggins*, 539 U.S. at 524-525.

Prior to the adoption of the *ABA Guidelines*, the ABA promulgated standards emphasizing that counsel has the responsibility in a capital case to conduct a thorough investigation of the defendant's background -- including investigating information relevant to sentencing -- from the inception of the representation. *See ABA Standards for Criminal Justice* § 4-4.1 cmt. (2d ed. 1980) ("It is the duty of

the lawyer to conduct a prompt investigation into the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction.").[9] "Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough

[9] The notion that effective performance in a capital case requires a thorough investigation was widely accepted among practitioners throughout the 1980s. Articles and attorney handbooks from that time stress that defense counsel in a capital case should investigate the defendant's background, including by reviewing a defendant's prior conviction records, prison records, juvenile court records, school records, and records relating to childhood abuse and substance abuse. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323-24 (1983) ("Trial counsel has a duty to investigate the client's life history, and emotional and psychological make-up . . . . There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. . . . The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized."); Lois Heaney, National Jury Project, *Constructing a Social History*, H49-H50 (1983) (a social history of a defendant should include investigating school and other institutional records, as well as any experiences of child abuse, learning disabilities, emotional problems, substance abuse, and involvement with criminal justice, mental health or social service agencies); Michael Morrissey, *Investigating the Death Case, in Illinois Death Penalty Defense Manual*, at 7-9 to 7-13 (Andrea D. Lyon ed., 1988) (describing need for defense counsel investigating penalty phase to obtain school and military records, alcohol and drug history, juvenile court records, prison records, mental health records, criminal records); Kit Keller, *Indiana Death Penalty Manual*, at 7 § 1-13 to 1-14 (1985) (investigation into mitigating factors should identify records relating to childhood trauma, education, employment, military service, physical and mental health, and substance abuse) (citing Butler, *Ohio Death Penalty Manual* (1981)).

investigation with respect to both phases of the case." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted); *see also Hamblin v. Mitchell*, 354 F.3d 482, 492 (6th Cir. 2003).

Indeed, at no time is the thoroughness of counsel's investigation into the client's background more critical than in preparation for the penalty phase of a capital case. *See ABA Guidelines* § 11.4.1 cmt. ("The duty is intensified . . . by the unique nature of the death penalty[.]"). This Court has said that an investigation by counsel that may be adequate for the guilt/innocence phase may be wholly inadequate for the penalty phase. *See e.g., Williams*, 529 U.S. at 395. In both *Williams* and *Wiggins*, this Court stressed that counsel cannot fulfill his or her constitutional duty without conducting a thorough investigation of the available mitigating evidence. *See, e.g., Williams*, 529 U.S. at 396 (counsel failed to fulfill his obligation to conduct a thorough investigation of the defendant's background because he failed to uncover and present mitigating evidence); *Wiggins*, 539 U.S. at 522 (counsel's failure to present mitigating evidence of defendant's background prejudiced sentencing decision).

In this case, counsel's conduct fell far short of prevailing professional norms as reflected in the *ABA Guidelines*. Counsel not only failed to conduct a basic background investigation and obtain records that were readily available, they also did not conduct a minimal investigation into the aggravating evidence that the prosecution gave notice it intended to introduce at sentencing. The record shows that had counsel conducted a minimal investigation of the aggravating evidence, they would have uncovered much in that process that actually would have been mitigating.

Counsel here did not claim that they conducted a thorough investigation and made a strategic decision not to offer more evidence in mitigation. *See, e.g., Strickland*, 466 U.S. at 673; *Wiggins*, 539 U.S. at 521. Quite to the contrary,

trial counsel testified at the post-conviction hearing that they would have presented other mitigating evidence if they had been aware of it. *Rompilla v. Horn*, 355 F.3d 233, 279-281 (3d Cir. 2004) (Sloviter, J., dissenting). Counsel simply did not do enough background investigation to make the necessary strategic decisions. *See Wiggins*, 539 U.S. at 521-22; *Strickland*, 466 U.S. at 690-91.

B. Counsel Has An Obligation To Investigate All Reasonably Available Mitigating Evidence Regarding The Client's Background.

A thorough investigation must include an investigation of the client's background, for the Eighth Amendment mandates consideration of the "character and record of the offender" as part of the capital sentencing process. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "[I]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), *rev'd on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

To prepare effectively for the penalty phase, counsel should explore at a minimum, all reasonably available sources of mitigation evidence. *See generally ABA Guidelines* § 11.4.1. A reasonable background investigation for the penalty phase includes a review of all reasonably available documents and records. *Updated ABA Guidelines* § 10.7 cmt.; *see also ABA Guidelines* § 11.4.1(D)(2)(c). The *ABA Guidelines* advise that counsel should even "seek

necessary releases for securing confidential records[.]" *ABA Guidelines* § 11.4.1(D)(2)(d). Those background "[r]ecords - from courts, government agencies, the military, employers, etc. - can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witness' recollections." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted).

As the *ABA Guidelines* explain, sources of mitigation information for the penalty phase may include: charging documents, interviews with the client, interviews with family members, interviews with witnesses, interviews with others familiar with the client's life history, police reports and other physical evidence in possession of the police, review of the scene, the client's background records, and expert witnesses. *ABA Guidelines* § 11.4.1(D). Counsel should research those sources to develop and consider all reasonably available mitigation evidence regarding the client in the following areas:

> medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma, and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

ABA Guidelines § 11.4.1, *see also* § 11.8.6 (B); *Updated ABA Guidelines* § 10.7 cmt. ("Counsel should use all appropriate avenues . . . to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to: a. school records, b. social service and welfare records, c. juvenile dependency or family court records, d. medical records, e. military records, f. employment records, g. criminal and correctional records, h. family birth, marriage, and death records, i. alcohol and drug abuse assessment or treatment records, and j. INS records"). If counsel's interviews with the client do not immediately suggest that relevant mitigation evidence is available, or if the client does not want to put forth mitigating evidence, counsel should nonetheless investigate all available sources.

This Court and other courts have emphasized that obtaining available records pertaining to the client's background is a critical element of investigation in death penalty cases. In *Wiggins*, this Court held that the lower court unreasonably applied *Strickland* in part because defense counsel's investigation did not extend beyond the pre-sentence investigation report and the Department of Social Services' records when other records, of the kind recommended by the *ABA Guidelines*, were available. *Wiggins*, 539 U.S. at 530-31. In *Williams*, this Court found that counsel was ineffective where they "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation, but because they incorrectly thought that state law barred access to such records." *Williams*, 529 U.S. at 365. There is consensus in the lower federal courts that counsel must obtain background records in order to conduct a constitutionally sufficient investigation. *See Hamblin*, 354 F.3d at 491 (counsel failed to review client's mental health records, school records, and

IQ tests); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) ("even though [counsel] obtained school records, counsel failed to examine [. . .] employment records, medical records, prison records, past probation reports, and military records"); *Jermyn v. Horn*, 266 F.3d 257, 307 (3d Cir. 2001) (counsel failed to obtain school records that disclosed childhood abuse); *Carter v. Bell*, 218 F.3d 581, 588-89 (6th Cir. 2000) (counsel failed to obtain a release from client to view prison records, and did not seek any other available records regarding the client or his family); *Glenn v. Tate*, 71 F.3d 1204, 1208 (6th Cir. 1995) (counsel failed to examine the client's school, medical, mental health, or probation records); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (counsel failed to request hospital, school, and child welfare records).

In this case, Mr. Rompilla's counsel failed to conduct the most basic of mitigation investigations suggested by the *ABA Guidelines*. Counsel failed to obtain fundamental records of Mr. Rompilla's background, including school records, and records of his prior adult and juvenile convictions, all of which were readily available to trial counsel in close proximity to the courtroom. *See Rompilla*, 355 F.3d at 273-74, 277, 281-82 (Sloviter, J., dissenting). Counsel also failed to interview several key family members who knew important mitigation information. *Id.* at 279-81. Even when counsel interviewed some members of the family, counsel failed to inquire about the client's past. *Id.*

While this Court has noted that it must avoid the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689, the records that counsel failed to obtain showed: that Mr. Rompilla had experienced an extremely traumatic childhood under conditions of extreme poverty, parental neglect and abuse; that his IQ was repeatedly found to be in the mentally retarded range, and he was not able to advance functionally

past the third grade level; that he had demonstrated serious mental health abnormalities on scales measuring schizophrenia, paranoia, neurosis and obsessive/compulsive disorders; and that he had exhibited a history of debilitating alcoholism. *Rompilla*, 355 F.3d at 273-74, 278-79, 281-82, 284 (Sloviter, J., dissenting). The testimony that counsel should have obtained from other family members would have bolstered all of that evidence. *Id.* at 279.

C. Counsel Has A Responsibility To Investigate The Aggravating Evidence.

Counsel's duty to investigate for the penalty phase of a capital trial includes the duty to conduct a reasonable investigation of potential aggravating factors that could be offered by the prosecution. The *ABA Guidelines* provide that "[t]he investigation for preparation of the sentencing phase . . . should comprise efforts to discover all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Guidelines* § 11.4.1(C). Counsel should investigate areas that may relate to aggravation "at the earliest possible [time]." *ABA Guidelines* § 11.8.5(A). The importance of investigating potentially aggravating evidence at the earliest possible time is twofold. First, the possible aggravating evidence may contain leads that counsel can use to develop mitigating evidence. Second, "[b]ecause the scope of evidence admissible in mitigation is generally broader than that admissible in aggravation," investigating the potential aggravating evidence will prepare counsel to object at sentencing to "inadmissible evidence proffered by the prosecutor." *ABA Guidelines* § 11.8 cmt.

In *Wiggins*, this Court quoted from the *ABA Guidelines* and said that reasonable counsel should seek "all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced." *Wiggins*, 539 U.S. at 524. This Court wrote that "in assessing the reasonableness of an attorney's

investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 525-26. That is particularly important with respect to the investigation of aggravating evidence.

Several lower federal courts, as well, have cited *ABA Guidelines* as evidence of professional norms concerning the investigation of aggravating evidence. *Allen v. Woodford*, 366 F.3d 823, 844-45 (9th Cir. 2004) (investigations in the penalty phase of a capital case should include "efforts to discover all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor"); *Hamblin*, 354 F.3d at 490 (same); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994) ("basic concerns" of capital counsel "are to neutralize the aggravating circumstances . . . and to present mitigating evidence"; counsel was ineffective because he failed to challenge aggravating factors).

In most cases, investigation of aggravating evidence will involve at least a thorough review of the defendants' prior convictions and juvenile convictions.

> Counsel must . . . investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.

Updated ABA Guidelines § 10.7 cmt. (citations omitted); *see also Esslinger v. Davis*, 44 F.3d 1515, 1529-30 (11th Cir. 1995) (counsel failed to investigate non-capital defendant's

criminal record, which was used to enhance sentence); *Lewis v. Lane*, 832 F.2d 1446, 1453-58 (7th Cir. 1987) (counsel failed to investigate portions of capital defendant's criminal record that were used to establish an aggravating factor). A review of the records from the client's prior convictions may provide valuable clues concerning mental health, or concerning other witnesses who possess potential mitigating testimony that might be offered in response to the aggravating evidence. *See Updated ABA Guidelines* § 10.7 cmt.; *see also Wiggins*, 539 U.S. at 527 (in assessing reasonableness, a court must consider "whether the known evidence would lead a reasonable attorney to investigate further").

In this case, had counsel conducted even a minimal investigation into the aggravating evidence that the prosecution gave notice it intended to introduce, counsel would have discovered key mitigating evidence. The prosecution gave notice before trial that it intended to offer evidence of Mr. Rompilla's criminal record in aggravation. The records from Mr. Rompilla's prior conviction and time in prison were available in the same courthouse where the trial occurred. *Rompilla*, 355 F.3d at 282. If counsel had obtained those records, Mr. Rompilla's counsel would have obtained leads indicating that it was necessary to investigate the history of their client's abuse by his family, alcoholism, neuropsychological problems and mental retardation. It would have been apparent that this evidence could be used in mitigation.

D. Counsel's Duty To Conduct A Thorough Investigation Is Not Excused Merely Because The Client Or Family Members Are Uncooperative.

The responsibility of conducting a thorough investigation in preparation for the capital sentencing proceeding rests solely with defense counsel. *ABA Guidelines* § 11.4.1(A).

That duty is separate from, and a necessary predicate to, the client's ultimate decision whether to present available mitigating evidence at the sentencing hearing. The duty also exists regardless of the cooperation counsel receives from the client or the client's family in gathering mitigation evidence or in investigating aggravation evidence.

It is not uncommon for clients facing the death penalty to be recalcitrant or otherwise unhelpful with respect to the penalty phase investigation. *See, e.g., Douglas v. Woodford*, 316 F.3d 1079, 1087 (9th Cir. 2003); *Silva v. Woodford*, 279 F.3d 825, 839-41 (9th Cir. 2002); *Carter*, 218 F.3d at 596; *Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998); *Dobbs v. Turpin*, 142 F.3d 1383, 1387 (11th Cir. 1998).

> Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. . . . Obtaining such information [like childhood sexual abuse] typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer.

Updated ABA Guidelines § 10.7 cmt.

The fact that it may be difficult to elicit this personal information does not excuse counsel from the duty to ask the client and others all questions necessary to probe for mitigating evidence, and to investigate through other sources, like school records, records from social service agencies, military records, prison records, and records from other criminal convictions. "[I]f a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a

capital murder trial." *Silva*, 279 F.3d at 847; *see also Coleman v. Mitchell*, 268 F.3d 417, 449-50 (6th Cir. 2001) ("[D]efendant resistance to disclosure of information does not excuse counsel's duty to independently investigate."); *Carter*, 218 F.3d at 596 ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility.").

Moreover, while the decision whether to present to the fact finder any mitigation evidence may rest ultimately with the client, the *ABA Guidelines* make clear that "[t]he investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." *ABA Guidelines* § 11.4.1(C). *See also Dobbs*, 142 F.3d at 1388 ("[L]awyers may not 'blindly follow' [clients' commands not to present mitigating evidence]. Although the decision whether to use mitigating evidence is for the client, . . . 'the lawyer first must evaluate potential avenues and advise the client of those offering possible merit.'") (quoting *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986)).

Family members and others who know the client personally can prove a reliable and valuable resource in the penalty phase investigation. *Updated ABA Guidelines* § 10.11 cmt. (those with personal knowledge of the defendant "can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants"); *see also ABA Guidelines* § 11.8.3(F)(1) (counsel should investigate the "client's life and development, from birth to the time of sentencing") However, in some instances, those individuals do not assist the investigation, perhaps because they do not trust counsel, do not understand what information may be helpful to the

mitigation case, or simply have no direct knowledge of mitigating evidence. *See Updated ABA Guidelines* § 10.7 cmt. (family members may suffer from the same impairments as the client). This may be the case particularly where a client's past includes abuse, troubling medical history, or clear signs of mental deficiency.

In this case, counsel did not interview all of the family witnesses apparently because the client and some family witnesses were unhelpful. *Rompilla*, 355 F.3d at 279-81 (Sloviter, J., dissenting). There is also evidence that even when counsel interviewed some members of the family, counsel failed to inquire about the client's past. *Id.* Counsel's deficient performance cannot be excused by uncooperativeness on the part of the defendant and his family. That lack of cooperation made it all the more important that counsel investigate other sources of mitigation. Counsel should not assume that interviews yielding little in the way of mitigation evidence equate with the absence of such evidence. Quite the opposite. If interviews with family members are not fruitful in the way of mitigation information, counsel should intensify their search for background records of the client and investigate other potential mitigation sources. Counsel also should attempt to interview other extended family members, and "virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others." *Updated ABA Guidelines* § 10.7 cmt. (citations omitted); *see also ABA Guidelines* § 11.8.3(F)(1).

E. Counsel Should Not Delegate To Experts The Determination Of The Scope Of The Investigation.

Defense counsel should consult with experts in preparation for the penalty phase of a capital trial, for expert witnesses are an important component of the penalty phase.

Areas in which experts may be helpful include: deciphering the prosecution's aggravation case; rebutting the prosecution's aggravation case; and presenting mitigation topics in defense counsel's case. *ABA Guidelines* § 11.4.1(D)(7). Experts can also be used "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death[.]" *Updated ABA Guidelines* § 10.11. However, counsel cannot, consistent with prevailing professional norms, delegate his or her duty to investigate to experts.

The duty to investigate remains with counsel, regardless whether counsel consults with experts. *See ABA Guidelines* § 11.4.1. Counsel must not simply delegate the responsibility for conducting a thorough investigation of the client's background to expert witnesses. Nor should counsel assume that experts will independently obtain background information needed to carry out their role effectively. Rather than delegate the duty to investigate to experts, counsel should ensure that experts are apprised of and provided all reasonably available information necessary and helpful to the expert's role in the mitigation case. *Id.*

This Court and others have echoed the ABA's longstanding view that counsel has an "obligation to conduct a thorough investigation of the defendant's background," whether or not she hires expert witnesses. *Wiggins*, 539 U.S. at 522; *see Smith v. Stewart*, 189 F.3d 1004, 1012 (9th Cir. 1999) ("A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant's case for mitigation does not

function as 'counsel' under the Sixth Amendment."); *see also Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) ("When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel").

In this case, Mr. Rompilla's counsel attempted to justify their failure to investigate records of their client's background by claiming that they relied on experts (who may have been engaged in preparation for the guilt/innocence phase and not the penalty phase), to tell them what records were needed for the experts' analysis. *Rompilla*, 355 F.3d at 280-81 (Sloviter, J., dissenting). Although experts may request certain documents or access to particular witnesses to complete their analysis, counsel should not assume that any potential source of mitigation evidence is not important because it was not requested by the expert. Counsel should instead independently seek to procure through investigation other mitigating evidence that may enhance the expert's analysis. Counsel's reliance upon experts to define the scope of their mitigation investigation was not in accordance with prevailing professional norms reflected in the *ABA Guidelines*.

CONCLUSION

The ABA respectfully submits that the decision of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

TERRI L. MASCHERIN
DAVID E. WALTERS
JARED O. FREEDMAN

ROBERT J. GREY, JR.*
President
American Bar Association
321 N. Clark
Chicago, IL 60610
312-988-5000

November 12, 2004

**Counsel of Record*

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

(15)

No. 04-5462

IN THE

Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

vs.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the Pennsylvania Supreme Court unreasonably apply *Simmons* v. *South Carolina* by interpreting it in the same way as the four dissenting Justices of this Court did four years later in *Kelly* v. *South Carolina*?

2. Does the Sixth Amendment prohibit an attorney managing a capital case with limited resources from terminating a line of investigation into mitigating circumstances when preliminary investigation gives him a reasonable basis to believe that particular inquiry will be fruitless?

3. Should the power to decide how much states must spend to comply with the Sixth Amendment be delegated to the American Bar Association?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

Four years before the 5-4 decision in *Kelly*, a decision congruent with the *Kelly* dissent was neither contrary to nor an unreasonable application of clearly established federal law 5

A. Reasonableness 5

B. The AEDPA standard 9

II

Clearly established law permits reasonable limits on penalty-phase investigation 13

III

The ABA Guidelines are not constitutional minimums ... 16

Conclusion 19

TABLE OF AUTHORITIES

Cases

Beard v. Banks, 542 U. S. __, 159 L. Ed. 2d 494
124 S. Ct. 2504, (2004) 7, 9

Burger v. Kemp, 483 U. S. 776, 97 L. Ed. 2d 638,
107 S. Ct. 3114 (1987) 14, 15

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347,
110 S. Ct. 1212 (1990) 7, 9

Commonwealth v. Chandler, 554 Pa. 401,
721 A.2d 1040 (1998) 10

Commonwealth v. Pierce, 515 Pa. 153,
527 A.2d 973 (1997) 13

Commonwealth v. Rompilla, 539 Pa. 499,
653 A. 2d 626 (1995) 2, 3

Commonwealth v. Rompilla, 554 Pa. 378,
721 A.2d 786 (1998) 3, 10

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859,
96 S. Ct. 2909 (1976) 10

Grutter v. Bollinger, 539 U. S. 306, 156 L. Ed. 2d 304,
123 S. Ct. 2325 (2003) 5

Jones v. Barnes, 463 U. S. 745, 77 L. Ed. 2d 987,
103 S. Ct. 3308 (1983) 16

Kelly v. South Carolina, 534 U. S. 246, 151 L. Ed. 2d 670,
122 S. Ct. 726 (2002) 5, 10, 12

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 9

Lockyer v. Andrade, 538 U. S. 63, 155 L. Ed. 2d 144,
123 S. Ct. 1166 (2003) 7, 10

Marks v. United States, 430 U. S. 188, 51 L. Ed. 2d 260,
97 S. Ct. 990 (1977) 5

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384,
108 S. Ct. 1860 (1988) 9

Morgan v. Illinois, 504 U. S. 719, 119 L. Ed. 2d 492,
112 S. Ct. 2222(1992) 13

O'Dell v. Netherland, 521 U. S. 151, 138 L. Ed. 2d 351,
117 S. Ct. 1969 (1997) 5, 6

Price v. Vincent, 538 U. S. 634, 155 L. Ed. 2d 877,
123 S. Ct. 1848 (2003) 9

Rompilla v. Horn, 2000 U. S. Dist Lexis 9620
(E. D. Pa. 2000) 3

Rompilla v. Horn, 355 F. 3d 233 (CA3 2004) ... 4, 8, 14, 16

Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193,
110 S. Ct. 2822 (1990) 7

Simmons v. South Carolina, 512 U. S. 154, 129 L. Ed. 2d
133, 114 S. Ct. 2187 (1994) 2, 5, 6, 10, 11, 12

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984) 13, 14, 15, 17

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 6

United States v. American Bar Assn.,
934 F. Supp. 435 (DC DC 1996) 17

Wiggins v. Smith, 539 U. S. 510, 156 L. Ed. 2d 471,
123 S. Ct. 2527 (2003) 14, 15

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389,
120 S. Ct. 1495 (2000) 6, 7, 8, 9

Wright v. West, 505 U. S. 277, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) 6, 7, 8

Yarborough v. Alvarado, 541 U. S. __, 158 L. Ed. 2d 938, 124 S. Ct. 2140 (2004) 7

United States Statutes

28 U. S. C. § 2254(d) 1, 4, 7, 9

28 U. S. C. § 2254(e) 14

Miscellaneous

Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344, (2003) 12

American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA (1992) .. 19

IN THE

Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

vs.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation and application of 28 U. S. C. § 2254(d), as enacted in the Antiterrorism and Effective Death Penalty Act of 1996. Congress enacted this

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

law, as its name states, to make the death penalty effective in the United States. The purpose remains frustrated because many federal courts continue to set aside reasonable state judgments merely because they disagree with them or because of changes in the law after the state decision. Both of these are illegal after AEDPA, and contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Sixteen years ago, Ronald Rompilla was sentenced to death for the murder of James Scanlon in Allentown, Pennsylvania. See *Commonwealth* v. *Rompilla*, 539 Pa. 499, 504, 653 A. 2d 626, 628 (1995). (*Rompilla I*). Rompilla stabbed Mr. Scanlon repeatedly, set him on fire, and left him in a pool of blood during an after-hours robbery at Mr. Scanlon's bar. *Id.*, at 505, 653 A. 2d, at 629.

The jury found the aggravating circumstances that the killing was committed in the course of a felony and by torture, and that Rompilla had a significant history of violent felonies. See *id.*, at 514, n. 13, 653 A. 2d, at 634, n. 13. The prior crime also involved a burglary and robbery, and Rompilla raped the victim. See *id.*, at 514, n. 12, 653 A. 2d, at 633, n. 12.

The prosecutor's sentencing argument referred to the brutality of the crime, Rompilla's violent nature, his prior violent crime, and the evident motive to eliminate Mr. Scanlon as a witness. J. A. 161-167. At no time did the prosecutor say that Rompilla would be dangerous in the future or suggest the prevention of future crimes as a reason to sentence him to death.

On automatic appeal, the Supreme Court of Pennsylvania heard oral argument October 20, 1994, four months after this Court's decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). No *Simmons* issue is discussed in the opinion, apparently not having been raised in the appeal. The court unanimously affirmed the conviction and sentence. *Rompilla I*, 539 Pa., at 515, 653 A. 2d, at 634.

Rompilla filed a state postconviction review petition in the trial court, making a *Simmons* claim, an ineffective assistance claim, and other claims. Although the *Simmons* claim would have been considered defaulted in most states, both the trial court and the Pennsylvania Supreme Court addressed it on the merits. The trial court found *Simmons* was distinguishable, because the prosecutor had not argued future dangerousness. J. A. 259-260.

Rompilla also claimed ineffective assistance of counsel based on the attorney's failure to uncover evidence of brain damage and an abusive childhood. J. A. 262. The trial court found that counsel retained recognized experts and provided them "whatever they asked for," and they reported that Rompilla had no brain damage. J. A. 263-264. Further, the trial court found that counsel's testimony that they had interviewed Rompilla's family in detail was credible, J. A. 264, and the family's testimony was not. J. A. 264-265.

The Pennsylvania Supreme Court affirmed, with a single dissent. *Commonwealth* v. *Rompilla*, 554 Pa. 378, 721 A. 2d 786 (1998). The court rejected both claims on reasoning similar to the trial court. See *id.*, at 385, 394-395, 721 A. 2d, at 789-790, 794-795.

Rompilla then sought federal habeas relief. See *Rompilla* v. *Horn*, 2000 U. S. Dist Lexis 9620 (E. D. Pa. 2000) The District Court found that the ineffective assistance claim was "a very close call," *id.*, at *39, but nonetheless found that the state court had "unreasonably applied" the *Strickland* standard. *Id.*, at 40. There is no explanation of how a decision either way in a "very close" case can possibly be unreasonable. The District Court rejected the *Simmons* claim, because the prosecutor's argument went to the circumstances of the crime and not to future dangerousness. See *id.*, at *44-45.

The Third Circuit reversed the grant of habeas relief on the penalty phase. *Rompilla* v. *Horn*, 355 F. 3d 233 (CA 3 2004) with one judge dissenting. This Court granted certiorari on September 28, 2004.

SUMMARY OF ARGUMENT

In cases governed by 28 U. S. C. § 2254(d)(1), the distinction between new rules and applications of old rules to new facts is not critical, as it is under the *Teague* rule. By applying the new deference standard to both questions of law and mixed questions of law and fact, Congress has required that objectively reasonable decisions of state courts of either type be respected on federal habeas corpus.

In 1998, it was entirely reasonable for a court to believe that *Simmons* did not apply when the prosecutor introduced evidence and made arguments directed toward the retribution basis for capital punishment, even though the same evidence would, in nearly all cases, enable the jury to infer an incapacitation rationale as well. Otherwise, the requirement that *Simmons* indicated was an exception would swallow the general rule. Although the exception *did* swallow the rule in *Kelly* in 2002, the fact that four Justices dissented in *Kelly* is strong evidence that the contrary view was reasonable.

The Sixth Amendment does not require a "scorched earth" investigation of every conceivably mitigating piece of evidence in every capital case. Under *Strickland* v. *Washington* and *Burger* v. *Kemp*, the most pertinent precedents available at the time of state court decision, counsel's decision not to pursue a line of investigation, based on information from both the defendant and his family that it would be fruitless, was a reasonable conservation of limited resources. The state court's decision to that effect was a reasonable application of *Strickland*.

American Bar Association standards do not establish the minimum required representation under the Sixth Amendment. This Court explicitly so held in *Jones* v. *Barnes*, and that decision should be reaffirmed. In criminal law generally and capital punishment particularly, the ABA is an advocate for one side of the debate, and it should not be allowed to dictate the allocation of limited public resources.

ARGUMENT

I. Four years before the 5-4 decision in *Kelly*, a decision congruent with the *Kelly* dissent was neither contrary to nor an unreasonable application of clearly established federal law.

A. Reasonableness.

Prior to 1994, it was the law in many states that it was improper to instruct the jury in any case " 'of the possibility of commutation, pardon, or *parole*.' " *O'Dell* v. *Netherland*, 521 U. S. 151, 163 (1997) (quoting *California* v. *Ramos*, 463 U. S. 992, 1013, n. 30 (1983) (emphasis added in *O'Dell*)). The choice of whether to inform the jury was a prerogative retained by the States. See *id.*, at 164.

Simmons v. *South Carolina*, 512 U. S. 154 (1994) created a new rule. See *O'Dell*, *supra*, at 166. Because there was no opinion for the Court in *Simmons*, the rule of that case is the position of the opinion concurring in the result on the narrowest ground. See *id.*, at 162; *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Although applying *Marks* can be difficult in some cases, see, *e.g.*, *Grutter* v. *Bollinger*, 539 U. S. 306, 325 (2003), it is straightforward here. The "prevailing opinion" in *Simmons* is Justice O'Connor's. See *Kelly* v. *South Carolina*, 534 U. S. 246, 258 (2002) (Rehnquist, C. J., dissenting).

A precedent creates a rule of law by requiring that future cases which are not distinguishable in their material facts be decided with the same result. The "rule" of a case consists of

the criteria for deciding which facts are material. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, http://www.cjlf.org/briefs/Grutter.pdf, pp. 7-8. The opinion concurring on the narrowest grounds defines a subset of cases which a majority agrees is like the case before the court and must be decided the same way.

In *Simmons* there is no doubt that the prosecutor's argument on future dangerousness was a material fact in the decision and essential to the result. "[I]f the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration . . . ." 512 U. S., at 176 (O'Connor, J., concurring in the judgment).

In *Simmons*, the prosecutor's future dangerousness argument was express and unambiguous. See *id.*, at 157 (plurality opinion). In *O'Dell*, not only was the argument unambiguous, but future dangerousness was a statutory aggravating circumstance the jury was instructed to decide. See 521 U. S., at 154. *O'Dell* and *Simmons* itself were the only Supreme Court cases on the *Simmons* rule in 1998, when the Pennsylvania Supreme Court decided Rompilla's *Simmons* claim.

Amicus NACDL insists that *Kelly* was only an application of *Simmons* and not a new rule. Brief for National Association of Criminal Defense Lawyers on *Amicus Curiae* 7-12 ("NACDL Brief"). Prior to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this would have presented a difficult question. The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) applies to rules of law but not to applications of existing rules to particular facts, and the line between the two has not always been easy to draw. See *Wright* v. *West*, 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). Congress addressed the *Wright* conundrum by making the new deference standard applicable to "mixed questions" as well as pure "rules." See *Williams* v. *Taylor*, 529 U. S. 362, 407-408 (2000). Indeed, multiple supporters of the habeas reform expressly referred to application of the law to the

facts as being within the scope of the new deference standard. See *id.*, at 408, n. *.

As this is an AEDPA case and not a *Teague* case,[2] the new rule/application question is a distinction without a difference. The case comes down to the objective reasonableness of the state court decision, based on this Court's precedents at the time, whichever prong is applied.

Existing Supreme Court precedent does not "clearly establish[ ] Federal law" to which a state court decision can be "contrary," 28 U. S. C. § 2254(d)(1), unless the "holdings, as opposed to the dicta," of the cases constitute an "old rule" within the meaning of the *Teague* line of cases. *Williams*, 529 U. S., at 412; see also *Yarborough* v. *Alvarado*, 541 U. S. __, 124 S. Ct. 2140, 2150-2151, 158 L. Ed. 2d 938, 953 (2004) (noting similarity of § 2254(d) and *Teague* regarding extending existing rules). General principles from which a rule may be derived are not a rule for this purpose. See *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990). Where the contours of a rule are unclear, a decision that a materially distinguishable set of facts is not within the rule is not contrary to clearly established law so long as reasonable minds can differ on the question, bearing in mind that reasonableness is determined objectively. See *Lockyer* v. *Andrade*, 538 U. S. 63, 73 (2003) (unclear contours); *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) (reasonable minds); *Wright* v. *West*, 505 U. S., at 304 (O'Connor, J., concurring in the judgment) (objective standard).

Under AEDPA, unlike *Teague*, the state court's application of law to facts is *also* governed by the same kind of objective

---

2. Sometimes *Teague* continues to bar a claim where AEDPA does not, as when a new rule is created after finality on direct review but before a decision on the merits on state collateral review. See *Beard* v. *Banks*, 542 U. S. ___, 124 S. Ct. 2504, 2509, 159 L. Ed. 2d 494, 501-502 (2004). This is not such a case. *Simmons* came before both dates, and *Kelly* came after both.

reasonableness standard. See *Williams*, 529 U. S., at 409-410. "Whether the prisoner seeks the application of an old rule in a novel setting," *Wright* v. *West*, 505 U. S., at 308 (Kennedy, J., concurring in the judgment), as opposed to a new rule, was a difficult question which often divided this Court. Cf. *id.*, at 313-316 (Souter, J., concurring in judgment) (finding a "new rule" when reviewing the same opinion). Congress has decided that cases will no longer turn on this difficult distinction when § 2254(d) applies. When the petitioner's case is materially distinguishable from the existing Supreme Court precedent, objective reasonableness is the standard either way.

The dispositive question in the present case is whether, four years before *Kelly*, a court was objectively unreasonable in its conclusion that the *Simmons* rule does not extend to a situation where the prosecutor did not argue dangerousness, but where the jury could very well infer dangerousness from evidence and argument which is directed to other independently legitimate sentencing factors. Only one of the four federal judges to consider the AEDPA question so far thought so, because of her belief that "even if *Kelly* 'arguably' broadened *Simmons* it is dispositive for present purposes that the majority of the Supreme Court [in *Kelly*] believed otherwise." *Rompilla* v. *Horn*, 355 F. 3d 233, 291 (CA3 2004) (Sloviter, J., dissenting). Judge Sloviter thought that the language in the *Kelly* opinion that the prosecutor " 'placed the case within the four corners of *Simmons*' " was sufficient to make *Kelly* fully applicable to this case. This view is fundamentally mistaken.

A similar argument was emphatically rejected early in the *Teague* line of cases.

> "But the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for the purpose of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In [*Arizona* v.] *Roberson* [486 U. S. 675 (1988)], for instance, the Court found *Edwards* [v. *Arizona*, 451 U. S. 477 (1981)] controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously." *Butler* v. *McKellar*, 494 U. S., at 415.

We see the same principle at work in this Court's most recent *Teague* decision. *Beard* v. *Banks*, 542 U. S. __, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). Even though there was language in *Mills* v. *Maryland*, 486 U. S. 367 (1988) to support the proposition that its rule was required by *Lockett* v. *Ohio*, 438 U. S. 586 (1978), it was still "clear that reasonable jurists could have differed as to whether the *Lockett* principle compelled *Mills*." 124 S. Ct., at 2512, 159 L. Ed. 2d, at 505.

Although the very existence of a dissent in this Court or of contrary prior opinions in lower courts is not proof of reasonableness, see *Williams*, 529 U. S., at 410, these opinions remain highly relevant to that determination. See *Banks*, 124 S. Ct., at 2512, 159 L. Ed. 2d, at 505; *Butler*, 494 U. S., at 415. To say that six Justices of the Pennsylvania Supreme Court were unreasonable in this case is also to say that four Justices of this Court and four of the five Justices of the South Carolina Supreme Court were unreasonable in *Kelly*. A powerful showing should be required to sustain such an assertion.

B. The AEDPA Standard.

With this guidance from the *Teague* cases on what "reasonable" means, we can turn specifically to the tests applied under §2254(d)(1). "[A] decision by a state court is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' " *Price* v. *Vincent*, 538 U. S. 634, 640 (2003) (quoting *Williams*, 529 U. S., at 405-406).

There can be no question that the facts of the present case are materially distinguishable from *Simmons*. The prosecutor in *Simmons* expressly argued future dangerousness, while the prosecutor in this case did not. Although *Kelly* subsequently held that difference was not determinative, at the time of the state court decision in the present case it was a distinction that reasonable jurists could and did consider decisive. See *Kelly*, 534 U. S., at 260 (Rehnquist, C. J., dissenting). In other words, it was not "clearly established Federal law" that mere implications from evidence and argument had to be treated the same as explicit argument. A conclusion that they were different was reasonable at that time, even if that view did not ultimately prevail in *Kelly*.

Nor did the state court apply a rule that contradicts the rule stated in *Simmons*. The state court cited *Simmons* for the proposition that a "without parole" instruction is required only when future dangerousness is at issue. *Commonwealth* v. *Rompilla*, 554 Pa. 378, 395, 721 A. 2d 786, 795 (1998). The court referred to its own post-*Simmons* cases for its interpretation that "at issue" means that the prosecutor argues future dangerousness. Far from contradicting the governing law stated in *Simmons*, that is *exactly* what the opinion concurring on the narrowest grounds explicitly says. See *Simmons*, 512 U. S., at 176-177 (O'Connor, J., concurring in the judgment).

The only colorable argument, then, is that the Pennsylvania Supreme Court unreasonably applied *Simmons*. To clear this hurdle, it is not enough to show that the decision would be considered incorrect and reversed under *Kelly* if it arose on direct appeal today. "Rather, that application must be objectively unreasonable." *Andrade*, 538 U. S., at 76.

There are three reasons to sentence a murderer to death: deterrence, incapacitation, and retribution, also known as "just deserts" or simply "justice." See *Gregg* v. *Georgia*, 428 U. S. 153, 183 and n. 28 (1976) (lead opinion). A future dangerousness argument is one that urges the jury to sentence

defendant to death for the purpose of incapacitation. That was the argument in *Simmons*: " ' Your verdict will be an act of self-defense . . . .' " 512 U. S., at 176 (O'Connor, J., concurring in the judgment). The Pennsylvania Supreme Court correctly understood and applied *Simmons* to cases where it found the prosecutor making such an argument. See *Commonwealth* v. *Chandler*, 554 Pa. 401, 414-415, 721 A. 2d 1040, 1046-1047 (1998) (death sentence urged " 'to stop him from ever killing another woman again' ").

Amicus NACDL refers to *Chandler* as involving "weaker facts" than the present case, see NACDL Brief 18, but the question is not whether the facts make a stronger or weaker case for the death penalty, but rather whether the argument is directed at incapacitation rather than just deserts as the rationale for imposing the death penalty. That was the argument in *Chandler*, but it was not in the present case.

The same evidence will very often support more than one rationale for the death penalty. Habitual criminals deserve more severe punishment as a matter of justice, and they are also more likely to reoffend, thereby warranting stronger incapacitation. The same is true for those who commit calculated crimes as opposed to impulsive ones. It would be a rare case indeed where the evidence supporting retribution could not also be argued in support of incapacitation. But the rule of *Simmons* was based on what the prosecutor *did* argue from the evidence, not what he *could have* argued from the evidence or what the jury could have inferred from it *sua sponte*. See *Simmons*, 512 U. S., at 176-177 (O'Connor, J., concurring in the judgment).

Petitioner complains of the prosecutor arguing that he is merciless, cruel, savage, sadistic, and violent, and that he killed the victim to prevent his testimony. See Brief for Petitioner 4-5. These are retribution arguments. These are arguments that, although all murders are heinous, this one is exceptionally so and therefore *deserving* of the most severe punishment allowed. Indeed, this is the only kind of penalty phase argument that can

feasibly be made when the prosecutor is not making an incapacitation argument. While deterrence is a powerful argument for retaining capital punishment generally,[3] it is not well suited for arguing that the penalty should be imposed in one case versus another.

Reading Justice O'Connor's opinion in *Simmons*, one could reasonably conclude that the general rule of state option remained, and *Simmons* had federalized an exception of limited scope, even in capital cases. Only two Justices in *Simmons* voted to expand the rule to all capital cases. See *Simmons*, 512 U. S., at 172 (Souter, J., concurring). For the traditional rule to remain the rule and for *Simmons* to be the exception, *Simmons* would necessarily have to be limited to cases where incapacitation is straightforwardly argued as the reason for the sentence, see *id.*, at 174 (Ginsburg, J., concurring) and not extended to cases where exceptional heinousness is argued as the basis for retribution, with incapacitation being merely an inference drawn by the jury.

Kelly effectively held that mere incapacitation implications from arguments and evidence which are directed to retribution would suffice to invoke *Simmons*. See 534 U. S., at 255. With *Kelly*, the exception *has* swallowed the rule. There is no practical difference between the law after *Kelly* and the position endorsed only by Justices Souter and Blackmun in *Simmons*. A prosecutor would be a fool to oppose a *Simmons* instruction in any post-*Kelly* capital case where life without parole is the only alternative sentence.[4] There are few, if any, convincing

---

3. See, e.g., Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344, 373 (2003) ("our most conservative estimate is that the execution of each offender seems to save, on average, the lives of eighteen potential victims")

4. Amicus NACDL calls Pennsylvania "aberrant" for not giving the *Simmons* instruction in all cases. See NACDL Brief 22. The fact that states change their practices in fear of having their sentences thrown out

arguments to make or evidence to introduce without tripping *Kelly*'s vastly expanded definition of what places future dangerousness "at issue." The policy change that NACDL seeks has already been made for all practical purposes, whether the Constitution actually requires it or not.

The question in this case, though, is not what policy to set for the future but whether to apply *Kelly*'s gloss on *Simmons* to overturn pre-*Kelly* decisions. The answer is no. AEDPA, like *Teague*, is intended in part to limit the damage caused by the continuing expansion of constitutional criminal procedure jurisprudence. Changes which are desirable policy for future trials need not overturn judgments that are already final. Congress has commanded that decisions of state courts which are reasonable interpretations and applications of this Court's jurisprudence at the time they are rendered need not be overturned later on federal habeas corpus. This is such a case.

II. Clearly established law permits reasonable limits on penalty-phase investigation.

To prevail on his ineffective assistance claim, petitioner must show that the state courts unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984) to the facts found by them. He has not argued that the state courts applied a rule contrary to *Strickland*. Despite some differences in phrasing, the Pennsylvania courts apply a standard equivalent to the federal rule. See *Commonwealth* v. *Pierce*, 515 Pa. 153, 161, 527 A. 2d 973, 976-977 (1997). Also, notwithstanding petitioner's reliance on the testimony of his family, the state PCR court found that their testimony was not credible, J.A.

---

by the next twist in the "annually improvised" jurisprudence of capital punishment, see *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), is not proof that they think the change is good policy. See Tr. of Oral Arg. in *Roper* v. *Simmons*, No. 03-633, 48-49.

264-265, and 28 U. S. C. § 2254(e) requires deference to that finding. See *Wiggins* v. *Smith*, 539 U. S. 510, 530 (2003).

Petitioner quotes *Wiggins*, *supra*, at 524 quoting the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989), for the proposition that counsel must "discover all reasonably available mitigating evidence." See Brief for Petitioner 31. Taken to its logical extreme, this would mean that if there were a single piece of mitigating evidence that counsel did not discover, and if that piece, taken individually, had been reasonably available, then counsel would be branded ineffective, and the only question would be prejudice. If *Wiggins* had really held that, it would have overruled established precedent, and it would have done so in a federal habeas proceeding where such retroactive changes in the law are forbidden. Such a departure from the legitimate limits of habeas corpus should not be lightly inferred.

The proposition that the Sixth Amendment requires a no-stone-unturned investigation in every capital case was rejected in *Strickland* itself, a capital case. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." 466 U. S., at 691. The testimony of trial counsel, credited by the state PCR court, fits *Strickland*'s description of cutting off apparently fruitless investigation. See *Rompilla* v. *Horn*, 355 F. 3d 233, 252 (CA 3 2004).

The general statement of *Strickland* was given concrete application in *Burger* v. *Kemp*, 483 U. S. 776 (1987). *Burger*, like the present case, involved a decision of trial counsel to terminate investigation into background evidence. The background evidence that might have been presented as mitigating concerned the defendant's "exceptionally unhappy and unstable childhood." *Id.*, at 789. Burger's counsel "was aware of some, but not all," of the defendant's background information prior to trial. *Id.*, at 790. He did not make the kind

of exhaustive investigation that petitioner and *amicus* American Bar Association contend is invariably required by the Sixth Amendment in every case.

Burger argued that defense counsel's failure to conduct such an investigation into his background was ineffective because, if he had done so, he would have discovered much more information about defendant's troubled family background. See *id.*, at 793. This Court disagreed. "The record at the habeas corpus hearing does suggest that [defense counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '*[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.*'" *Id.*, at 794 (quoting *United States* v. *Cronic*, 466 U. S. 648, 665, n. 38 (1984)) (emphasis added).

In *Burger*, counsel curtailed his investigation because he believed he had learned enough to decide that the "background" defense would be contrary to and less effective than another line of defense he had decided to present. *Burger* holds that this is one valid reason to curtail a line of investigation, see *id.*, at 794-795, but it is not the only reason. Information from the defendant indicating that a line of investigation is "fruitless" is also a valid reason. See *Strickland*, 466 U. S., at 691. The simple, valid reason for terminating a line of inquiry based on a reasonable assessment that it will not bear fruit is that, in the real world, there are always limits to resources, and this statement in *Strickland* implicitly recognizes resource limitations as a valid consideration in making strategic decisions.

In *Wiggins*, the Court took care to point out that resource limitations were *not* the reason for counsel's decision not to pursue the background investigation. "Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report." 539 U. S., at 524. Further, the *Wiggins* Court noted that the leads available to counsel indicated that there

was mitigating background evidence to be gained by such an investigation. See *id.*, at 525.

The present case is therefore the opposite of *Wiggins* in two important aspects. First, this case involves a strategic decision regarding the allocation of limited resources, while *Wiggins* did not. See 355 F. 3d, at 252. Second, Wiggins' counsel had reason to believe the background investigation would produce useful mitigation, while Rompilla's counsel had reason to believe it would not.

Even if the question of counsel's effectiveness were close on the merits, the AEDPA question is not. Given the language in *Strickland* and the holding of *Burger*, the Pennsylvania Supreme Court's decision was well within the bounds of reasonable application of this Court's precedents as of 1998. That is sufficient to preclude this collateral attack on a final judgment under AEDPA.

III. The ABA Guidelines are not constitutional minimums.

The argument that the guidelines issued by the American Bar Association establish a constitutional minimum that states and counsel must meet is not a new one. "In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." *Jones* v. *Barnes*, 463 U. S. 745, 753, n. 6 (1983).

Although it does not *quite* say so, the ABA comes very close to asking this Court to overrule *Jones*.

> "Based on this history and precedent, the ABA submits that its *Guidelines* are indicative of prevailing professional norms by which defense counsel's conduct should be evaluated for reasonableness under *Strickland*. Because they reflect professional norms that prevailed in the 1980s, the ABA guidelines are an appropriate benchmark against which counsel's conduct should be judged in this case." Brief for the American Bar Association as *Amicus Curiae* 7-8 ("ABA Brief").

To the extent that the ABA is proposing that this "benchmark" be a constitutional minimum and that any deviation be declared *per se* ineffective assistance of counsel, that proposal was rejected in *Jones* and rejected in *Strickland* v. *Washington*, 466 U. S. 668, 688 (1986) ("only guides"), and it should be rejected again in the present case.

The American Bar Association is a private organization. The people of the United States have no voice in the election of its officers or the determination of its policies. The greatest caution is therefore required when the ABA proposes that it be delegated the power to decide what is required in the courts of the nation. The requisite caution is tripled when the issue to be decided involves the allocation of always-scarce public funds.

The ABA is the nation's largest lawyers' organization and among the oldest. See ABA Brief 1. It was once held in nearly universal regard as the voice of America's lawyers, and, although it has fallen considerably from that pinnacle, it still occupies a position of prestige in the eyes of many. Even so, the interests of the ABA are not the interests of the American people. The ABA has its own interests and its own agenda. In the guise of promulgating standards, it must not be delegated the power to allocate public resources or to force its policy preferences on an unwilling public by pricing its disfavored choice out of the people's fiscal reach.

The ABA's authority is at its zenith when it speaks to restrain lawyers for the protection of the public. Because much of the ABA's standards on ethics follows these lines, they are often adopted and given legal force by government bodies. Conversely, the ABA's authority is at its nadir when it seeks to advance the interests of its members against others. The misuse of the ABA's law school accreditation authority to force salary increases for law faculties brought a government antitrust suit,

a consent decree, and a permanent injunction. See *United States* v. *American Bar Assn.*, 934 F. Supp. 435, 436 (DC DC 1996), aff'd 118 F. 3d 776 (CA DC 1997).

By requiring a "scorched earth" investigation in every capital case, the ABA would force governmental bodies to allocate more resources for criminal defense, which inevitably means fewer resources for other worthy governmental purposes. If the cost is driven high enough, governments may be forced to abandon a sentencing policy that they believe is both necessary for justice and invaluable for saving innocent lives through deterrence. The ABA's position raises the strong suspicion that this is the real agenda.

Filing in support of the criminal defendant in the present case, the ABA continues its uniform record over many years of *always* supporting the defendant against the prosecution whenever it appears in this Court in a criminal case. Over twelve years ago an ABA committee warned of the danger of this persistent partisanship:

> "The American Bar Association historically has been an umbrella organization, representing a wide variety of viewpoints from all aspects of the legal profession. Its ethical rules, criminal justice standards, and other contributions to American law have traditionally represented the consensus product of the most experienced and responsible members of the profession.
>
> The ABA's unique status, however, is in grave danger, at least as to criminal justice issues. Prosecutors have been increasingly alienated from the ABA, and many are publicly rejecting not merely the ABA's policies but the very legitimacy of the organization's role in promulgating those policies. Reduced to its simplest terms, most prosecutors now perceive that the ABA has become captive to the narrow adversarial interests of the criminal defense bar."

American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA 1 (1992).

The problem has only worsened since then. The ABA's claim "that it takes no position on the death penalty as a general matter," ABA Brief 2, is a veneer which is transparent to everyone involved in this debate. Its efforts are invariably directed at blocking the execution of justly imposed death sentences, never toward removing the obstructions. As an advocate for one side of the debate, the ABA has as much right to express its view as any other advocate. That view, however, should not be given the force of law, especially not constitutional law.

Thirty-eight states and the federal government have decided that capital punishment serves vital interests in protecting the public and administering justice. That is their decision to make, however much the ABA disagrees with it. To implement this decision, the government must allocate the resources for the representation of indigents that the Sixth Amendment *actually* requires. This Court, not the American Bar Association, must determine the constitutional minimum. The duty is not delegable.

Jones v. *Barnes* wisely and correctly held that ABA standards do not determine the constitutional minimum. That holding should be clearly and unequivocally reaffirmed.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

December, 2004

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(20)

Supreme Court, U.S.
FILED
NOV 7 - 2004
OFFICE OF THE CLERK

Case No. 04-5462

In The

Supreme Court Of The United States

OCTOBER TERM, 2004

RONAL ROMPILLA

PETITIONER,

vs.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

RESPONDENT

CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

~~**MOTION FOR LEAVE TO FILE AMICUS CURIÆ BRIEF, AND**~~

BRIEF OF AMICI CURIÆ THE FRIENDS OF RONALD A. ROMPILLA

WITH APPENDIX

JAMES JOSEPH LYNCH, JR.
ATTORNEY AT LAW (SBN 85805)
2740 HOWE AVENUE
SACRAMENTO, CA 95821-4523
OFFICE: (916) 929-3055
FAX: (916) 929-3071
EMAIL: JJLYNCH@CWNET.COM

COUNSEL FOR *AMICI CURIAE*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

Motion For Leave To File Amici Curiæ Brief 1

INTEREST OF *AMICI CURIÆ* 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY ARGUMENTS 2

ARGUMENTS 2

1. Emerging Standards Suggest A Jury Instruction Must Inform The Jury That Before A Verdict of Death Can Be Returned, the State Must Demonstrate Beyond A Reasonable Doubt It Cannot Control Defendant's Conduct By Mere Incarceration 2

   1. CONSTITUTIONAL PREMISE & FRAMEWORK; THE PEOPLE CAN ONLY DELEGATE REASONABLE FORCE FOR THE PROTECTION OF SOCIETY. 3

   2. INTERNATIONAL LAW PROSCRIBES THE USE OF UNREASONABLE FORCE IN DEFENSE OF STATE INTERESTS 6

   3. WHERE PERSONS ARE A DANGER TO SOCIETY, INCARCERATION IS THE NORM. 7

   4. THERE HAS BEEN A GRADUAL WITHDRAWAL OF THE DEATH PENALTY AS A FORM OF PUNISHMENT, AND WITHDRAWAL FROM PUBLIC VIEW WHEN USED. 8

   E. CONCLUSION 10

CONCLUSION 11

APPENDIX A1

TABLE OF AUTHORITIES

CASES

Adams v. Storey, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817) 3

Apodaca v. Oregon, 406 U.S.404 (1972) 8

Bank of the United States v. Deveaux, 5 Cranch (9 U.S.) 61, 85 (1809 3

Barefoot v. Estelle, 463 U.S. 880 (1983) 7

Bolling v. Sharpe, 347 U.S. 497 (1954) 5

Brown v. Bd. of Education, 347 U.S. 483 (1954) (Brown I) 5, 6

Brown v. Bd. of Education, 349 U.S. 289 (1955) (Brown II) 6

Broun v. United States, 256 U.S. 335 (1921) 5

Coker v. Georgia, 433 U.S. 584 (1977) 9

Eberhardt v. Georgia, 433 U.S. 917 (1977) 9

Enmund v. Florida, 458 U.S. 752 (1982) 9

Field v. Clark, 143 U.S. 649, 691 (1891) 5

Garland, Ex Parte, 71 U.S. (4 Wall.) 333 (1867) 5

Gibbons v. Ogden, 9 Weat. (22 U.S.) 1 (1824) 3

Hitchcock v. Dugger, 481 U.S. 939 (1987) 7

INS v. Cardozo-Fonesca, 480 U.S. 421 (1987) 6

Locke v. New Orleans, 4 Wall (71 U.S.) 172 (1866) 3

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 4

People v. Ghent, 43 Cal.3d 739 (1987) 6, 7

Plessy v. Ferguson, 163 U.S. 537 (1896) 5

Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) 4

Solem v. Helm, 463 U.S. 277 (1983) 7

Tennessee v. Garner, 471 U.S. 1 (1986) 5, 7

The Nereide, 13 U.S. 388 (1815) 6

Tison v. Arizona, 481 U.S. 137 (1987) 9

United States v. Block, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1867) 3

United States v. Classic, 314 U.S. 707 (1941) 3

United States v. Harris, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) 3

Veazie Bank v. Fenno, 8 Wall (75 U.S.) 533 (1869) 3

Wright v. United States, 302 U.S. 583 (1938) 3

CONSTITUTIONS

United States

Preamble 3, 4

Art. I, § 1 6

Art. I, § 8 4

Art., §§ 9 & 10 4

10th Amend 4

TREATIES

United Nations Charter, Chapter VI [commencing with Article 33] 6

CODES

United States

18 U.S.C. § 3566 10

18 U.S.C. §§ 3551 9

Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987 9

California

Govt.C. § 100(a) 4
Penal Code § 3605 10
Probate Code, § 1400, et seq. 7
Welfare & Institutions Code § 0200, et seq 7
Welfare & Institutions Code § 5000, et seq 7

MISCELLANEOUS

3 Encyclopædia Britannica 404 (1971) 10
3 Rotunda, Treatise on Constitutional Law, § 23.33, p. 512 (1986) 5
4 Bl.Comm. *97 8
4 Encyclopædia Britannica 847 (1971) 8, 9
6 Encyclopædia Britannica 802 10
11 Encyclopædia Britannica 64 10
ALI, MPC, part II, vol. I, pp. 112-114 10
Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2 4
Cheshire, THE MODERN LAW OF REAL PROPERTY 4
Farrands 28-33 4
Foster, CROWN LAW 273-277 (1762) 5
Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) §§ 6.1 n.2, 15.11 n.4, & 23.8 4
Note, PROBATE CODE CONSERVATORSHIPS
A LEGISLATIVE GRANT OF NEW PROCEDURAL PROTECTIONS (1977) 8 Pacific L.J. 73 7
Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, ... 3
Perkins, CRIMINAL LAW AND PROCEDURE (Foundation press, 4th Ed., 1972), ... 5, 8

Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) § 3.12 n.2 4
Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) §§ 3.1, 3.2 4
Statute of Westminster (1275) 1, c. 15 8
The International Covenant on Civil and Political Rights, Part III, art. 6(2) 7
United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43, 53 6
Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571 4
Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571 (1937) 6
Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1961) 4, 6

MOTION FOR LEAVE TO FILE AMICI CURIÆ BRIEF

The Friends of Petitioner move for leave to file a brief in support of the petitioner on the grounds there are issues, and refinement of issues, not adequately dealt with in the Petition, the brief will aid this court in reaching a just result in this case, and a capital Petitioner should have as much help as possible.

The interest of Amici follows.

Dated November 7, 2004

James Joseph Lynch, Jr.
Attorney At Law (SBN 85805)
2740 HOWE AVENUE
SACRAMENTO, CA 95821-4523
OFFICE: (916) 929-3055
FAX: (916) 929-3071
Email: jjlynch@cwnet.com

Counsel for Amici Curiae

INTEREST OF *AMICI CURIÆ*

The Friends of Petioner are an unorganized group of individuals scattered throughout the United States who are opposed to capital punishment generally. Amicii are concerned that a decision in this court will affect the sentencing procedures in each of the severa; States, and therefore seek to uphold and defend the Constitution of the United States.

Friends believe that pro-life individuals should not take human life without substantial justification, and that the proection of society may be adequately protected by incarceration.

Pursuant to Rule 37.6, I hereby represent, that no counsel for a party authored the brief in whole or in part and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief on behalf of *amicii curiae*. The brief is being submitted *pro bono publico*.

-STATEMENT OF THE CASE AND FACTS

Amici Curiæ adopts by reference Petitioner's statement of the case.

SUMMARY ARGUMENTS

1. As the common law concept of sovereignty has been abolished and sovereignty now resides in the people, the only power the People can delegate to the government in its defense is reasonable force, and deadly force if reasonable.

2. In other contexts, Inernational law, a state must resort I the first instance to pacific means of protecting society, and the use of force only when reasonable, such that in a capital case the force required to protect society from further harm is incarceration.

3. Traditionally, persons that are a danger to society are incarcerated, and given modern peneological institutions available, in most, if not all, cases, the reasonable force required to protect society from further harm in a capital case is incarceration.

4. There has seen a gradual withdrawal of the death penalty as a form of punishment for all felonies at common law to a more modern view of a requirement of special circumstances in which the defendant has the requisite mental element and the victim dies, and withdrawal of exection from public view when used.

5. Statistical evidence suggests that the death penalty serves no legitimate governmental purpose as a deterance to crime.

ARGUMENTS

I.

EMERGING STANDARDS SUGGEST A JURY INSTRUCTION MUST INFORM THE JURY THAT BEFORE A VERDICT OF DEATH CAN BE RETURNED, THE STATE MUST DEMON-

STRATE THAT IT CANNOT CONTROL DEFENDANT'S CONDUCT BY MERE INCARCERATION

A. CONSTITUTIONAL PREMISE & FRAMEWORK; THE PEOPLE CAN ONLY DELEGATE REASONABLE FORCE FOR THE PROTECTION OF SOCIETY.

Sovereignty resides in the People. U.S. Constitution,[1] Preamble ["We, the People"].[2] The federal powers

---

[1] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817) . The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85 (1809) . No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938) . Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the constitution and the amendments were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869) ; *Locke v. New Orleans*, 4 Wall (71 U.S.) 172, (1866) ; *Gibbons v. Ogder.*, 9 Weat. (22 U.S.) 1, 188-189 (1824) ; *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) ; *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877) ; Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) . Where there are several possible meanings of the words of the constitution, that meaning that will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 314 U.S. 707 (1941).

are expressly recognized as being delegated powers. U.S.Const., 10th Amendment. 1 Rotunda, Treatise on Constitutional Law §§ 3.1, 3.2. By its terms, the 10th Amendment implies that powers are delegated by the People to the State, and the concept is written into the California Constitution's Preamble.[3]

It has always been recognized that a Person could only grant that estate which he possessed. Blackstone, Commentaries on the Laws of England, Vol. 2, page 290;[4] Cheshire, THE MODERN LAW OF REAL PROPERTY, p. 660 (Citing common law principles). At the time the constitution was drafted, an individual could use only reasonable force for self-defense, and deadly force only when met with deadly force and its use is reasonable. If the attacker retreats or abandons the fray, then the victim can no longer use deadly force. Foster, CROWN LAW 273-277 (1762); *Brown v. United States*, 256 U.S. 335 (1921); Perkins, CRIMINAL LAW AND PROCEDURE (1972) 660-667; *Tennessee v. Garner*, 471 U.S. 1 (1986).

Because an individual at common law could only use reasonable force, and deadly force if reasonable [*Foster*], that is all the power the individual collectively can delegate to the States, hence the State may only use reasonable force, and deadly force if reasonable.[5]

---

[2] While the result in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), may be correct, its *ratio decidendi* does not square with the Preamble and Article I §§ 9 & 10. Clearly, the President does not stand in the shoes of the King, because titles of nobility were abolished for an intended purpose. Farrands 28-33; Federalist Papers, ## 32, 39;. The framers placed sovereignty in the People. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) .

[3] The United States was established in the light of the Hobbs/Locke Theory of Social Contracts wherein the Government is established to protect the welfare of its citizens at home. 1 Rotunda 3.12 n.2. This is an internationally recognized duty of Nations. Verdross, *Jus Dispositivum land Jus Cogens in International Law*, 60 AJIL 55 (1961); Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937) ;. and recognized in the Preamble; and Art. I, § 8; of the U.S. Constitution. See also, California Constitution, Preamble ["We, the People"]; Cal. Govt. C. § 100(a).

[4] Blackstone; is a recognized source of the common law in aid of interpreting the U.S. Constitution. 1 Rotunda §§ 6.1 n.2, 15.11 n.4, & 23.8; n.1, para. 5 (p. 484, left column).

[5] Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). The Court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by the Court, the Court overruled, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown I*). *Accord, Bolling v. Sharpe* 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled.

Garner.

B. International Law Proscribes the Use of Unreasonable Force in Defense of State Interests

The rules of self-defense apply to states in International Law.[6] United Nations Charter, Chapter VI [commencing with Article 33]. It is considered a rule of *jus cogens*, vis peremptory norm of international law, from which no state may derogate. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1961), 60, #3; Id, *Forbidden Treaties in International Law*, 31 AJIL 571-77.[7] The concept is preserved in the United States Constitution, Art. I, § 1 (No State shall, ... engage in War, unless actually invaded

---

Brown I, 347 U.S., at 488-89, 496 (1954); *Brown v. Bd. of Education*, 349 U.S. 289, 294, 298 (1955) (*Brown II*) (Nature of remedy to be utilized).

[6] Courts are bound by the law of Nations which is part of the law of the land. *The Nereide*, 13 U.S. 388 (1815); *INS v. Cardozo-Fonesca*, 480 U.S. 421 (1987) ; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980).

[7] In *People v. Ghent*, 43 Cal.3d 739 (1987), the court rejected an argument that the United Nations Charter and Declaration on Human Rights precludes the imposition of the death penalty, and in any event before those documents may be utilized, they must be either be implemented by Congress or self-executing. However, rules of *jus cogens* are recognized by multinational pact. The United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43; [Obligations imposed independently of treaty], Art. 53 [*jus cogens* and void treaties], U.N. Doc. A/Conf. 39/11. Moreover, Verdross points out that these laws, by their very nature, are self-executing. The argument made here centers on what process is due before it may be imposed.

... imminent Danger ...). It has been tacitly recognized by *stare decisis*. *Tennessee v. Garner*, 471 U.S. 1 (1986) [Striking down State's fleeing felon statute].

Once an individual is incarcerated, that is all the force required to protect society from further harm therefore the death penalty[8] would be cruel and unusual punishment, unless the State shows that society cannot be protected by incarceration.

C. Where Persons Are A Danger to Society, Incarceration is the Norm.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983) it was held that it was proper for the jury to consider whether or not defendant would commit criminal acts in the future and thus pose a threat to society. However, the court went on to say in *Solem v. Helm*, 463 U.S. 277 (1983), that we will not assume that there is no rehabilitative opportunity. *Accord, Hitchcock v. Dugger*, 481 U.S. 393 (1987) [reversing death penalty for refusal to consider mitigating circumstances].

Every day we incarcerate People who pose a threat to society. LPS Act, Welfare & Institutions Code § 5000, *et seq.*; Probate Code, § 1400, et seq.; Conservatorship and Wardship, Welfare & Institutions Code § 200, et seq.; Generally, NOTE, PROBATE CODE CONSERVATORSHIPS: A LEGISLATIVE GRANT OF NEW PROCEDURAL PROTECTIONS (1977) 8 Pacific L.J. 73. Thus, the relevant inquiry is not whether the defendant poses a fu-

---

[8] The International Covenant on Civil and Political Rights, Part III, article 6(2), declares: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...." Ratified by the United States and 71 other countries, effective March 23, 1966. *E.g., People v. Ghent*, 43 C.3d 739 (1987) (Dissenting Opinion by Broussard and Mosk, JJ).

ture threat to society, an entirely speculative and subjective opinion of what may happen, but whether or not society can effectively control the behavior by incarceration, with a possibility of rehabilitation. That is to say, the emerging standards of decency is such that the State may not exact the death penalty unless it demonstrates beyond a reasonable doubt that it cannot protect society by mere incarceration.

D. THERE HAS BEEN A GRADUAL WITHDRAWAL OF THE DEATH PENALTY AS A FORM OF PUNISHMENT, AND WITHDRAWAL FROM PUBLIC VIEW WHEN USED.

At common law, all felonies, regardless of whether death resulted, and in theft cases, regardless of the amount taken, warranted the death penalty, except mayhem for which mutilation was substituted. Perkins, Criminal Law and Procedure (Foundation press, 4th Ed., 1972), p. 4-5. Whipping was substituted for death as the penalty for petite larceny, but that was a change from the common law resulting from an early statute. Id. Statute of Westminster, 1, c. 15 (1275). In the words of Blackstone, "the true criterion of felony is forfeiture." 4 Bl.Comm. *97. Modernly, few felonies are recognized as capital crimes. Perkins, at p. 5; *generally*, 4 Encyclopædia Britannica 847 (1971). Moreover, and notwithstanding *Apodaca v. Oregon*, 406 U.S.404 (1972), there is not a single jurisdiction left which allows the infliction of the death penalty with less than a unanimous jury verdict.[9]

The United States Supreme Court has recognized further restrictions upon the utilization of the death penalty. Thus in non-fatal felonies, the court held that

---

[9] When *Apodaca* was decided, only two jurisdictions allowed the death penalty on less than a unanimous decision. Oregon required a 10-2 decision, but has since repealed its death penalty. Louisiana now requires a unanimous decision. ALI, MPC, p. 154.

the imposition of the death penalty was unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977); *Eberhardt v. Georgia*, 433 U.S. 917 (1977). Similarly, in *Enmund v. Florida*, 458 U.S. 752 (1982), the court held that in felony-murder cases, the death Penalty was unconstitutional where the accomplice did not commit murder, nor intend that death result. Then in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court distinguished *Enmund* on the basis that in *Enmund* "the degree of participation **was so tangential** that it could not be said to justify a sentence of death", and held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."[10]

Congress at one point abolished the death penalty altogether. Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987, adopting Chapter 227 - Sentences, 18 U.S.C. §§ 3551, et seq.[11] 10 States of the United States have abolished it. 4 Encyclopædia Britannica 847 (1971). Of 20 Latin American Countries, 10 have abolished it. Id. All but 4 Mexican States have abolished it. Id.[12]

At common law, and the early days of this Country, executions were a public affair designed as a de-

---

[10] *Enmund* was outside in the getaway car, hence he was not in a position to prevent the homicides by co-defendants even had he wanted to. In *Tison*, on the other hand, the defendants were at the scene of the homicides, and made no effort to curb their father.

[11] Congress did not reinstate the mode of execution until September 1, 1994. 18 USC Sec. 3596.

[12] See footnote 6.

terrent. 3 Encyclopædia Britannica 404 (1971) [except heads of state]; 4 Id 847; 6 Id 825; 11 Id 64; 18 Id 556. At the restoration, Cromwell's body was exhumed, and his head displayed on a spike at the gates as a warning to all. 6 Encyclopædia Britannica 802. Common Law displays of execution have become a relict of the past. The last public execution occurred in Kentucky in 1936. 11 Encyclopædia Britannica 64. Under modern statutes, the public is excluded, witnesses limited to those found by law necessary to be present to assure the State that the law had been obeyed. Infliction of the death penalty has steadily been withdrawn from public view.[13] Former 18 U.S.C. § 3566 [Chap. 227]; California Penal Code § 3605. In the table set forth in the appendix, page A8, hereinafter, using statistics from the Statistical Abstrat of the United, States, based upon the number of murders per hundred thousand, the homicide rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity of capital punishment as a deterent. The deterrent effect, if there ever was any deterrent effect, is gone.[14]

E. CONCLUSION

Capital punishment is no longer a universally recognized means of controlling human behavior. It has been withdrawn as a public spectacle, and restricted to a narrow class of cases in which a victim dies as a proximate result of the defendant's own culpable conduct. Most jurisdictions that do allow capital punishment require a unanimous verdict.

The sum total of the foregoing, implicit in *Garner*, is that the State may not use its sovereignty with any more force than is reasonable under the circumstances, and the death penalty is appropriate, if at all, only if the State has demonstrated that it cannot protect society by mere incarceration.

---

[13] We can literally say "We have swept the death penalty under the carpet and out of view."

[14] The ALI Committee set out some rather stale statistical studies which failed to conclusively prove that capital punishment was or was not a deterrent. ALI, MPC, part II, vol. I, pp. 112-114. In the table hereinafter, using more current statistics, based upon the number of murders per hundred thousand, the rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity for capital punishment. A statistician would be better qualified to render an expert opinion.

CONCLUSION

WHEREFORE, *Amicus Curiæ* pray, for all of the reasons and arguments set forth herein, this court reverse the judgment, and remand for further proceedings not inconsistent with this court's opinion, and such other and further relief as the court deems just and proper under the circumstances.

Dated: November 7, 2004

RESPECTFULLY SUBMITTED,

James Joseph Lynch, Jr.
Attorney At Law (SBN 85805)
2740 Howe Avenue
Sacramento, CA 95821-4523
Office: (916) 929-3055
Fax: (916) 929-3071
Email: jjlynch@cwnet.com

Counsel for Amici Curiae

APPENDIX

EXCERPTS FROM

2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

*****

---

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

[196]

Tuesday MADISON August 7

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

*****

[209]

Tuesday MADISON August 7

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee
of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]
THURSDAY, SEPTEMBER 13, 1787.
JOURNAL
Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd Ayes --- 9; noes --- 1.]

*****

To strike out the word "to" before establish justice Ayes --- 8; bites --- 2,]

[641]
MONDAY, SEPTEMBER 17, 1787.
JOURNAL
Monday September 17, 1787.
Detail of Ayes and Noes

The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the

			President
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

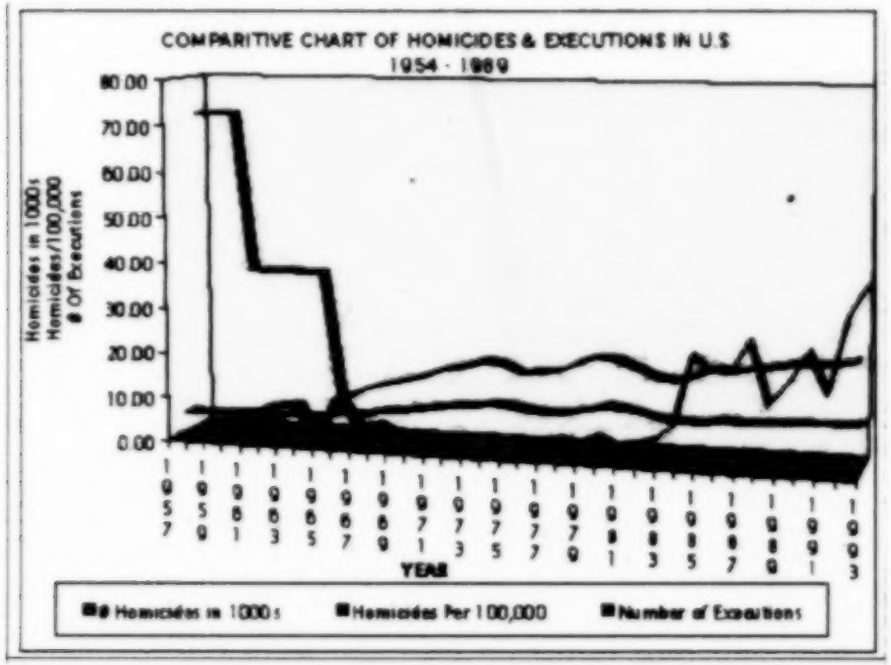
[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****



Source: STATISTICAL ABSTRACT OF THE UNITED STATES, 1963 (Table 197), 1969 (Table 199), 1976 (Tables 252 & 299), 1986 (Tables 279 & 329), 1996. Total Murders represent number of murders committed in United States. Number per 100,000 represents the number of murders per 100,000 persons in the United States.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

No. 04-5462

IN THE

Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Of Counsel:
PAMELA HARRIS
NATL. ASSN. OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5386

AUDREY J. ANDERSON*
PETER S. SPIVACK
KEITH J. BENES
CHRISTOPHER M. MILLER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5600

*Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 04-5462

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, the National Association of Criminal Defense Lawyers ("NACDL") moves for leave to file the attached brief amicus curiae in support of petitioner, Ronald Rompilla. Petitioner and Respondent have orally consented to the filing of this brief. But NACDL has not obtained the necessary written consent, necessitating this motion.

NACDL is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and exper-

tise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus and the death penalty. One way in which NACDL promotes the interests of its members is by participating as amicus curiae in cases whose outcome will have significant and far-reaching consequences for its members. *See Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Penry* v. *Johnson*, 532 U.S. 782 (2001).

This is such a case. As part of their private and *pro bono publico* service, NACDL's members regularly represent defendants accused of capital crimes. Given what is at stake in these proceedings, the need for clarity in the law is at its zenith. And nowhere is this need more pronounced than at the sentencing phase of these capital trials where, literally, an individual's life hangs in the balance. The Third Circuit Court of Appeals' decision below, however, which erroneously restricted and misapplied this Court's precedent of *Simmons v. South Carolina*, 512 U.S. 154 (1994), throws a large measure of uncertainty into this process. Following the Third Circuit's decision, prosecutors could sidestep a defendant's due-process entitlement to a parole-ineligibility instruction simply by placing a defendant's future dangerousness squarely at issue, but by refraining from *expressly* arguing the point. Thus, at a time when jurors are deliberating over whether a defendant should live or die, the jurors are not provided complete information to inform their decision. This is a matter of grave implications.

Given the breadth of experience and the day-to-day activities of its members, NACDL is uniquely situated to address for the Court a national and pragmatic perspective on the Third Circuit's decision. In addition, NACDL will further highlight the inconsistencies between established precedent of this Court and the Third Circuit's decision under review.

Accordingly, NACDL respectfully requests that the Court grant this motion for leave to file the attached brief amicus curiae.

Respectfully submitted,

Of Counsel:
PAMELA HARRIS
NATL. ASSN. OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5386

AUDREY J. ANDERSON*
PETER S. SPIVACK
KEITH J. BENES
CHRISTOPHER M. MILLER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5600

*Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE	i
TABLE OF AUTHORITIES	vi
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE STATE COURT UNREASONABLY INTERPRETED *SIMMONS*	6
A. The Court of Appeals Used an Incorrect Standard in Determining that the State Court Reasonably Applied *Simmons*	7
B. The Law Clearly Established by *Simmons* Requires a No-Parole Instruction When Future Dangerousness is at Issue	9
C. *Kelly* is an Application of *Simmons*, Not a New Standard.	10
D. A Proper Application of *Simmons* Mandates Reversal of Rompilla's Death Sentence	12
II. PENNSYLVANIA IS ABERRANT IN REFUSING TO INFORM THE JURY WHEN THE ONLY ALTERNATIVE SENTENCE TO DEATH IS LIFE WITHOUT PAROLE	22

TABLE OF CONTENTS

Page

III. THIS COURT SHOULD CLARIFY THAT A BRIGHT-LINE STANDARD EXISTS FOR DETERMINING WHEN A LIFE-WITHOUT-PAROLE INSTRUCTION IS REQUIRED IN DEATH PENALTY CASES 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Commonwealth v. *Chandler*, 721 A.2d 1040 (Pa. 1998) 18, 19

Commonwealth v. *Douglas*, 737 A.2d 1188 (Pa. 1999), *cert. denied*, 530 U.S. 1216 (2000) 20, 21

Commonwealth v. *May*, 551 Pa. 286, 710 A.2d 44 (Pa 1998), *cert. denied*, 525 U.S. 1078 (1999) 7

Commonwealth v. *Trivigno*, 750 A.2d 243 (Pa. 2000) 19, 20

Early v. *Packer*, 537 U.S. 3 (2002) 9

Gardner v. *Florida*, 430 U.S. 349 (1977) 10

Harmelin v. *Michigan*, 501 U.S. 957 (1991) 27

Kelly v. *South Carolina*, 534 U.S. 246 (2002) ..... *passim*

Lawrence v. *Texas*, 539 U.S. 538 (2003) 26

Lockyer v. *Andrade*, 538 U.S. 63 (2003) 8

Penry v. *Johnson*, 532 U.S. 782 (2001) 2, 8

People v. *Gacho*, 522 N.E.2d 1146 (Ill. 1988) 23

TABLE OF AUTHORITIES—Continued

	Page
People v. *LaValle*, __ N.E.2d __, 2004 WL 1402516 (N.Y. June 24, 2004)	25
Price v. *Vincent*, 538 U.S. 634 (2003)	8
Ring v. *Arizona*, 536 U.S. 584 (2002)	24
Shafer v. *South Carolina*, 532 U.S. 36 (2001)	13
Simmons v. *South Carolina*, 512 U.S. 154 (1994)	*passim*
Skipper v. *South Carolina*, 476 U.S. 1 (1986)	10
Solem v. *Helm*, 463 U.S. 277 (1983)	27
State v. *Kleypas*, 40 P.3d 139 (Kan. 2001)	25
State v. *Moeller*, 616 N.W.2d 424 (S.D. 2000), *cert. denied*, 537 U.S. 834 (2002)	25
Strickland v. *Washington*, 466 U.S. 668 (1984)	11
Tennard v. *Dretke*, 124 S. Ct. 2562 (2004)	8

TABLE OF AUTHORITIES—Continued

	Page
Turner v. *State*, 573 So. 2d 657 (Miss. 1990), *cert. denied*, 500 U.S. 910 (1991)	23
Weeks v. *Angelone*, 528 U.S. 225 (2000)	9
Wiggins v. *Smith*, 539 U.S. 510 (2003)	2, 8, 11
Williams v. Taylor, 529 U.S. 362 (2000)	8, 9, 11
Woodson v. North Carolina, 428 U.S. 280 (1976)	27
STATUTORY PROVISIONS:	
28 U.S.C. § 2254(d)	6, 8
Ala. Code § 13A-5-46(e)	23
Ariz. Rev. Stat. § 13-703.01(A)	22, 24
Ark. Code Ann. § 5-4-603(b)	23
Cal. Penal Code § 190.3	23
Colo. Rev. Stat. § 18-1.3-1201(1)(b)	23
Conn. Gen. Stat. § 53a-46a(g)	23

TABLE OF AUTHORITIES—Continued

	Page
Del. Code Ann., tit. 11, § 4209(a)	23
Ga. Code Ann. § 17-10-31.1(a)	23
Idaho Code § 19-2515(7)	25
Ind. Code § 35-50-2-9(d)	23
Kan. Stat. Ann. § 21-4624(e)	25
Ky. Rev. Stat. Ann. § 532.025(3)	25
La. Code Crim. Proc. Ann. art. 905.6	23
Md. Code Ann. Crim. § 2-303(f)(1)	23
Md. Code Ann. Crim. § 2-304	23
Mo. Rev. Stat. § 565.030.4	23
Mont. Code Ann. § 46-18-305	22, 24
N.C. Gen. Stat. § 15A-2002	25
Neb. Rev. Stat. § 29-2520(f)	23, 24
Neb. Rev. Stat. § 29-2520(h)	23, 24

TABLE OF AUTHORITIES—Continued

	Page
Nev. Rev. Stat. § 175.554(2)(c)	23
N.H. Rev. Stat. Ann. § 630:5(IV)	23
N. J. Stat. Ann. § 2C11-3(f)	25
N.M. Stat. Ann. § 31-18-14	22
N.M. Stat. Ann. § 31-20A	22
N.Y. Crim. Proc. Law § 400.27(10)	25
Okla. Stat. tit. 21 § 701.10(A)	23
Ohio Rev. Code Ann. § 2929.03	25
Or. Rev. Stat. § 163.105	23
Or. Rev. Stat. § 163.150	23
S.C. Code Ann. § 16-3-20(A)	24
Tenn. Code Ann. § 39-13-204(a)-(f)	23
Tex. Crim. Code Ann. § 37.071	22
Utah Code Ann. § 76-3-207.5	23

TABLE OF AUTHORITIES—Continued

	Page
Va. Code Ann. § 19.2-264.4	24
Wash. Rev. Code § 10.95.030	23
Wyo. Stat. Ann. § 6-2-102(b)	25
Wyo. Stat. Ann. § 6-2-102(d)(ii)	25
RULE:	
S. Ct. Rule 37.6	1
OTHER AUTHORITIES:	
Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61 (1993)	16

IN THE

Supreme Court of the United States

No. 04-5462

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus and the death penalty. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus and the death penalty, similar to the one presented here. *See Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Penry* v. *Johnson*, 532 U.S. 782 (2001).

STATEMENT OF THE CASE

Petitioner, Ronald Rompilla, was convicted of murder in the Pennsylvania Court of Common Pleas for Lehigh County. In Pennsylvania, like many states, once a defendant is convicted of a capital offense the only sentencing options are death or life without parole. Unlike every other state with such a scheme, Pennsylvania only informs the sentencing jury that life imprisonment precludes the possibility of parole if the trial judge determines the prosecution has explicitly raised the issue of the defendant's future dangerousness in the sentencing proceeding.

During the capital sentencing phase, the Commonwealth made numerous arguments that called into question Rompilla's future dangerousness. The jury, however, was not instructed that if he was sentenced to life in prison Rompilla would never be eligible for parole. App. 788, 799-803. [2]

At sentencing, the Commonwealth read into the record testimony from the victim of a prior rape and robbery committed by Rompilla in 1974 and framed Rompilla's most recent criminal activity as the product of a savage who became only more prone to violence after 14 years in prison. App. 647, 662-96, 780-81. As the Commonwealth presented the issues to the jury, the only "lesson" Rompilla learned from his previous lengthy prison term and his prior crimes was not to "leave anybody behind who can testify against you." App. 780. This focus on the inadequacy of incarceration followed by parole and release for Rompilla was further reinforced by testimony, elicited by the prosecutor, that Rompilla could not be rehabilitated, App. 752, and references by the prosecutor to the fact that Rompilla had been on parole when he committed the present crimes for only three and one-half months. App. 737, 741-42.

The judge instructed the jury that it must sentence Rompilla to death or to life imprisonment without instructing the jury that Rompilla would be parole ineligible. App. 614, 783.

During its deliberations, the jury asked three questions that demonstrated its concern about Rompilla's future dangerousness if he were ever released from prison. First, it asked: "If a life sentence is imposed, is there any possibility of the defendant ever being paroled?" App. 802. The court refused to answer the question, stating: "I'm sorry to say, I can't answer that question. That's not before you as such * * * . I – if there were other alternatives that you should consider we would have outlined them in the Charge, all right." App. 802-03. In separate inquiries several hours later, the jury asked additional questions about the circumstances surrounding Rompilla's prior release from prison and whether there was any attempted rehabilitation. App. 838. The trial court again provided no answers, and did nothing to inform the jury that these issues were not relevant because Rompilla would not be eligible for parole. App. 842-43.

On state collateral review, the Pennsylvania Supreme Court rejected Rompilla's claim that his due process rights were violated by the trial court's refusal to instruct the jury that Rompilla would not be eligible for parole. *Commonwealth* v. *Rompilla*, 721 A.2d 786, 795 (Pa. 1998). The court limited

[2] All appendix citations are to the appendix prepared for *Rompilla* v. *Horn*, 355 F.3d 233 (3d Cir. 2004).

its analysis to whether a history of felony convictions puts future dangerousness at issue, and held it did not because prior felony convictions "only address [Rompilla's] past conduct, and not his future dangerousness." *Id.*

Rompilla filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. After considering numerous arguments, the district court granted the writ based on its conclusion that Rompilla's counsel had been ineffective for failing to investigate and present mitigating evidence at the sentencing proceeding. *Rompilla* v. *Horn*, 2000 WL 964750, at *14 (E.D. Pa., July 11, 2000). The district court also concluded that the prosecutor did not argue future dangerousness and that the Pennsylvania Supreme Court's application of this Court's decision in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), although a "close issue," was not unreasonable. *Rompilla*, 2000 WL 964750, at *15.

The Commonwealth appealed to the Third Circuit Court of Appeals, which reversed the district court and denied Rompilla's habeas petition. Regarding the failure to give a life-without-parole instruction, the Court of Appeals did not consider whether the Pennsylvania Supreme Court's application of *Simmons* was reasonable. *Rompilla*, 355 F.3d at 265-66. Rather, the Court of Appeals engaged in its own independent analysis of *Simmons* and held that the state court had been "reasonable" based on a conclusion never reached by the state court – *i.e.*, that *Simmons* may be read "narrowly," to require a life-without-parole instruction only where the prosecutor explicitly argues that the defendant poses a future threat. *Id.*.

SUMMARY OF ARGUMENT

Rompilla was sentenced to death in violation of his due process rights because although his future dangerousness was at issue in the sentencing proceeding the jury was not informed that a sentence of life imprisonment means life without the possibility of parole. The Pennsylvania Supreme Court's contrary decision was an unreasonable application of

this Court's precedent in *Simmons*. There can be no question that the prosecution placed Rompilla's future dangerousness at issue in his sentencing proceeding.

The Court of Appeals' conclusion that the Pennsylvania Supreme Court reasonably applied *Simmons* is incorrect. Foremost, the Court of Appeals erroneously based its decision on its own, restricted analysis of *Simmons* rather than on the analysis actually employed by the state court. A federal court's independent analysis, which was not relied upon by a state court, has no bearing on whether that state court decision was a reasonable application of law.

Even on its own terms the Court of Appeals' legal conclusion is not supportable. As this Court recognized in *Kelly* v. *South Carolina*, 534 U.S. 246 (2002), a *Simmons* instruction should be given whenever a defendant's future dangerousness is at issue, and not just when the prosecution expressly states the defendant should be put to death to prevent future crimes. *Kelly* was itself an application of the rule from *Simmons*, not a new rule of law, and thus is as controlling as *Simmons*.

Pennsylvania is the only state that gives the sentencing jury the authority to impose the death penalty and provides the alternative sentence of life without parole but resists giving *Simmons* instructions. All of the 32 other states that employ such a system routinely give *Simmons* instructions or otherwise ensure the jury understands the sentencing options before it regardless of whether future dangerousness is at issue. At minimum, the Due Process Clause requires Pennsylvania to follow suit whenever future dangerousness is at issue. This Court should vacate Rompilla's death sentence and re-affirm its holding from *Simmons* that a life-without-parole instruction must be given whenever a defendant's future dangerousness is placed at issue. This case also highlights the need to clarify that future dangerousness can be placed "at issue" in any one or more of three ways: (1) express arguments by the prosecution; (2) introduction of

evidence of prior bad acts, or (3) questions from the jury regarding a defendant's parole eligibility.

ARGUMENT

I. THE STATE COURT UNREASONABLY INTERPRETED *SIMMONS*

Pursuant to this Court's decision in *Simmons*, the jury considering Rompilla's sentence should have been instructed that a sentence of life in prison meant a sentence of life without parole. The decision of the Pennsylvania Supreme Court that no such instruction was required "involved an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court of the United States," and requires that Rompilla be granted relief. 28 U.S.C. § 2254(d).

The Court of Appeals erred three times over in reaching a contrary conclusion. First, rather than reviewing the actual decision of the Pennsylvania Supreme Court to determine whether its application of *Simmons* was reasonable, the Court of Appeals erroneously considered whether some hypothetical court could have reasonably reached the conclusion reached by the Pennsylvania Supreme Court. Then the Court of Appeals compounded this error through its own overly restricted reading of *Simmons*, concluding that the life-without-parole instruction is only required when the prosecution explicitly argues future dangerousness, but not when the prosecution introduces evidence and/or makes arguments from which future dangerousness can be inferred. Finally, to support its reading of *Simmons*, the Court of Appeals had to conclude that this Court's decision in *Kelly*, announced an entirely new rule of constitutional law when in fact it merely applied the rule in *Simmons* to a different set of facts.

A proper application of the rule announced in *Simmons* and *Kelly* requires that jurors be informed that the alternative sentence to death is life without parole when future dangerousness is at issue. Future dangerousness is undeniably at issue when, as in this case, the prosecution argues that the

defendant has an ongoing pattern of violent behavior that will not be deterred through incarceration, and the jury demonstrates its interest in the future dangerousness of the defendant by specifically inquiring about the possibility of parole.

A. The Court of Appeals Used an Incorrect Standard in Determining that the State Court Reasonably Applied *Simmons*

The Pennsylvania Supreme Court's analysis of the *Simmons* issue is contained in a single paragraph of its opinion:

> Under the current state of the law in Pennsylvania, the jury must be told that life means life without parole only when the defendants' future dangerousness is at issue. Appellant argues that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence. The court rejected this argument in *Commonwealth* v. *May*, 551 Pa. 286, 710 A.2d 44, 47 (Pa 1998). As stated in that case, this aggravating circumstance only addresses Appellant's past conduct, not his future dangerousness. *See id.* Thus, no relief is due. [*Rompilla*, 721 A.2d at 795 (citation omitted).]

The state-court decision that no *Simmons* instruction was necessary was based solely on a conclusion that the aggravating circumstance of a significant history of past violent felonies did not constitute evidence of Rompilla's future dangerousness. This analysis, as discussed below, is a plainly unreasonable interpretation of *Simmons* – which requires a life without parole instruction whenever the issue of future dangerousness is raised – and it furthermore unreasonably applies *Simmons* to the evidence presented by the prosecution in this case.

The Court of Appeals may well have agreed. In finding that the state-court decision was "reasonable," it did not

address the reasoning actually employed by the state court. Instead, the Court of Appeals held that the state court's decision was "reasonable" based on a conclusion never reached by the state court – that is, that *Simmons* may be read "narrowly," to require a no-parole instruction only where the prosecutor explicitly argues that the defendant poses a future threat. *Rompilla*, 355 F.3d at 264-66. This was error by the Court of Appeals. Rather than reviewing the actual decision of the state court, it "invoked its own restrictive gloss on" *Simmons*, a "restrictive gloss" that was not actually applied by the state court. *Tennard* v. *Dretke*, 124 S. Ct. 2562, 2569 (2004). Because the Court of Appeals' restriction on *Simmons* was not actually relied upon by the state court, "it has no bearing on whether the [state-court] decision reflected an objectively unreasonably application" of clearly established law. *Wiggins*, 539 U.S. at 529-30.

In determining whether a state-court decision unreasonably applies clearly established Supreme Court precedent, this Court focuses on the actual reasoning employed by the state court in reaching its decision. *See, e.g., Lockyer* v. *Andrade*, 538 U.S. 63, 73-74 (2003) (reviewing actual reasoning employed by state court); *Price* v. *Vincent*, 538 U.S. 634, 640-42 (2003) (discussing reasoning employed in state-court decision); *Penry*, 532 U.S. at 796-97 (discussing possible interpretations of state-court decision); *Williams v. Taylor*, 529 U.S. 362, 393-98 (2000) (extensive discussion of reasoning from state court in applying this Court's ineffective assistance of counsel decisions). The Court of Appeals correctly noted that where a state-court decision on the merits includes *no* discussion of an issue, a federal court reviewing that decision under § 2254(d)(1) must make an independent determination as to whether the decision was contrary to, or an unreasonable application of, this Court's clearly established law. *See Rompilla*, 355 F.3d at 247-48 (*citing, inter alia*, *Weeks* v. *Angelone*, 528 U.S. 225, 237 (2000)). But where, as here, the state court decision includes a rationale for a determination on the merits, a federal court must review the reasoning actually employed, rather than some hypothetical basis on which the state-court decision might have been

based. *See Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curium) (state-court decision is not contrary to this Court's established law "so long *as neither the reasoning* nor the result of the state-court decision contradicts" established law) (emphasis added).

B. The Law Clearly Established by *Simmons* Requires a No-Parole Instruction When Future Dangerousness is at Issue

"Clearly established Federal law, as determined by the Supreme Court of the United States" encompasses "the holdings * * * of this Court's decisions as of the time of the relevant state-court decision." *Williams,* 529 U.S. at 412. The law that is clearly established by this Court's decision in *Simmons*[3] is that "[w]here the State *puts the defendant's future dangerousness in issue*, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury * * * that he is parole ineligible." *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring in the judgment) (emphasis added).

The Court of Appeals' restrictive reading of *Simmons*, which would require a no-parole instruction only where the prosecution *expressly argues* future dangerousness is not consistent with this Court's opinion in *Simmons*. There was no disagreement in *Simmons* that the prosecution had put Rompilla's future dangerousness at issue, and there should be none here as discussed *infra*. Although the Court's opinions in *Simmons* mentioned the prosecutor's closing argument, no member of the Court relied solely on that argument to determine that the State had put the defendant's future dangerousness at issue, or suggested that comparable closing

---

[3] There can be no question that "*Simmons* applies here because it was decided before Rompilla's conviction became final upon conclusion of his direct appeal in 1995." *Rompilla*, 355 F.3d at 264 n.18.

arguments would be a necessary precondition for application of its rule.

Simmons' scope is confirmed by the Court's decision in *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), on which *Simmons* was based. *Skipper* did not rely on a prosecutor's closing argument. Instead, it held more broadly that due process requires "that a defendant not be sentenced to death 'on the basis of *information* which he had no opportunity to deny or explain.'" *Id.* at 175 (O'Connor, J., concurring in the judgment) (*quoting Skipper*, 476 U.S. at 5 n.1 (quoting *Gardner* v *Florida*, 430 U.S. 349, 362 (1977))).

Accordingly, the Court of Appeals had no basis for its finding that the holding of *Simmons* could reasonably be restricted to requiring an instruction of parole ineligibility "only where the prosecution *actually* 'argue[s]' that a defendant poses a future threat." *Rompilla*, 355 F.3d at 265 (emphasis added). As the Court of Appeals majority itself recognized, Justice O'Connor's controlling opinion in *Simmons* noted that a parole ineligibility instruction is required "where the State seeks to show the defendant's future dangerousness," where "the State sought to show that petitioner is a vicious predator who would pose a continuing threat to the community," or where the prosecutor puts "petitioner's future dangerousness in issue." *Id.* (*citing Simmons*, 512 U.S. at 175-17). In addition, even the "*Simmons* dissenters interpreted the plurality opinion as apparently requiring admission of parole ineligibility even when the prosecution does not argue future dangerousness." *Id.* at 265 (*citing Simmons*, 512 U.S. at 183 (Scalia, J., dissenting)).

The evidence relied upon by the Commonwealth against Rompilla surely put his future dangerousness at issue, requiring a no-parole instruction pursuant to the law clearly established by *Simmons*.

C. *Kelly* is an Application of *Simmons*, Not a New Standard.

There is no validity to the conclusion of the Court of Appeals that this Court's decision in *Kelly* must be ignored in

determining the reasonableness of the state court's application of *Simmons*. *Kelly* indeed post-dates the pertinent state court decision. This Court has been clear, however, that if the precedent in question itself only applies the rule from a case that pre-dates the pertinent state court decision, then that post-dated case also controls.

Wiggins is a good example. In *Wiggins* the state had argued that *Williams*, should be ignored because it post-dated the state-court decision. *Wiggins*, 539 U.S. at 522. This Court rejected that argument, holding that decisions interpreting established standards that do not make "new law" indeed constitute controlling precedent. *Wiggins*, 539 U.S. at 522.

The underlying ineffective assistance standard at issue in *Williams* had been announced by this Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Strickland* established a duty on the part of defense counsel to make reasonable investigation into his or her client's background in order that mitigation evidence might be discovered and presented. *Id.* at 690-91. "[R]easonableness" is gauged by professional norms. *Id.* at 688. Applying *Strickland*, this Court thus evaluated defense counsel's investigative performance in *Williams*, finding the background investigation to be deficient in light of, among other things, the ABA's Standards for Criminal Justice. *Williams*, 529 U.S. at 396. Thus, because *Williams* was only applying *Strickland*, this Court held in *Wiggins* that *Williams* "made no new law," and applied that case to the one before it. *Wiggins*, 539 U.S. at 522.

Likewise, the underlying standard for giving a life-without-parole instruction at issue in *Kelly* – like *Simmons*, also a case arising out of South Carolina and addressing a defendant's due-process entitlement to the instruction – had been announced by this Court nearly ten years earlier, in *Simmons*. *Kelly* no more made "new law" than *Williams*. Indeed, the *Kelly* majority expressly and repeatedly stressed that it was simply applying the standard originally set forth in *Simmons*. For example, at one point the majority chastised the state court for its "error in trying to distinguish *Simmons* in this way," 534 U.S. at 254, and at another point the majority

admonished the state court for its failure to recognize that part of the prosecution's argument being reviewed "echoed the one made in *Simmons* itself." *Id.* It is readily apparent that the *Kelly* majority was not expanding *Simmons*, but simply applying it.

This Court's application of *Simmons* in *Kelly* is no different than its application of *Strickland* in *Williams*. *Simmons* was clearly established, and the issue in *Kelly* was whether the state's evidence and arguments sufficiently implicated "future dangerousness" to warrant a *Simmons* instruction. The majority in *Kelly* evaluated the arguments and evidence presented in light of *Simmons*, comparing and contrasting the cases in an attempt to determine if the state in fact "raised the specter * * * of future dangerousness generally." *Kelly*, 534 U.S. at 252 (*citing Simmons*, 512 U.S. at 165). Similarly, the majority in *Williams* evaluated the arguments before it in light of *Strickland*. In the end, the *Kelly* majority concluded that the state's evidence and arguments sufficiently "echoed" *Simmons*, placing "the case within the four corners of *Simmons*." *Id.* at 255.

If the *Kelly* majority's approach to *Simmons* and "future dangerousness" is still good law, then the Court of Appeal's failure to consider *Kelly* controlling is error.

D. A Proper Application of *Simmons* Mandates Reversal of Rompilla's Death Sentence.

Under *Simmons* and *Kelly* this is a straightforward case: The Commonwealth here went further in implicating Rompilla's future dangerousness than did the prosecutor in either *Simmons* or *Kelly*. It is, of course, not necessary for a prosecutor to actually use the words "future dangerousness" to warrant a *Simmons* instruction. *Simmons*, 512 U.S. at 165. Were it otherwise, a prosecutor could evade *Simmons* simply by avoiding the term "future dangerousness" in his or her closing argument, while still putting future dangerousness at issue. Direct or indirect evidence of a future danger is sufficient to mandate a *Simmons* instruction.

> [E]vidence of dangerous "character" may show "characteristic" future dangerousness, as it did here. * * * Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms. [*Kelly*, 534 U.S. at 254.]

1. The *Simmons* prosecutor "generally" raised future dangerousness in much the same way as the Commonwealth did during the sentencing phase of Rompilla's trial. During closing arguments the *Simmons* prosecutor asked the jury "what to do with [petitioner] now that he is in our midst." *Simmons,* 512 U.S. at 157. The prosecutor went on, urging imposition of the death penalty as "a response of society to someone who is a threat. Your verdict will be an act of *self-defense*." *Id.* (emphasis added).

Before returning a sentence of death, the *Simmons* jury interrupted its deliberations and asked the court if a life sentence carried with it the possibility of parole. *Id.* at 160. The *Simmons* trial court responded – over defense counsel's objection – that parole eligibility was not to be considered and that the "terms of life imprisonment and death sentence" were to be understood in their ordinary meanings. *Id.* This Court reversed Simmons' death sentence, holding that failure to give a life-without-parole instruction when future dangerousness is at issue violates the due process clause.[4]

---

[4] This Court similarly held in *Shafer* v. *South Carolina,* 532 U.S. 36 (2001), that a *Simmons* instruction was mandatory after the prosecutor introduced evidence of Shafer's "criminal record, past aggressive conduct, probation violations, and misbehavior in prison" during the penalty phase of his trial. *Id.* at 41. In addition, during closing argument the prosecutor quoted a witness who said Shafer and his accomplice "might come back." *Id.* at 43. Like *Simmons*, the *Shafer* jury inquired during deliberations if Shafer would ever be eligible for parole. *Id.* at 44. The trial court

This Court evaluated parallel facts in *Kelly*. The *Kelly* prosecutor opened the sentencing phase of the trial by telling the jury, "I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." *Kelly*, 534 U.S. at 248. The prosecutor later offered evidence that Kelly had fashioned a knife in prison and attempted escape by making plans to lure a female guard to his cell and hold her hostage. *Id.* Additional prosecution evidence established that Kelly was a sadist from an early age and harbored an "inclination to kill anyone who rubbed him the wrong way." *Id.* at 248-49.

Still, the trial court denied Kelly a *Simmons* instruction, concluding that the prosecutor's comments and evidence went to Kelly's character, not future dangerousness. *Id* at 249. The prosecutor then referred to Kelly in closing argument as, among other things, "Bloody Billy," and argued that someone as intelligent and "quick-witted" as Kelly was "a little more dangerous." *Id.* at 250. The jury sentenced Kelly to death without inquiring about parole eligibility. This Court, nonetheless, held that failure to give a *Simmons* instruction was reversible error. "A jury hearing evidence of defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." *Id.* at 253-54.

This case presents an even more compelling case for reversal. The obvious and irreducible import of the Commonwealth's sentencing arguments is that future dangerousness was at issue. The Commonwealth relied heavily on testimony from the victim of a prior rape and robbery committed by Rompilla in 1974 that was read into the record. App. 659-96. With that backdrop the Commonwealth framed Rompilla's most recent criminal activity as the product of a savage who became only more prone to violence after 14

refused to give a *Simmons* instruction, and this Court reversed. *Id.* at 45.

years in prison. App. 779-80. The prosecutor argued in closing that the similarities between Rompilla's 1974 crimes and his more recent activities were "absolutely frightening." App. 779-80.

> I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. [App. 779-80.]

The Commonwealth also argued that the only "lesson" Rompilla learned from a lengthy prison term and his prior crimes was not to "leave anybody behind who can testify against you." App. 780. The unmistakable inference from this statement is that another lengthy prison sentence would not be sufficient to protect society from Rompilla – *i.e.*, that Rompilla is a danger who would only be fully contained if the jury sentenced him to death. This argument was reinforced by testimony, elicited by the prosecutor, that Rompilla could not be rehabilitated. App. 752. The prosecutor also made references to the fact that Rompilla had been on parole when he committed the present crimes for only three and one-half months. App. 737, 741-42. To suggest such arguments do not touch on Rompilla's likely future danger to society if not put to death is to ignore the very logic of their appeal in the penalty phase.[5]

[5] Amicus believes that the introduction of prior bad acts is alone sufficient to warrant a *Simmons* instruction and thus a reversal in this case. But this prosecutor did much more than rely on Rompilla's criminal history during the penalty phase.

2. In this case, one need not speculate whether the sentencing jury harbored confusion over the meaning of a life sentence. It expressly said that it did. During its deliberations, the jury posed three inquiries to the court – all related to what was likely to happen to Rompilla if he was not sentenced to death. App. 802-03, 823-24, 838, 842-43.

The jury's first question was its most direct: "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" App. 802. The court refused to answer the question. App. 802-03. In separate inquiries several hours later the jury asked additional questions about the circumstances surrounding Rompilla's prior release from prison and whether there was any attempted rehabilitation. App. 838, 842. The trial court provided no answers and made equivocal comments about the relevance of these matters. App. 842-43. Such equivocation could very well have left jurors with the erroneous impression that a death sentence was the only way to ensure Rompilla would never be released from prison.

It can hardly be questioned that most juries lack accurate information about the precise meaning of "life imprisonment" as defined by the States. For much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term (whether a term of life or a term or years) in practice was understood to be shorter than the stated term. [*Simmons*, 512 U.S. at 169 (*citing* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61 (1993)).]

Explicit or implied prosecutorial appeals to a defendant's continued threat, if not sentenced to death, tend to exacerbate misconceptions about parole eligibility. Trial courts commonly confront this mix of confusion and fear through questions similar to those posed by this jury.[6] Heading off these questions with a *Simmons* instruction when the jury is charged assures that the jury properly understands the alternatives. Regardless, due process requires a candid response from a trial court if such questions later arise during deliberations. Refusing to answer such questions almost certainly prompts jurors to assume the worst.

> [O]ne of these particular jurors did not understand the meaning of the term [life imprisonment], since the jury sent a note to the judge asking, "Does the imposition of a life sentence carry with it the possibility of parole?" The answer here was easy and controlled by state statute. The judge should have said no. [*Simmons*, 512 U.S. at 173 (Souter, J. concurring).]

Further, unlike the *Simmons* jury – which imposed a death sentence only 25 minutes after being told to ignore parole eligibility – Rompilla's sentencing jury continued to telegraph its confusion through subsequent questions of the trial court. App. 802, 823, 838, 842. In fact, the jury only returned a death sentence after being told by the trial court to rely on its "own knowledge" of what rehabilitation services are available to Pennsylvania prisoners. App. 842-43. Such conduct signaled that the possibility of Rompilla ever being released, *i.e.*, future dangerousness, factored prominently into the jury's decision to impose a death sentence. Yet, Rompilla

---

[6] *See Simmons*, 512 U.S. at 170 n.10 ("It almost goes without saying that if the jury in this case understood that the 'plain meaning' of life imprisonment was life without parole in South Carolina, there would have been no reason for the jury to inquire about petitioner's parole eligibility.")

was denied the opportunity to rebut such conclusions by demonstrating that if he was not sentenced to death he would remain in prison until the end of his natural life.

The Commonwealth, moreover, has only itself to blame for the present dilemma. The prosecutor's sentencing strategy here – using Rompilla's prior crimes to support an argument that he is a brute who with time will only become more violent – is common and permissible. App. 774-82. But this argument, as it routinely does, begged the very question this jury asked: "If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?" App. 802. When asked this question, due process requires that the trial court give a truthful answer. "The judge should have said no." *Simmons*, 512 U.S. at 173 (Souter, J., concurring).

3. It is difficult to harmonize the many Pennsylvania decisions addressing *Simmons*, but even the Pennsylvania Supreme Court has required a *Simmons* instruction on weaker facts than Rompilla presents, demonstrating that the Pennsylvania Supreme Court understood the rule from *Simmons* to be less restrictive than the position now advanced by the Commonwealth and endorsed by the Court of Appeals. In at least three instances following *Simmons*, the Pennsylvania Supreme Court or its members have concluded that indirect future dangerousness arguments warranted reversal or would have if *Simmons* applied. For *Simmons* purposes, the circumstances of Rompilla's sentencing proceeding are more compelling than any of these decisions.

In *Commonwealth* v. *Chandler*, 721 A.2d 1040 (Pa. 1998), a double-murder trial, the prosecutor made these comments during the penalty phase closing argument:

> Frankly, ladies and gentlemen, life imprisonment in this case is simply not enough. I am asking you with your verdict today, to stop Kevin Chandler, to stop him from ever hurting another woman again, to stop him from ever killing another woman again. [*Id.* at 1046.]

With these remarks and absent any subsequent inquiry from the jury regarding the meaning of a life sentence, a majority of the Pennsylvania Supreme Court concluded that future dangerousness was at issue. *Id.* at 1047. The court accordingly reversed Chandler's death sentence based on the trial court's failure to give a *Simmons* instruction *even in the absence of an express mention of the term "future dangerousness."* *Id.* (emphasis added).

> While the prosecutor did not actually use the words "future dangerousness," * * * [t]he absence of a precise phrase simply cannot overcome the effect of the prosecutor's statements, which was to inject the issue of Appellant's future dangerousness into the jury's deliberations in the penalty phase of the Appellant's trial. [*Id.* at 1046.]

The Pennsylvania Supreme Court's future dangerousness analysis in *Chandler* is inconsistent with its treatment of Rompilla. The Commonwealth presented graphic and inflammatory testimony from Rompilla's 1974 rape victim and then argued that despite the passage of nearly two decades the similarities between these crimes and Rompilla's more recent activities were "absolutely frightening." App. 779-80. The prosecutor further argued that the "lesson" Rompilla learned over the many years since initially convicted was to kill his witnesses. App. 780. These arguments were buttressed with evidence that Rompilla could not be rehabilitated. App. 737, 741-42, 752. Not surprisingly, the prosecutor's arguments led the jury to ask several questions during its lengthy sentencing deliberations about the meaning of a life term and Rompilla's prior sentence.

The prosecutor in *Commonwealth* v. *Trivigno*, 750 A.2d 243 (Pa. 2000), similarly secured a death sentence by drawing an escalating connection between Trivigno's latest crime, a homicide, and his prior convictions for criminal trespass and misdemeanor assault.

> Well, then you will decide whether or not this history is significant or not, whether or not these prior criminal convictions are a weather vane looking into the future, *whether or not they are significant in that they are a determinant of where the man is, where's he's [sic] going, not just where he's been, breaking in*, assault and now this. [*Id.* at 253 (emphasis in original).]

Moreover, the *Trivigno* jury likewise telegraphed its understandable apprehension following these remarks by asking the court, "Could you please define exactly what life without parole means? Is it in prison forever or is there still a chance for parole?" *Id.* at 254. As in *Chandler*, a majority of the Pennsylvania Supreme Court reversed Trivigno's death sentence because the trial court failed to give a *Simmons* instruction as requested by defense counsel, finding that the prosecution's argument of escalating wrongs was sufficient to put future dangerousness at issue. *Id.*

Finally, although agreeing that the sentence should stand on procedural grounds, at least two members of the Pennsylvania Supreme Court concluded in *Commonwealth* v. *Douglas*, 737 A.2d 1188 (Pa. 1999), *cert. denied*, 530 U.S. 1216 (2000), that the following comments during closing implicated future dangerousness for *Simmons* purposes:

> Remember Dr. Camiel said * * * that the prognosis for the defendant was poor, in fact [it] doesn't matter whether on the street or in jail he is going to act the same way, assaulting people.
>
> * * *
>
> If he is not going to conform his conduct to the requirements of the law, if he is going to be assaultive and violent on the streets as well as in jail, why should he be allowed to live?

> Why shouldn't he die just like Donald Knight did?
>
> * * *
>
> He will do what he wants to do when he wants to do it and his conduct is not going to change. Whether he is up in Holmesburg Prison, Dallas, Huntingdon, or on the streets of Philadelphia walking the Raymond Rosen Projects he will always be Robert Douglas.
>
> * * *
>
> Robert Douglas should just be plain put to death as we put mad dogs out of their misery * * * because there is nothing else you can do for them. He will always be what he is now. [*Id.* at 1202 (Saylor, J., concurring).]

These remarks collectively represent a more specific version of the Commonwealth's "lesson learned" comments before Rompilla's sentencing jury. But the most logical inference from both presentations is identical – if ever released, these defendants will surely engage in more of the same dangerous conduct, making a death sentence the only punishment that will halt such a possibility. Irrespective of any merit to this common prosecutorial argument, when it is rolled out before a death penalty jury, as it often is, due process requires a *Simmons* instruction to ensure that the jury understands the true alternatives with which it is faced.

II. PENNSYLVANIA IS ABERRANT IN REFUSING TO INFORM THE JURY WHEN THE ONLY ALTERNATIVE SENTENCE TO DEATH IS LIFE WITHOUT PAROLE

There are 33 states with capital sentencing systems that give the jury a direct role in selecting the sentence and provide for life without parole as an alternative to the death penalty.[7] Pennsylvania is now the only state that refuses to inform sentencing juries, as a standard part of the capital sentencing procedure, when a life sentence means life without the possibility of parole.

When this Court decided *Simmons* in 1994, there were 26 states that used juries in capital sentencing and authorized life-without-parole sentences as an alternate to death. *Simmons*, 512 U.S. at 167 n.7. At that time, Pennsylvania, South Carolina, and Virginia were the only states that refused to inform sentencing juries that life without parole was the only alternative to a death sentence regardless of whether future dangerousness was at issue. *Id.*

---

[7] Thirty-eight states utilize the death penalty. Of those 38, New Mexico and Texas do not provide for the alternate sentence of life without parole in capital cases. *See* N.M. Stat. Ann. §§ 31-18-14.1; 31-20A; Tex. Crim. Code Ann. Proc. § 37.071. In Arizona, although the jury makes factual findings regarding the existence of aggravating or mitigating factors, and determines whether or not to impose the death penalty, the sentencing judge, not the jury, determines independently whether to sentence the defendant to life or life without parole. Ariz. Rev. Stat. § 13-703.01(A). In Montana and Nebraska the jury is responsible for deciding whether any aggravating factors have been proved beyond a reasonable doubt, but the judge retains ultimate sentencing authority. *See* Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. §§ 29-2520(f), 29-2520(h).

Twenty states in 1994 all provided that the jury in capital cases would be informed as a matter of course when the alternative to death was a life sentence without parole.[8] Nine states explicitly identified the jury's sentencing alternatives as death or life without parole – Alabama, Arkansas, California, Connecticut, Delaware, Louisiana, Missouri, New Hampshire, and Washington. *Id.*[9] Eight additional states empowered the jury to specify whether a defendant should be sentenced to death, to life without parole, or to life with the possibility of parole – Georgia, Indiana, Maryland, Nevada, Oklahoma, Oregon, Tennessee, and Utah. *Id.*[10] Three states required that the jury should be instructed if a life sentence in fact meant the defendant would not be parole eligible – Colorado, Illinois, and Mississippi. *Id.*[11]

These 20 states all continue the same or substantially similar practices today. None of these states has narrowed the situations in which jurors must be informed that a life sentence means life without possibility of parole.

---

[8] The remaining three states – Florida, South Dakota, and Wyoming – had not addressed the issue in 1994. *Id.*

[9] These nine states continue the same practice today. *See* Ala. Code § 13A-5-46(e); Ark. Code Ann. § 5-4-603(b); Cal. Penal Code Ann. § 190.3; Conn. Gen. Stat. § 53a-46a(g); Del. Code Ann., tit. 11, § 4209(a); La. Code Crim. Proc. Ann., art. 905.6; Mo. Rev. Stat. § 565.030.4; N.H. Rev. Stat. Ann. § 630:5(IV); Wash. Rev. Code § 10.95.030.

[10] These eight states also maintain the same practice today. *See* Ga. Code Ann. § 17-10-31.1(a); Ind. Code § 35-50-2-9(d); Md. Code Ann. Crim. L. §§ 2-303(f)(1), 2-304; Nev. Rev. Stat. § 175.554(2)(c); Okla. Stat. Ann. Tit. 21 § 701.10(A); Or. Rev. Stat. §§ 163.105, 163.150; Tenn. Code Ann. §§ 39-13-204(a)-(f)(2); Utah Code Ann. § 76-3-207.5.

[11] Again, these states continue this practice today. *See* Colo. Rev. Stat. § 18.1.3-1201(1)(b); *People* v. *Gacho*, 522 N.E.2d 1146, 1166 (Ill. 1988); *Turner* v. *State*, 573 So. 2d 657, 675 (Miss. 1990).

Not only have the 20 states that in 1994 informed the jury when the alternative sentence to death was life without parole maintained similar practices, the uniform trend amongst the states has been to inform the jury when the alternate sentence to death is life without possibility of parole. Virginia and South Carolina have both changed their procedures to give juries this vital information even when future dangerousness is not at issue.[12]

Indeed, since *Simmons* was decided in 1994, nine additional states have addressed anew the question of whether and when jurors should be informed that the alternate sentence to death is life without parole.[13] These states have uniformly required that juries be informed when the alternative to death is life without parole.

---

[12] Va. Code Ann. § 19.2-264.4; S.C. Code Ann. § 16-3-20(A).

[13] These developments have occurred as states either have added the option of a life sentence without the possibility of parole, or have had to restructure their sentencing procedures to give more authority to juries in response to this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002). In response to *Ring*, Nebraska and Montana have modified their capital sentencing procedures so that the jury is responsible for deciding whether any aggravating factors have been proved beyond a reasonable doubt, but the judge retains the ultimate sentencing authority. See Mont. Code Ann. § 46-18-305; Neb. Rev. Stat. §§ 29-2520(f), 29-2520(h). Arizona instituted a procedure where the jury finds aggravating and mitigating circumstances and decides whether death is appropriate, but if a death sentence is not handed down, the judge determines whether the sentence should be life, or life without parole. Ariz. Rev. Stat. § 13-703.01(A). Where the judge retains the authority to impose the sentence, and/or to select between life or life without parole, "the sentencing authority is fully aware of the precise parole status of life-sentenced murderers," and the life without parole jury instruction loses relevance. See *Simmons*, 512 U.S. at 168 n.7.

New York has joined the ranks of states explicitly giving the jury the power to decide between death or life without parole.[14] Idaho, Kentucky, Ohio, and Wyoming empower the jury to decide whether the defendant is sentenced to death, life without parole, or life with the possibility of parole.[15] Kansas, New Jersey, North Carolina, and South Dakota either mandate that the jury be instructed in capital cases when a life sentence is in fact life without parole, or do so as a matter of common practice.[16]

---

[14] N.Y. Crim. Proc. Law § 400.27(10). In June 2004, the Court of Appeals of New York invalidated the state death penalty statute related to an adjacent jury instruction, which informed the jury that if they deadlocked, the defendant would get neither death, nor life without parole, but would in fact be eligible for parole. *See People* v. *LaValle*, __ N.E.2d __, 2004 WL 1402516 (N.Y. June 24, 2004). This ruling did not affect the portion of the death penalty statute empowering the jury to sentence defendants to death or life in prison without parole.

[15] Idaho Code § 19-2515(7); Ky. Rev. Stat. Ann. § 532.025(3); Ohio Rev. Code Ann. § 2929.03; Wyo. Stat. Ann. §§ 6-2-102(b), 6-2-102(d)(ii).

[16] *State* v. *Kleypas*, 40 P.3d 139, 270 (Kan. 2001) (holding that when the defendant requests it, the trial court must inform the jury of the number of years the defendant would serve if not sentenced to death); Kan. Stat. Ann. § 21-4624(e) (amended by 2004 Kan. Sess. Laws ch. 102) (instituting life without parole as the alternative sentence to death); N.J. Stat. Ann. § 2C:11-3(f); N.C. Gen. Stat. § 15A-2002 (stating that the judge must instruct the jury that a life sentence means life without parole); *State* v. *Moeller*, 616 N.W.2d 424, 460-461 (S.D. 2000) (noting that the jury instructions in a capital case specify that life is life without parole, but not further describing what "life without parole" means).

This uniform trend is one toward providing jurors with more information about the alternative sentences a defendant faces if they do not sentence him or her to death.[17] Pennsylvania alone paddles against this tide of change, not only refusing to automatically inform the jury when a life sentence means life without parole, but also actively trying to narrow the application of *Simmons* with overly formalistic interpretations of when future dangerousness is at issue, as the Commonwealth has done in this case.

III. THIS COURT SHOULD CLARIFY THAT A BRIGHT-LINE STANDARD EXISTS FOR DETERMINING WHEN A LIFE-WITHOUT-PAROLE INSTRUCTION IS REQUIRED IN DEATH PENALTY CASES

A sentence of death is qualitatively different from all other sentences in kind, rather than degree. A reviewing court, and we as a society, must be confident that a jury's sentence of death in a particular case is reliable in all respects.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. [*Solem* v. *Helm*, 463 U.S. 277, 312 n.4 (Burger, C.J., dissenting, joined by White, J., Rehnquist, J., and O'Connor, J.) (*quoting Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.)), *overruled, Harmelin* v. *Michigan*, 501 U.S. 957 (1991).]

[17] This nationwide trend toward states providing capital juries with more complete information about the life-without-parole alternative to a death sentence bears materially upon this Court's due-process analysis. *See Lawrence* v. *Texas*, 539 U.S. 558, 570 (2003) (holding that Texas' prohibition on homosexual conduct violated the Due Process Clause and relying in part on the fact that "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them"); *id.*, at 573 ("The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

The jury's sentence of death is not reliable in this case. The prosecutor's arguments, the jury's questions, the Pennsylvania Supreme Court's application of *Simmons* in other cases, and the legal isolation in which Pennsylvania finds itself by refusing to give a *Simmons* instruction all render the death sentence imposed on Rompilla unreliable and constitutionally deficient.

The only way to provide reliability in this case, and to ensure that other death sentences do not similarly suffer from this defect, is to establish a bright-line rule. Juries must be instructed on the availability of a sentence of life without parole in a capital case when the prosecution introduces evidence of prior bad acts in the penalty phase or the jury inquires about the parole eligibility of the defendant. Such a rule will clarify *Simmons* and avoid the subjectivity and inconsistency inherent in a reviewing court's evaluation of whether a reference to prior bad acts expressly or implicitly put future dangerousness at issue.

A bright-line rule will not preclude prosecutors from arguing that a pattern of prior bad conduct merits the ultimate sanction. Likewise, sentencing juries will not be prevented from considering such conduct, nor will they be dissuaded from asking for clarification about sentencing options. Jurors will, instead, get honest answers to their questions and be able to make the type of informed judgment that our Constitution demands when they impose the most serious of penalties.

CONCLUSION

For the foregoing reasons, this Court should vacate Rompilla's sentence. Rompilla's future dangerousness was placed at issue through the prosecution's introduction of evidence of prior bad acts and argument tying those prior bad acts to Rompilla's present and future conduct, and through the jury's inquiry about the possibility of parole.

This Court should also clarify that *Simmons* establishes a bright-line rule that requires a life-without-parole instruction whenever a defendant's future dangerousness is placed at issue by express prosecution argument, introduction of evidence of prior bad acts, or questions from the jury about parole eligibility.

Respectfully submitted,

Of Counsel:
PAMELA HARRIS
NATL. ASSN. OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5386

AUDREY J. ANDERSON*
PETER S. SPIVACK
KEITH J. BENES
CHRISTOPHER M. MILLER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5600

*Counsel of Record

Counsel for Amicus Curiae